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WHO: Sponsored by the Office of the Federal Register.

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

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

3. The important elements of typical Federal Register documents.

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

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

WHEN: Tuesday, April 19, 2005
9:00 a.m.-Noon—(SESSION FULL)

Tuesday, May 17, 2005
9:00 a.m.-Noon

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

RESERVATIONS: (202) 741-6008

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DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 1942

Disbursement of Funds

AGENCY: Rural Housing Service, USDA.

ACTION: Final rule.

SUMMARY: The Agency is revising its disbursement of funds regulations. This action is necessary since existing regulations do not accurately reflect the current disbursement methodologies employed by the Agency. The intended effect is to simplify and update the regulations. These amended regulations are to ensure the Agencies' field offices have current guidance on the disbursement methods available.

EFFECTIVE DATE: April 13, 2005.

FOR FURTHER INFORMATION CONTACT: Ronald Gianella, Staff Accountant, Office of the Deputy Chief Financial Officer, Policy and Internal Review Division, U.S. Department of Agriculture, STOP 33, P.O. Box 200011, St. Louis, MO 63120, telephone: (314) 457–4298.

SUPPLEMENTARY INFORMATION:

Classification

This action is not subject to the provisions of Executive Order 12866 since it involves only internal Agency management. This action is not published for prior notice and comment under the Administrative Procedure Act since it involves only internal Agency management and publication for comment is unnecessary and contrary to the public interest.

Programs Affected

The Catalog of Federal Domestic Assistance programs impacted by this action are as follows:

10.405—Farm Labor Housing Loans and Grants
10.415—Rural Rental Housing Loans
10.433—Rural Housing Preservation Grants
10.766—Community Facilities Loans and Grants

Intergovernmental Consultation

Programs with Catalog of Federal Domestic Assistance numbers 10.405, 10.415, 10.433, and 10.766 are subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) Unless otherwise specifically provided, all State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division (7 CFR part 11) must be exhausted before litigation against the Department is instituted.

Paperwork Reduction Act

There are no new reporting and recordkeeping requirements associated with this rule.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 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, the Agencies 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, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, the rule is not subject to the requirements of section 202 and 205 of the UMRA.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, Subpart G, "Environmental Program." The Agencies have determined that this final action does not constitute a major Federal action significantly affecting the quality of human environment, and in accordance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, an Environmental Impact Statement is not required.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Discussion of Final Rule

These subparts are being revised to conform with changes made to 7 CFR 2018, subpart D, to include information concerning implementation of electronic funds transfer.

List of Subjects in 7 CFR Part 1942

Community development, community facilities, loan programs—housing and community development, loan security, rural areas, waste treatment and disposal—domestic, water supply—domestic.

■ Accordingly, Chapter XVIII, Title 7, of the Code of Federal Regulations is amended as follows:

PART 1942—ASSOCIATIONS

■ 1. The authority citation for part 1942 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932; 7 U.S.C. 1989; and 16 U.S.C. 1005.

Subpart A—Community Facility Loan

■ 2. Section 1942.7 is amended by revising paragraphs (a) and (e) to read as follows:

§ 1942.7 Loan closing.

* * * * *

(a) *Authority to execute, file, and record legal instruments.* Area Office employees are authorized to execute and file or record any legal instruments necessary to obtain or preserve security for loans.

* * * * *

(e) *Loan disbursements.* Whenever a loan disbursement is received, lost, or destroyed, the Rural Development Manager will take appropriate actions outlined in Rural Development Instruction 2018–D.

* * * * *

■ 3. Section 1942.12 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1942.12 Loan cancellation.

* * * * *

(a) *Form Rural Development 1940–10, "Cancellation of U.S. Treasury Check and/or Obligation."* The Rural Development Manager or State Director may prepare and execute Form Rural Development 1940–10, Cancellation of U.S. Treasury Check and/or Obligation, in accordance with the Forms Manual Insert (FMI). If the disbursement has been received or is subsequently received in the Area Office, the Rural Development Manager will return it as prescribed in Rural Development Instruction 2018–D.

(b) *Notice of Cancellation.* If the docket has been forwarded to Office of General Counsel that office will be notified of the cancellation by copy of Form Rural Development 1940–10. Any application for title insurance, if ordered, will be cancelled. The borrower's attorney and engineer/architect, if any, should be notified of the cancellation. The Rural Development Manager may provide the borrower's attorney and engineer/architect with a copy of the notification to the applicant. The State Director will notify the Director of Legislative Affairs and Public Information by telephone or electronic mail and give the reasons for such cancellation.

■ 4. Section 1942.15 is revised to read as follows:

§ 1942.15 Delegation and redelegation of authority.

The State Director is responsible for implementing the authorities in this subpart and for issuing State supplements redelegating authorities. Loan and grant approval authority is in Subpart A of Part 1901 of this chapter. Except for loan and grant approval authority, Rural Development Manager may redelegate their duties to qualified staff members.

Subpart C—Fire and Rescue and Other Small Community Facilities Projects

■ 5. Section 1942.123 is amended by revising paragraphs (h)(2), (h)(3), (j), and (l) to read as follows:

§ 1942.123 Loan closing.

* * * * *

(h) * * *

(2) The Office of the Deputy Chief Financial Officer will prepare a statement of account including accrued interest through the proposed date of retirement and also show the daily interest accrual. The statement of account and the interim financing instruments will be forwarded to the Rural Development Manager.

(3) The Rural Development Manager will collect interest through the actual date of the retirement and obtain the permanent instrument(s) of debt in exchange for the interim financing instruments. The permanent instruments and the cash collection will be forwarded to the Office of the Deputy Chief Financial Officer immediately, except that for notes and single instrument bonds fully registered as to principal and interest the original will be retained in the Area Office and a copy will be forwarded to the Office of the Deputy Chief Financial Officer. In developing the permanent instruments, the sequence of preference set out § 1942.19(e) of Subpart A of Part 1942 of this chapter will be followed.

* * * * *

(j) *Loan disbursements.* Whenever a loan disbursement is received, lost, or destroyed, the Rural Development Manager will take the appropriate actions outlined in Rural Development Instruction 2018–D.

* * * * *

(l) *Review of loan closing.* When the loan has been closed, the Rural Development Manager will submit the completed loan closing documents and a statement showing what was done in closing the loan to the State Director. The State Director will review the documents and the Rural Development Manager's statement to determine whether the transaction was closed properly. For loans to public bodies or Indian tribes the State Director will forward all documents, along with a statement that all administrative requirements have been met, to the Regional Attorney. The Regional Attorney will review the submitted material to determine whether all legal requirements have been met. The Regional Attorney should review Rural Development standard forms only for proper execution, unless the State Director brings attention to specific questions. Facility development should not be held up pending receipt of the Regional Attorney opinion. When the review of the State Director has been completed, and for public bodies and Indian tribes the Regional Attorney's opinion has been received, the State Director must advise the Rural Development Manager of any deficiencies that must be corrected and return all material that was submitted for review.

* * * * *

Dated: March 9, 2005.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. 05–7377 Filed 4–12–05; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE220, Special Condition 23–160–SC]

Special Conditions; Lancair LC41–550FG and LC42–550FG for the Protection of Systems From High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued to The Lancair Company, 22550 Nelson Road, Bend, Oregon 97701, for a Type Design Change for the Lancair LC41–550FG and LC42–550FG airplanes. These airplanes have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of electronic flight instrument system (EFIS) displays Model 700–00006–XXX–() manufactured by Avidyne Corporation for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

DATES: The effective date of these special conditions is April 13, 2005. Comments must be received on or

before May 13, 2005 for domestic, August 11, 2005 for foreign.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE220, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE220. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Wes Ryan, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4127.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

Interested persons are invited to submit such written data, views, or arguments, as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. CE220." The postcard will be date stamped and returned to the commenter.

Background

In 2001 and 2002, The Lancair Company, 22550 Nelson Road, Bend, Oregon 97701, made applications to the FAA for a Type Design Change for the Lancair LC41–550FG and LC42–550FG airplanes. The modification incorporated an existing Supplemental Type Certificate (STC) into the Type Design as optional equipment on the LC41–550FG and LC42–550FG. These models are currently approved under Type Certificate Data Sheet (TCDS) No. A00003SE. The proposed modification incorporates a novel or unusual design feature, such as digital avionics consisting of an EFIS, that is vulnerable to HIRF external to the airplane.

Type Certification Basis

Under the provisions of 14 CFR part 21, § 21.101, The Lancair Company must show that the LC41–550FG and LC42–550FG aircraft meet the following provisions, or the applicable regulations in effect on the date of application for the change to the two models.

For the LC41–550FG: Part 23 of the Federal Aviation Regulations (FAR) effective February 1, 1965, as amended by 23–1 through 23–46, except for FAR 23.1305 and FAR 23.1359. FAR 23.1305 as amended through 23–52 and FAR 23.1359 as amended through 23–49. FAR 36 as amended on the date of certification. Application for type certificate dated October 24, 2002. Equivalent Level of Safety (ELOS) Findings for Emergency exit requirements of FAR 23.807 in accordance with ELOS No. ACE–99–02, as detailed in FAA memo dated February 2, 1999 (FAA memo reference no. 99–190S–64), and the terms of these Special Conditions.

For the LC42–550FG: Part 23 of the Federal Aviation Regulations (FAR) effective February 1, 1965, as amended by 23–1 through 23–46, except for FAR 23.1305 and FAR 23.1359. FAR 23.1305 as amended through 23–52 and FAR 23.1359 as amended through 23–49. FAR 36 as amended on the date of certification. Applicable Equivalent Level of Safety (ELOS) Findings: Stall and spin requirements of FAR's 23.201, 23.203, and 23.221 in accordance with ELOS No. ACE–98–1, as detailed in the FAA memo dated September 3, 1998 (FAA memo reference no. 98–190S–581) and ELOS No. ACE–98–2 as detailed in the FAA memo dated October 7, 1998 (FAA memo reference no. 98–190S–608). Emergency exit requirements of FAR 23.807 in accordance with ELOS No. ACE–99–02 as detailed in FAA memo dated February 2, 1999 (FAA memo reference no. 99–190S–64), and the terms of these Special Conditions.

Discussion

If the Administrator finds that the applicable airworthiness standards do not contain adequate or appropriate safety standards because of novel or unusual design features of an airplane, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38 after public notice and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply to modify any other model already included on the same Type Data Sheet to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

The Lancair Company plans to incorporate certain novel and unusual design features into an airplane for which the airworthiness standards do not contain adequate or appropriate safety standards for protection from the effects of HIRF. These features include EFIS, which are susceptible to the HIRF environment, that were not envisaged by the existing regulations for this type of airplane.

Protection of Systems From High Intensity Radiated Fields (HIRF)

Recent advances in technology have given rise to the application in aircraft designs of advanced electrical and electronic systems that perform functions required for continued safe flight and landing. Due to the use of sensitive solid state advanced components in analog and digital electronics circuits, these advanced systems are readily responsive to the transient effects of induced electrical current and voltage caused by the HIRF. The HIRF can degrade electronic systems performance by damaging components or upsetting system functions.

Furthermore, the HIRF environment has undergone a transformation that was not foreseen when the current requirements were developed. Higher energy levels are radiated from transmitters that are used for radar, radio, and television. Also the number of transmitters has increased significantly. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore,

coupling to cockpit-installed equipment through the cockpit window apertures is undefined.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided by the design and installation of these systems. The accepted maximum energy levels in which civilian airplane system installations must be capable of operating safely are based on surveys and analysis of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels, which are lower than previous required values, are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require qualification of systems that perform critical functions, as installed in aircraft, to the defined HIRF environment in paragraph 1 or, as an option to a fixed value using laboratory tests, in paragraph 2, as follows:

(1) The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the HIRF environment defined below:

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak root-mean-square (rms) values.

or,

(2) The applicant may demonstrate by a system test and analysis that the electrical and electronic systems that perform critical functions can withstand a minimum threat of 100 volts per meter, electrical field strength, from 10 kHz to 18 GHz. When using this test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

A preliminary hazard analysis must be performed by the applicant, for approval by the FAA, to identify either electrical or electronic systems that perform critical functions. The term "critical" means those functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or any combination of these. Service experience alone is not acceptable since normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

Applicability

As discussed above, these special conditions are applicable to the Lancair Company Model LC41–550FG and LC42–550FG airplanes. Should the Lancair Company apply at a later date for a type design change to modify any other model on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features being proposed for the model(s) discussed in this special condition. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

PART 23—AIRWORTHINESS STANDARDS: NORMAL, UTILITY, ACROBATIC, AND COMMUTER CATEGORY AIRPLANES

Citation

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Lancair LC41–550FG and LC42–550FG airplanes modified to add an EFIS as optional equipment by the Lancair Company.

1. Protection of Electrical and Electronic Systems from High Intensity Radiated Fields (HIRF). Each system that performs critical functions must be designed and installed to ensure that the operations, and operational capabilities of these systems to perform critical functions, are not adversely affected when the airplane is exposed to high intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definition applies: Critical Functions: Functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on April 1, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7427 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE221, Special Condition 23–161–SC]

Special Conditions; Twin Commander Aircraft Models 690C, 690D, 695, 695A, and 695B; Protection of Systems for High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued to Twin Commander Aircraft LLC. 19010 59th DR. NE. Arlington, WA. 98223 for a Supplemental Type Certificate for the Twin Commander Aircraft Models 690C, 690D, 695, 695A, and 695B. These airplanes will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. The novel and unusual design features include the installation of dual Innovative Solutions & Support (IS&S) Air Data Display Units (ADDU) for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

DATES: The effective date of these special conditions is April 13, 2005.

Comments must be received on or before May 13, 2005 for domestic, August 11, 2005 for foreign.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE221, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE221. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Wes Ryan, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4127.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

Interested persons are invited to submit such written data, views, or arguments, as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. CE221." The postcard will be date stamped and returned to the commenter.

Background

On April 5, 2004, Twin Commander Aircraft LLC. 19010 59th DR NE. Arlington, WA. 98223, made application to the FAA for a new Supplemental Type Certificate for the Twin Commander Aircraft Models 690C, 690D, 695, 695A, and 695B. The Twin Commander Aircraft Models of concern are approved under TCDS No. 2A4. The proposed modification incorporates a novel or unusual design feature, a digital air data computer, which may be vulnerable to HIRF external to the airplane.

Type Certification Basis

Under the provisions of 14 CFR part 21, § 21.101, Twin Commander Aircraft LLC. must show that the Twin Commander Aircraft Models 690C, 690D, 695, 695A, and 695B meet the following provisions, or the applicable regulations in effect on the date of application for the change. For those areas modified or impacted by the installation of the IS&S ADDU (Air Data Display Unit) system, the following paragraphs as amended by Amendments 23–1 through 23–54 must be complied with: 23.305, 23.307, 23.365, 23.603, 23.609, 23.611, 23.613, 23.625, 23.627, 23.771, 23.773, 23.777, 23.1301, 23.1303, 23.1309, 23.1311, 23.1321, 23.1322, 23.1331, 23.1335, 23.1351, 23.1357, 23.1359, 23.1361, 23.1365, 23.1367, 23.1381, 23.1431, 23.1529, 23.1541, 23.1543, 23.1581 and the special conditions adopted by this rulemaking action. For systems that are not modified or impacted by the installation, the original certification basis listed on TCDS No. 2A4 are still applicable.

Discussion

If the Administrator finds that the applicable airworthiness standards do not contain adequate or appropriate safety standards because of novel or unusual design features of an airplane, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38 after public notice and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the models for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model already included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

Twin Commander Aircraft LLC. plans to incorporate certain novel and unusual design features into an airplane for which the airworthiness standards do not contain adequate or appropriate

safety standards for protection from the effects of HIRF. These features include the addition of a digital Air Data computer, which may be susceptible to the HIRF environment, that were not envisaged by the existing regulations for this type of airplane.

Protection of Systems From High Intensity Radiated Fields (HIRF)

Recent advances in technology have given rise to the application in aircraft designs of advanced electrical and electronic systems that perform functions required for continued safe flight and landing. Due to the use of sensitive solid-state advanced components in analog and digital electronics circuits, these advanced systems are readily responsive to the transient effects of induced electrical current and voltage caused by the HIRF. The HIRF can degrade electronic systems performance by damaging components or upsetting system functions.

Furthermore, the HIRF environment has undergone a transformation that was not foreseen when the current requirements were developed. Higher energy levels are radiated from transmitters that are used for radar, radio, and television. Also, the number of transmitters has increased significantly. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit-installed equipment through the cockpit window apertures is undefined.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided by the design and installation of these systems. The accepted maximum energy levels in which civilian airplane system installations must be capable of operating safely are based on surveys and analysis of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels, which are lower than previous required values, are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require qualification of systems that perform critical functions, as installed in aircraft, to the defined HIRF environment in paragraph 1 or, as an option to a fixed value using laboratory tests, in paragraph 2, as follows:

(1) The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the HIRF environment defined:

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak root-mean-square (rms) values.

or,

(2) The applicant may demonstrate by a system test and analysis that the electrical and electronic systems that perform critical functions can withstand a minimum threat of 100 volts per meter, electrical field strength, from 10 kHz to 18 GHz. When using this test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

The applicant, for approval by the FAA, to identify either electrical or electronic systems that perform critical functions, must perform a preliminary hazard analysis. The term "critical" means those functions, whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or any combination of these. Service experience alone is not acceptable since normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

Applicability

As discussed above, these special conditions are applicable to *the* Twin Commander Aircraft Models 690C, 690D, 695, 695A, and 695B. Should Twin Commander Aircraft LLC. apply at a later date for a supplemental type certificate to modify any other model on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

PART 23—AIRWORTHINESS STANDARDS; NORMAL, UTILITY, ACROBATIC, AND COMMUTER CATEGORY AIRPLANES

Citation

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for *the* Twin Commander Aircraft Models 690C, 690D, 695, 695A, and 695B modified by Twin Commander Aircraft LLC. to add a digital Air Data computer.

1. Protection of Electrical and Electronic Systems from High Intensity Radiated Fields (HIRF). Each system that performs critical functions must be designed and installed to ensure that the operations, and operational capabilities of these systems to perform critical functions, are not adversely affected when the airplane is exposed to high intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definition applies: Critical Functions: Functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on April 1, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7430 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20932; Directorate Identifier 2005–NE–11–AD; Amendment 39–14056; AD 2005–08–04]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CF6–45 and CF6–50 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for GE CF6–45 and CF6–50 series turbofan engines. This AD requires reviewing accumulated cyclic-life records of 10 life-limited rotating parts, correcting those records, and removing from service parts that exceed the low-cycle-fatigue (LCF) life limits published in the Engine Manual Chapter 5, Airworthiness Limitations Section (ALS). This AD results from an error in a tracking database that subtracted flight cycles of certain serial number (SN) parts from the actual accumulated cycles. We are issuing this AD to prevent rotating parts that may have exceeded their LCF life limit from failing, leading to uncontained engine failure.

DATES: This AD becomes effective April 28, 2005.

We must receive any comments on this AD by June 13, 2005.

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

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Karen Curtis, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238–7192; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: In March of 2005, GE informed us that a records review of a certain engine revealed that the number of cycles accumulated on that engine, and its life-limited rotating parts, were recorded incorrectly in the operator's database in 1989. GE has advised us that the engine and rotating parts actually have more cycles accumulated than currently recorded. Upon further investigation, GE has confirmed that that engine was affected by an error in a tracking database that subtracted flight cycles from the actual accumulated cycles on a total of 32 rotating parts.

GE advises that 22 of the 32 affected rotating parts are in the control of a foreign operator, and under the jurisdiction of the Direction Generale de L'Aviation Civile (DGAC), which is the airworthiness authority for France. The DGAC advises that there are three of the 32 parts installed on foreign registered airplanes, but not under the jurisdiction of the DGAC. The location, current cycle count, and corrected cycle count are known for these 25 parts. None of these 25 parts have exceeded their LCF life limit. GE advises that they do not know the locations or current cycle counts of the remaining seven affected rotating parts. These seven parts could be in service with accumulated cyclic life exceeding their LCF life limit. We are including the three parts mentioned previously with the seven parts, as being affected by this AD, to ensure their cyclic lives get corrected. This condition, if not corrected, could result in failure of rotating parts that may have exceeded their LCF life limit, leading to uncontained engine failure.

FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other GE CF6–45 and CF6–50 series turbofan engines of the same type design. For that reason, we are issuing this AD to prevent rotating parts that may have exceeded their LCF life limit, from failing, leading to uncontained engine failure. This AD requires:

- Reviewing the engine records within 10 days after the effective date of this AD, for the existence of rotating parts listed by SN in this AD; and
- Correcting the records for those parts; and
- Within 100 cycles-in-service after the effective date of this AD, removing from service those parts exceeding their LCF life limits.

FAA's Determination of the Effective Date

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

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your

comments to an address listed under **ADDRESSES**. Include "AD Docket No. FAA–2005–20932; Directorate Identifier 2005–NE–11–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

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

Examining the AD Docket

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–08–04 General Electric Company: Amendment 39–14056. Docket No. FAA–2005–20932; Directorate Identifier 2005–NE–11–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective April 28, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to General Electric Company (GE) CF6–45 and CF6–50 series turbofan engines. These engines are installed on, but not limited to, Boeing DC–10, 747 series, and Airbus Industrie A300 series airplanes.

Unsafe Condition

(d) This AD results from an error in a tracking database that subtracted flight cycles of certain serial number (SN) parts from the actual accumulated cycles. We are issuing this AD to prevent rotating parts that may have exceeded their low-cycle fatigue (LCF) life limit from failing, leading to uncontained engine failure.

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.

Records Check

(f) Within 10 days after the effective date of this AD, do the following:

(1) Check the engine records for the part numbers (P/Ns) and SNs listed in Table 1 of this AD.

(2) Make the required cycle and hour corrections for those parts.

TABLE 1.—ROTATING PARTS REQUIRING CYCLIC LIFE CORRECTION

P/N	SN	Part name	Required cycle correction	Required hour correction
9051M71P17	MPOA0748	Disk, Fan Stage 1	+2,429	+15,936
9079M63P17	MPOC7054	Shaft, Compressor Rotor Rear	+2,429	+15,936
9234M35P01	MPOU3470	Shaft, Forward High Pressure Turbine (HPT) Rotor	+2,429	+15,936
9128M81G03	APV01489	Shaft, HPT Rotor Rear	+2,429	+15,936
9080M27P04	MPOA0853	Shaft, Fan Forward	+2,429	+15,936
(9080M28G10)		(Shaft, Fan Forward-Balanced).		
9061M21P03	SNE01254	Disk, Low Pressure Turbine (LPT) Rotor Stage 1	+1,224	+5,708
9061M70G01	KLA00801	Tube, LPT Air	+2,429	+15,936
9185M75G01	MPOH4228	Spool, Fan Rotor Stage 2–4	+2,429	+15,936
9045M86P10	CAN01080	Adapter, Tube	+2,429	+15,936

TABLE 1.—ROTATING PARTS REQUIRING CYCLIC LIFE CORRECTION—Continued

P/N	SN	Part name	Required cycle correction	Required hour correction
9061M26P20	PMOA0508	Shaft, LPT Rear	+2,429	+15,936

(3) After correcting the cycles and hours, remove from service any rotating parts listed in Table 1 of this AD that exceed their LCF life limit, within 100 cycles-in-service after the effective date of this AD.

(g) After the effective date of this AD, do not install any part listed in Table 1 of this AD into any engine, unless the cycles and hours have been corrected as specified in paragraph (f) of this AD.

(h) After the effective date of this AD, do not install any engine unless the records check specified in paragraph (f) of this AD has been performed.

Alternative Methods of Compliance

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

Related Information

(j) General Electric Company Alert Service Bulletin No. CF6–50 S/B 72–A1275, dated March 24, 2005, pertains to the subject of this AD.

Material Incorporated by Reference

(k) None.

Issued in Burlington, Massachusetts, on April 7, 2005.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 05–7387 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Dichlorophene and Toluene Capsules

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations that reflect approval of a new animal drug application (NADA) for dichlorophene and toluene capsules used in dogs and cats for removal of certain intestinal parasites. In a notice published elsewhere in this issue of the **Federal Register**, FDA is withdrawing approval of the NADA.

DATES: This rule is effective April 25, 2005.

FOR FURTHER INFORMATION CONTACT: Pamela K. Esposito, Center for Veterinary Medicine (HFV–212), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–7818; e-mail: *pesposit@cvm.fda.gov.*

SUPPLEMENTARY INFORMATION: Natchez Animal Supply Co., 201 John R. Junkin Dr., Natchez, MS 39120, has requested that FDA withdraw approval of NADA 121–557 for THR Worm (dichlorophene and toluene) Capsules used in dogs and cats for removal of certain intestinal parasites. This action is requested because the product is no longer manufactured or marketed. The animal drug regulations are amended to reflect the withdrawal of approval.

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

List of Subjects in 21 CFR Part 520

Animal drugs.

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

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

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

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

§ 520.580 [Amended]

■ 2. Section 520.580 is amended in paragraph (b)(1) by removing "049968,".

Dated: March 31, 2005.

Catherine P. Beck,

Acting Director, Center for Veterinary Medicine.

[FR Doc. 05–7337 Filed 4–12–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Ivermectin Meal; Change of Sponsor

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for a new animal drug application (NADA) from Merial Ltd. to Farnam Companies, Inc.

DATES: This rule is effective April 13, 2005.

FOR FURTHER INFORMATION CONTACT: David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6967, e-mail: *david.newkirk@fda.gov.*

SUPPLEMENTARY INFORMATION: Merial Ltd., 3239 Satellite Blvd., Bldg. 500, Duluth, GA 30096–4640, has informed FDA that it has transferred ownership of, and all rights and interest in, NADA 141–241 for ZIMECTERIN–EZ (ivermectin) 0.6% w/w for Horses to Farnam Companies, Inc., 301 West Osborn, Phoenix, AZ 85013–3928.

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

List of Subjects in 21 CFR Part 520

Animal drugs.

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

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

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

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

§ 520.1194 [Amended]

■ 2. Section 520.1194 is amended in paragraph (b) by removing "050604" and by adding in its place "017135".

Dated: March 31, 2005.

Bernadette A. Dunham,

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

[FR Doc. 05–7344 Filed 4–12–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes

AGENCY: United States Parole Commission, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: During 2004 the Parole Commission carried out a pilot project to study the feasibility of conducting parole release hearings through videoconferences between an examiner at the Commission's office and prisoners at selected institutions of the Federal Bureau of Prisons. In order to give notice of this project, the Commission promulgated an interim rule that provided that a parole release hearing may be conducted through a videoconference with the prisoner. The pilot project has been a success and the Commission is now amending the interim rule to include institutional revocation hearings as hearings that may be conducted by videoconference. The Commission is taking this action to further conserve personnel resources and reduce the costs associated with travel by the agency's hearing examiners.

DATES: Effective Date: May 13, 2005. Comments must be received by June 13, 2005.

ADDRESSES: Send comments to Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815.

FOR FURTHER INFORMATION CONTACT: Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815, telephone (301) 492–5959. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION: The Parole Commission's hearing examiners travel to more than 60 locations of Federal correctional facilities to conduct parole release and revocation hearings. In order to reduce travel costs and to conserve the time and effort of its hearing examiners. in 2004 the Commission initiated a pilot project in which examiners conducted some parole release hearings by videoconference between the Commission's office in Maryland and the prisoner's Federal institution. The Commission published an interim rule that provided notice that the Commission would be using the videoconference procedure. 69 FR 5273 (Feb. 4, 2004).

By the end of 2004, the Commission conducted 102 hearings via videoconference at 11 institutions. The videoconference technology has worked well. Video and audio transmissions are clear and the hearings are seldom interrupted by technical difficulties. The Commission's experience is that the prisoner's ability to effectively participate in the hearing has not been diminished by the use of the videoconference procedure.

The Commission's pilot project only included parole release hearings. Now the Commission is extending the use of the videoconference procedure to institutional revocation hearings. A revocation hearing is held at a Federal institution when the releasee admits to the violation charge, is convicted of a new crime, or waives a local revocation hearing, *i.e.*, a hearing at the place of the alleged violation or arrest. Adverse witnesses are not produced at institutional revocation hearings for confrontation and cross-examination. On rare occasions, the releasee has a witness testify on his behalf at the hearing. Because the violation charge is either not contested by the releasee or is conclusively established by the new conviction, an institutional revocation hearing primarily focuses on the decisions regarding the appropriate prison term for the releasee's violation and whether the releasee should be returned to the community on supervision. Therefore, an institutional revocation hearing bears considerable similarity to a parole determination proceeding. Given this similarity and the additional cost savings and conservation of resources that may be gained from use of the videoconference procedure, the Commission is adding institutional revocation hearings to those hearings an examiner may conduct by videoconference.

Extending the videoconference procedure to institutional revocation hearings will provide additional flexibility for both the Commission and the Bureau of Prisons in the disposition of accused release violators and the use of personnel. For example, if the releasee is serving a new prison term at an institution where the Commission conducts parole hearings via videoconference, the Bureau will be able to designate that same institution as the site of the releasee's institutional revocation hearing. This saves either the cost of transporting the releasee to FTC Oklahoma or FDC Philadelphia, the institutions where the Commission conducts the majority of institutional revocation hearings, or the cost of sending a hearing examiner to travel to the institution to conduct one institutional revocation hearing when all other hearings at that same institution are conducted via videoconference. Moreover, conducting institutional revocation hearings by videoconference may avoid some violations of the 90-day time period for holding such hearings in situations where transportation difficulties or other problems have delayed the scheduling of the hearing.

The Commission is promulgating this rule as an interim rule in order to promptly take full advantage of the cost savings and other benefits in the deployment of examiner personnel that result from the extension of the videoconference procedure to institutional revocation hearings. The Commission is providing a 60-day period for the public to comment on the use of the videoconference procedure for such revocation hearings.

Implementation

The amended rule will take effect May 13, 2005, and will apply to institutional revocation hearings for Federal parolees and District of Columbia parolees and supervised releasees held on or after the effective date.

Executive Order 12866

The U.S. Parole Commission has determined that this interim rule does not constitute a significant rule within the meaning of Executive Order 12866.

Executive Order 13132

This regulation 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. Under Executive Order 13132, this rule does not have sufficient federalism implications requiring a federalism Assessment.

Regulatory Flexibility Act

The interim rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605 (b), and is deemed by the Commission to be a rule of agency practice that does not substantially affect the rights or obligations of non-agency parties pursuant to Section 804 (3) (c) of the Congressional Review Act.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local, or tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Sec. 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and Parole.

The Interim Rule

Accordingly, the U.S. Parole Commission is adopting the following amendment to 28 CFR part 2.

PART 2—[AMENDED]

■ 1. The authority citation for 28 CFR part 2 continues to read as follows:

Authority: 18 U.S.C. 4203 (a) (1) and 4204 (a) (6).

■ 2. Revise § 2.25 to read as follows:

§ 2.25 Hearings by videoconference.

Parole determination hearings (including rescission hearings), and institutional revocation hearings, may be conducted by a videoconference between the hearing examiner and the prisoner or releasee.

Dated: April 5, 2005.

Edward F. Reilly, Jr.,

Chairman, U.S. Parole Commission.

[FR Doc. 05–7389 Filed 4–12–05; 8:45 am]

BILLING CODE 4410–31–P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

32 CFR Part 199

RIN 0720–AA79

TRICARE; Elimination of Non-Availability Statement and Referral Authorization Requirements and Elimination of Specialized Treatment Services Program

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This rule implements Section 735 of the National Defense Authorization Act for Fiscal Year 2002 (NDAA–02) (Pub. L. 107–107). It also implements Section 728 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (NDAA–01) (Pub. L. 106–398). Section 735 of NDAA–02 eliminates the requirement for TRICARE Standard beneficiaries who live within a 40-mile radius of a military medical treatment facility (MTF) to obtain a nonavailability statement (NAS) or preauthorization from an MTF before receiving inpatient care (other than mental health services) or maternity care from a civilian provider in order that TRICARE will cost-share for such services. Section 735 of NDAA–02, however, authorizes the Department of Defense to make exceptions to the elimination of the requirement for a NAS through the exercise of a waiver process under certain specified conditions. This section also eliminates the NAS requirement for specialized treatment services (STSs) for TRICARE Standard beneficiaries who live outside the 200-mile radius of a designated STS facility. This rule portrays the Department's decision to eliminate the STS program entirely. Finally, Section 728 of NDAA–01 requires that prior authorization before referral to a specialty care provider that is part of the contractor network be eliminated under any new TRICARE contract.

DATES: Effective Date: December 28, 2003.

ADDRESSES: Medical Benefits and Reimbursement Systems, TRICARE Management Activity, 16401 East Centretech Parkway, Aurora, CO 80011–9066.

FOR FURTHER INFORMATION CONTACT: Tariq Shahid, TRICARE Management Activity, telephone (303) 676–3801.

SUPPLEMENTARY INFORMATION:

I. Elimination of Nonavailability Statement Requirement and Specialized Treatment Service Program

The NDAA–02 was signed into law on December 28, 2001. Section 735 of NDAA–02 amends Section 721 of the NDAA–01 with respect to the nonavailability statement (NAS) elimination requirements and eliminates the requirement for non-enrolled TRICARE beneficiaries who live within a 40-mile radius of a military medical treatment facility (MTF) to obtain an NAS or preauthorization from an MTF before receiving nonemergent inpatient or obstetrical (inpatient or outpatient) services from a civilian provider in order that TRICARE will cost-share for such services. A non-enrolled TRICARE beneficiary is a beneficiary who has not enrolled in TRICARE Prime, but who has chosen to use the TRICARE Standard and TRICARE Extra options. Section 735 retains MTF NAS authority for inpatient mental health services within the usual 40-mile catchment area. The section establishes that the NAS elimination requirements are to take effect on the earlier of the date the health care services are provided under new TRICARE contracts or the date that is two years after the date of the enactment of NDAA–02. As the health care services under new TRICARE contracts were to be available after March 2004, the NAS requirements are eliminated for admissions occurring on or after December 28, 2003, which is the date that is two years after the date of the enactment of NDAA–02. For obstetrical care, the NAS requirement is eliminated for maternity episodes wherein the first prenatal visit occurs on or after December 28, 2003. An NAS is required when the first prenatal visit occurs before December 28, 2003, by 10 U.S.C. 1080(b). The NAS for inpatient mental health care will continue to be required.

With the exception of maternity care, Section 735 of NDAA–02 gives the Secretary of DoD the authority to waive the NAS elimination requirements if: (a) Significant costs would be avoided by performing specific procedures at the affected military treatment facility (MTF); (b) A specific procedure must be provided at the affected MTF to ensure the proficiency levels of the practitioners at the facility; or (c) the lack of NAS data would significantly interfere with TRICARE contract administration. When this waiver authority will be exercised, the Department will notify the affected beneficiaries by publishing a notice in the **Federal Register** and notify the Congress. The TRICARE policy requires

MTFs, TRICARE Regions, and the contractors to publicize any NAS requirements to the affected beneficiaries with respect to any use of the waiver authority. In addition, outreach efforts will include posting Web site announcements on the TRICARE Web site directing affected beneficiaries to their local MTF Web sites with regard to any use of the waiver authority.

Section 735 of NDAA–02 furthermore eliminates the multi-regional and national NAS requirement for specialized treatment services (STSs) for TRICARE Standard beneficiaries who live outside the 200-mile radius of a STS facility. STS facilities were those designated facilities with regional, multi-regional or national catchment areas which provided complex medical and surgical services pursuant to 32 CFR 199.4(a)(10). Since the Department decided to terminate the STS program no later than June 1, 2003, all regional, multi-regional, and national NAS requirements under TRICARE Standard and authorization requirements under TRICARE Prime for STSs were eliminated before that date. The rationale behind the termination of the STS program was that this program was not based upon nationally developed consensus or evidenced-based criteria for clinical quality (there were none at the inception of this program) and had not consistently demonstrated cost-benefit to the government. In addition, the NAS requirement for STSs placed an unreasonable burden on our beneficiaries who had to travel extended distances to the STS facilities. This provided for enhanced continuity of care for TRICARE Standard beneficiaries who generally receive most medical and surgical services from civilian providers of their choice. The interim final rule gave notice of the Department's decision to terminate the STS program entirely no later than June 1, 2003.

II. Elimination of Prior Authorization Before Referrals to Specialty Care Providers

This rule implements Section 728 of NDAA–01 (Pub. L. 106–398) which was enacted on October 30, 2000. Section 728 requires that prior authorization (or more precisely, preauthorization as defined in 32 CFR 199.2(b)) before referral to a specialty care provider that is part of the network be eliminated as part of any new TRICARE contracts entered into by the Department of Defense after the date of the enactment of the Act. This means that medical necessity preauthorization will not be required when primary care or specialty care providers refer TRICARE Prime patients for consultation appointment services, which are provided within the contractors' network of providers. Only TRICARE Prime patients required preauthorization for obtaining consultation appointment services. TRICARE Prime beneficiaries are required to use network providers if available. This rule removes the requirement to obtain a medical necessity determination when the consultation services are provided within the contractor's network. Section 728 of NDAA–01 does not eliminate the requirement for medical necessity preauthorizations for specific procedures or other health care services which specialty providers may recommend for beneficiaries as a result of the original consultation appointment or the need for preauthorization referral to non-network providers. For example, a consultation might result in a recommendation for a high cost surgical procedure on a nonemergent basis. The specialist's intent to perform this procedure may still be subjected to medical necessity preauthorization based upon utilization review criteria as has been TRICARE policy for years in conformance with the peer review organization program in section 199.15.

In summary, under new TRICARE contracts, requests for consultation appointment services will not be subjected to medical necessity preauthorization though other health care services may continue to require preauthorizations based on a determination of best business practices.

III. Public Comments

We published the interim final rule on July 31, 2003, and provided a 60-day comment period. We received comments from one national association and two other commenters. These comments and the Department's responses are summarized below.

Comment: Essentially, the commenter raised concerns regarding the stated means of communicating to beneficiaries and providers the intent to exercise the waiver authority to require a nonavailability statement (NAS). The interim final rule stated that if the waiver authority is exercised, the Department will notify the affected beneficiaries by publishing a notice in the **Federal Register**.

Response: While these are used to announce the program changes and requirements to the public, the **Federal Register** notices are not the only means of communication upon which the Department relies. The Department is sensitive to streamlining administrative processes and recognizes the importance of communicating with the beneficiaries and providers with regard to any use of the waiver authority and any new NAS requirements. It is for this reason that we have included a provision in the TRICARE Policy Manual that requires military treatment facilities (MTFs), TRICARE Regions, and the contractors to publicize any NAS requirements to the affected beneficiaries with respect to any use of the waiver authority. We have included this clarification in this final rule. Normally, the TRICARE policy changes and new requirements are announced in the routine provider bulletins and beneficiary newsletters by TRICARE contractors. In addition, outreach efforts will include posting Web site announcements on the TRICARE Web site directing affected beneficiaries to their local MTF Web sites; sharing information with military and civilian media and beneficiary association publications; and partnering with network and non-network providers through the contractors and local American Medical Association organizations.

Comment: One commenter argued that the DoD should totally eliminate the NAS for TRICARE Standard beneficiaries and made several comments. With regard to the legislative provision that requires elimination of NAS or preauthorization from an MTF, this commenter stated that the law has eliminated preauthorization for TRICARE Standard, yet DoD rules do not comply. With regard to the title of this rule, the commenter argued that to title this rule "Elimination of the nonavailability statement" is deceiving to TRICARE Standard beneficiaries, since it has not been eliminated except for maternity care, and DoD should reveal the facts. The commenter stated that the beneficiary could have no rights under this rule to use TRICARE Standard rather than the MTF, and the rule grants authority to DoD to continue use of the NAS. With reference to the regulatory language in the rule, the commenter requested clarification regarding the use and impact of the term MTFs. Regarding the structure of the rule, the commenter stated that the entire document is confusing in applicability to TRICARE Prime vs. TRICARE Standard and suggested that at the beginning of each paragraph it should be specified whether it applies to Standard or Prime, or both. The commenter also raised concerns that the notification by a **Federal Register** notice with regard to using the waiver authority to require an NAS is inadequate and stated that unless a reasonable mechanism can be

established to notify each beneficiary and provider of the need for the NAS, the rule cannot be fairly implemented. In all cases when the beneficiary is denied a request for NAS, the commenter suggested that the beneficiary should be notified in writing within 24 hours giving the specific reasons related to: (a) The significant costs that would be avoided, (b) a specific procedure that must be provided at the affected MTF to ensure the proficiency levels of the practitioners, or (c) the lack of NAS data that would significantly interfere with TRICARE contract administration. The commenter emphasized the importance of detailed explanation for NAS denial and specific cost data and stated that the waiver authority is so liberal that the practical effect is to grant carte blanche authority to deny NAS request when the MTF is underutilized. Finally, the commenter presented a detailed argument in favor of total elimination of NAS.

Response: The rule eliminated the NAS requirements as provided by the law. It is incorrect to say that the DoD rules do not comply with respect to the elimination of MTF preauthorization. The fact is that under TRICARE, no care is preauthorized by MTFs and it was NAS that was administered by MTFs. The TRICARE contractors were required to preauthorize those admissions that required an NAS and that preauthorization was eliminated with the elimination of NAS. The title of this rule is appropriate and it is not deceiving as the rule does eliminate maternity and inpatient NAS with the exception of NAS for mental health admissions, and all the relevant information is presented in the rule. The fact that the rule provides information with regard to the waiver authority to require an NAS does not mean that it does not eliminate the inpatient NAS. It is incorrect to say that the beneficiary could have no rights under this rule to use TRICARE Standard other than the MTF. Use of an MTF is not required for emergency care or when a beneficiary has other health insurance and an NAS can never be required in such situations. The use of the term MTFs in the regulatory language is consistent with the provisions in Section 735 of the National Defense Authorization Act for Fiscal Year 2002. It is a plural of the term military treatment facility (MTF) and will be applicable when more than one MTF are granted a waiver to require an NAS. Regarding the structure of the rule, section I of the rule is clear that the NAS requirements are eliminated for non-enrolled beneficiaries and it has defined a non-enrolled beneficiaries as a beneficiary who is not enrolled in TRICARE Prime and has chosen to use TRICARE Standard and TRICARE Extra options. It should be noted that the NAS applies to non-enrolled beneficiaries and it does not apply under TRICARE Prime. With regard to termination of the specialized treatment service (STS) program, we have added language in Section I of the rule that clarifies that the STS program was terminated under both the TRICARE Standard and Prime. Section II. of the rule is clear that the elimination of prior authorization before referral to specialty care providers applies under TRICARE Prime. With regard to the notification concerning the waiver authority to require an NAS, see the response under the first comment, above. It should be noted that whenever an NAS is denied, the beneficiary is promptly notified and given the appeal rights. The specific information pertaining to the significant costs, procedures, etc., pertains to the waiver criteria for requiring an NAS and will be required by the Department for review and consideration from the MTF requesting the waiver. With the exception of maternity care, the law gives DoD the waiver authority to require an NAS under certain specified conditions. However, it should be noted that granting a waiver to an MTF to require an NAS is a complicated process and it involves notification to the Congress. Given the complexity of the process and its impact on beneficiaries and providers, the Department does not foresee any waivers at this time. However, should there be any exceptions, the Department anticipates any waivers granted would be implemented on a local basis, as needed, and the NAS requirements will be announced well in advance of their implementation. Essentially, this rule has followed the directions provided by the statute.

Comment: The commenter supported the rule and suggested that TRICARE remove the requirement for prior authorization of outpatient medical procedures under TRICARE Standard that are approved by the beneficiary's other health insurance (OHI).

Response: With the exception of adjunctive dental care, Program for Persons with Disabilities benefit, outpatient psychotherapy beyond the eighth visit, and psychoanalysis, an earlier policy change removed the preauthorization requirements for outpatient medical procedures for those TRICARE beneficiaries who have OHI.

Regulatory Procedure

The rule has been reviewed by the Office of Management and Budget. Executive order 12866 requires certain regulatory assessments for any significant regulatory action, defined as one which would result in an annual effect on the economy of $100 million or more, or have other substantial impacts. The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have significant impact on a substantial number of small entities.

This rule is not an unfunded mandate under the Unfunded Mandate Reform Act and it is not a significant regulatory action under E.O. 12866 that could potentially add more than $100 million in estimated annual costs for DoD, or state, local, tribal governments, and the private sector. This rule does not require a regulatory flexibility analysis as the policy action was taken by Congress and the rule merely puts it into effect. The policy of the Regulatory Flexibility Act that agencies adequately evaluate all potential options for an action does not apply when Congress has already dictated the action.

This rule will not impose significant additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511).

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

■ Accordingly, 32 CFR part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; and 10 U.S.C. Chapter 55.

■ 2. Section 199.7 is amended by revising paragraph (a)(7)(i) to read as follows:

§ 199.7 Claims submission, review, and payment.

(a) * * *

(7) * * *

(i) *Rules applicable to issuance of Nonavailability Statement.* Appropriate policy guidance may be issued as necessary to prescribe the conditions for issuance and use of a Nonavailability Statement.

* * * * *

■ 3. Section 199.15 is amended by revising paragraphs (b)(4)(i)(B) and (b)(4)(ii)(D) to read as follows:

§ 199.15 Quality and utilization review peer review organization program.

* * * * *

(b) * * *

(4) * * *

(i) * * *

(B) For healthcare services provided under TRICARE contracts entered into by the Department of Defense after October 30, 2000, medical necessity preauthorization will not be required for referrals for specialty consultation appointment services requested by primary care providers or specialty providers when referring TRICARE Prime beneficiaries for specialty consultation appointment services within the TRICARE contractor's network. However, the lack of medical necessity preauthorization requirements for consultative appointment services does not mean that non-emergent admissions or invasive diagnostic or therapeutic procedures which in and of themselves constitute categories of health care services related to, but beyond the level of the consultation appointment service, are not subject to medical necessity prior authorization. In fact many such health care services may continue to require medical necessity prior authorization as determined by the Director, TRICARE Management Activity, or a designee. TRICARE Prime beneficiaries are also required to obtain preauthorization before seeking health care services from a non-network provider.

(ii) * * *

(D) For healthcare services provided under TRICARE contracts entered into by the Department of Defense after October 30, 2000, medical necessity preauthorization for specialty consultation appointment services within the TRICARE contractor's network will not be required. However, the Director, TRICARE Management Activity, or designee, may continue to require or waive medical necessity prior (or pre) authorization for other categories of other health care services based on best business practice.

* * * * *

■ 4. Section 199.17 is amended by revising paragraph (n)(2)(ii)(B) to read as follows:

§ 199.17 TRICARE program.

* * * * *

(n) * * *

(2) * * *

(ii) * * *

(B) For healthcare services provided under TRICARE contracts entered into by the Department of Defense on or after October 30, 2000, referral requests (consultation requests) for specialty care consultation appointment services for TRICARE Prime beneficiaries must be submitted by primary care managers. Such referrals will be authorized by Health Care Finders (authorization numbers will be assigned so as to facilitate claims processing) but medical necessity preauthorization will not be required for referral consultation appointment services within the TRICARE contractor's network. Some health care services subsequent to consultation appointments (invasive procedures, nonemergent admissions and other health care services as determined by the Director, TRICARE Management Activity, or a designee) will require medical necessity preauthorization. Though referrals for specialty care are generally the responsibility of the primary care managers, subject to discretion exercised by the TRICARE Regional Directors, and established in regional policy or memoranda of understanding, specialist providers may be permitted to refer patients for additional specialty consultation appointment services within the TRICARE contractor's network without prior authorization by primary care managers or subject to medical necessity preauthorization.

* * * * *

Dated: April 7, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–7361 Filed 4–12–05; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2004–0411; AD–FRL–7899–1]

RIN 2060–AK80

National Emission Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Achievable Control Technology Standards; and National Emission Standards for Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rules; amendments.

SUMMARY: The EPA is taking direct final action on amendments to the National Emissions Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Control Technology Standards which were promulgated in June 1999 (64 FR 34863), and the National Emission Standards for Ethylene Manufacturing Units: Heat Exchange Systems and Waste Operations which were promulgated in July 2002 (67 FR 46258). The direct final rule amendments clarify the compliance requirements for benzene waste streams, clarify the requirements for heat exchangers and heat exchanger systems, and stipulate the provisions for offsite waste transfer in the national emission standards for ethylene manufacturing process units. The direct final rule amendments also correct the regulatory language that make emissions from ethylene cracking furnaces during decoking operations an exception to the provisions and delineate overlapping requirements for storage vessels and transfer racks.

In addition, the direct final rule amendments also correct errors in the proposed rule for the Acrylic and Modacrylic Fiber Production source category which were not corrected as indicated in the preamble to the June 1999 final rule (64 FR 34863).

We are issuing the amendments as direct final rules, without prior proposal, because we view the revisions as noncontroversial and anticipate no adverse comments. However, in the Proposed Rules section of this **Federal Register**, we are publishing a separate document that will serve as the proposal to amend the National Emissions Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Control Technology Standards and the National Emission Standards for Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations.

DATES: The direct final rule amendments are effective on June 13, 2005 without further notice, unless EPA receives adverse written comment by May 31, 2005. If adverse comments are received, EPA will publish a timely withdrawal in the **Federal Register** indicating which of the amendments will become effective, and which are being withdrawn due to adverse comment.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0411, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for

receiving comments. Follow the on-line instructions for submitting comments.

- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* EPA Docket Center, EPA, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a duplicate copy, if possible.
- *Hand Delivery:* Air and Radiation Docket, EPA, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

We request that a separate copy also be sent to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

Instructions: Direct your comments to Docket ID No. OAR–2004–0411. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Warren Johnson, Organic Chemicals Group, Emission Standards Division (C504–04), Office of Air Quality Planning and Standards, EPA, Research Triangle Park, NC 27711; telephone number (919) 541–5124; facsimile number (919) 541–3470; electronic mail (e-mail) address *johnson.warren@epa.gov*. For information concerning corrections to the Acrylic/Modacrylic Fiber Production source category of the Generic MACT, contact Ms. Ellen Wildermann, Policy, Planning and Standards Group, Emission Standards Division (C439–04), Office of Air Quality Planning and Standards, EPA, Research Triangle Park, North Carolina 27711, (919) 541–5408, e-mail address *wildermann.ellen@epa.gov*.

SUPPLEMENTARY INFORMATION: *Regulated Entities.* The entities potentially affected by this action include the following categories of sources:

Category	NAICS code	SIC code	Examples of potentially regulated entities
Industrial	325110	2869	Producers of ethylene from refined petroleum or liquid hydrocarbons.
	3252	2824	Producers of either acrylic fiber or modacrylic fiber synthetics composed of acrylonitrile (AN) units.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Not all facilities listed classified under the NAICS code or SIC code are affected. To determine whether your facility is affected by this action, you should examine the applicability criteria in § 63.1100 of the generic MACT standards (40 CFR part 63). If you have any questions regarding the applicability of these technical corrections to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Worldwide Web (WWW). In addition to being available in the docket, electronic copies of recently proposed and final rules are also available on the WWW through EPA's Technology Transfer Network (TTN). Following signature, a copy of the direct final rules will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *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.

Comments. We are publishing the direct final rule amendments without prior proposal because we view the amendments as noncontroversial and do not anticipate adverse comments. However, in the Proposed Rules section of today's **Federal Register**, we are publishing a separate document that will serve as the proposal to the amendments in the rules if adverse comments are filed. If we receive any adverse comments on one or more distinct amendments, we will publish a timely withdrawal in the **Federal Register** informing the public which amendments will become effective and which amendments are being withdrawn due to adverse comments. We will address all public comments in subsequent final rules based on the proposed rules. Any of the distinct amendments in today's final rules for which we do not receive adverse comment will become effective on the previously mentioned date. We will not institute a second comment period on

this action. Any parties interested in commenting must do so at this time.

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of these direct final rules is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by June 13, 2005. Under section 307(d)(7)(B) of the CAA, only an objection to the direct final rule amendments that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the direct final rule amendments may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

Outline. The following outline is provided to aid in reading the direct final rule amendments:

I. Background

We are amending two rules. One rule is the National Emissions Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Control Technology Standards which were promulgated in June 1999 (64 FR 34863) and also referred to as the Generic Maximum Achievable Control Technology or "GMACT" rule, provide a structural framework that allows source categories with similar emission types and control requirements to be covered under common subparts; thus, promoting regulatory consistency in the development of national emission standards for hazardous air pollutants (NESHAP). The other rule is the National Emission Standards for Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations which were promulgated in July 2002 (67 FR 46258) in the same notice that added by amendment the Ethylene Production source category to the GMACT rule applicability.

The amendments in today's action clarify the compliance requirements for benzene waste streams, clarify the requirements for heat exchangers and heat exchanger systems, and stipulate the provisions for offsite waste transfer in the national emission standards for ethylene manufacturing process units (40 CFR part 63, subpart XX).

The amendments in today's action will also correct the regulatory language that make emissions from ethylene cracking furnaces during decoking operations an exception to the provisions, delineate overlapping requirements for storage vessels and transfer racks, and correct typographical errors in Table 7 to 40 CFR 63.1103(e), "What are my requirements if I own or operate an ethylene production existing or new affected source?"

In addition, we are correcting errors to Table 3 to 40 CFR 63.1103(b)(3)(ii), "What are my requirements if I own or operate an acrylic and modacrylic fiber production existing or new affected source and am complying with paragraph (b)(3)(ii) of this section?" in the proposed rule for the Acrylic and Modacrylic Fiber Production source category which were not corrected as indicated in the preamble to the June 1999 final rule (64 FR 34863).

II. Amendments to the NESHAP for Ethylene Manufacturing Process Units and the Generic MACT

Today's actions include amendments to the NESHAP for ethylene manufacturing process units to clarify compliance requirements for benzene waste streams, to clarify the requirements for heat exchangers and heat exchanger systems, and to stipulate the provisions for offsite waste transfer. We are also amending the generic MACT standards to correct the regulatory language to state that emissions from furnaces during decoking operations are an exception to the provisions, and we are delineating overlapping requirements for storage vessels and transfer racks. Another source in the generic MACT is acrylic and modacrylic fiber production for which we are amending the Compliance Requirements Table.

We are amending 40 CFR 63.1086(b)(4) and 63.1095(a) to change units from parts per million by volume (ppmv) to parts per million by weight (ppmw) so that the units of measure accurately reflect the units of measure of the tests used by affected sources.

We are amending 40 CFR 63.1086(a)(5) to clarify the interpretation of the heat exchanger leak calculation requirements. While not explicitly stated, our intent in § 63.1086(a) was to define heat exchange systems in such a way as to ensure that leaks of 3.06 kilogram per hour (kg/hr) (the intended low end threshold of what would constitute a leak) or greater of hazardous air pollutants (HAP) into the cooling water stream are detectable and to specify that a leak is detected if the exit mean concentration is at least 10 percent greater than the entrance mean.

We are amending 40 CFR 63.1086(a)(2)(ii)(B) and (b)(1)(ii) to include performance-based monitoring frequencies.

We are amending 40 CFR 63.1095(b) to reword the type of waste stream to "waste streams that contain benzene," which is consistent with the wording in 40 CFR 61.342(c). The change clarifies that this section specifically applies to "waste streams" containing benzene, not benzene containing streams in general, since there are product streams that also contain benzene. We are also amending 40 CFR 63.1095(b) to clarify an option for an owner or operator to transfer waste off-site to another facility for treatment, according to 40 CFR 63.1096.

We are amending 40 CFR 63.1100(g)(1) to address overlapping storage vessel requirements in 40 CFR part 63, subpart YY, with the requirements in 40 CFR part 63, subparts G and CC.

We are amending 40 CFR 63.1103(e)(1)(ii)(J) by removing the term "furnace stack," because decoking emissions do not exit through the furnace stack. We are amending 40 CFR 63.1103(e)(2) to include a definition of "organic HAP" that identifies organic HAP as those compounds listed in Table 1 to 40 CFR part 63, subpart XX.

We are amending 40 CFR 63.1103(g)(3) to clarify our intent that transfer racks at an ethylene affected source that are also subject to either 40 CFR part 63, subpart G, or 40 CFR part 61, subpart BB, are only required to comply with the requirements of 40 CFR part 63, subpart YY.

III. Rule Language Clarifications

Paragraphs (b) and (e) of 40 CFR 63.1084 contain provisions that exempt heat exchange systems that contain less than 5 percent HAP by weight in either an intervening fluid or process fluid. We have been asked to clarify the frequency intended for determining the HAP content for the purpose of establishing or maintaining the exempt status of a heat exchange system. The HAP content must be determined prior to claiming the exemption. Thereafter, the HAP

content must be determined whenever you are relying on the exemption and have reason to believe that the HAP content may be in excess of 5 percent. In general, if you make a process or operating change that would nullify the exemption and would, therefore, need to be identified as part of the affected source subject to 40 CFR part 63, subpart XX, you would make a determination shortly after the change is made and report the determination in the next semiannual report. Likewise, any determinations necessary to document continued exempt status following any process or operational changes that could affect the HAP content of the process fluid or intervening fluid should follow the same schedule. Along these same lines, if you do not make a process or operating change that could increase the HAP content of the process or intervening fluid, and you reasonably believe that the initial demonstration of exempt status is valid, you do not need to perform another determination. The periodic reporting requirements and schedule are specified in 40 CFR 63.1110(e) and (f).

In response to stakeholder questions, we are clarifying that at facilities with total annual benzene (TAB) quantities less than the 10 megagrams per year (Mg/yr) (the applicability threshold of the Benzene Waste Operations NESHAP in 40 CFR part 61, subpart FF), the provisions of 40 CFR part 63, subpart XX, require control of two benzene waste streams as specified in § 63.1095(b)(1), and require control of continuous butadiene waste streams meeting the concentration and flow rate criteria at any benzene level (under 40 CFR 63.1095(a)(3)). Section 63.1095(b)(1) requires facilities whose TAB quantity from waste is less than 10 Mg/yr to manage and treat the two named benzene waste streams—spent caustic waste streams and dilution steam blowdown waste streams—according to 40 CFR 61.342(c)(1) through (c)(3)(i). Facilities with a TAB quantity from waste of 10 Mg/yr or greater must comply with the requirements of 40 CFR 63.1095(b)(2). These requirements are explained in the July 12, 2002, preamble to the final rule (67 FR 46265). Section 112 of the CAA requires standards for control of HAP, not only benzene; hence, all facilities subject to the Ethylene Production NESHAP (regardless of TAB quantity) are required to control continuous butadiene waste streams, as required in 40 CFR 63.1095(a).

We are clarifying the intent of provisions regarding overlapping provisions for leak detection and repair requirements for ethylene manufacturing process units (EMPU) as established by 40 CFR part 63, subpart UU. Equipment within an EMPU may potentially be regulated by several other equipment leak regulations, such as 40 CFR part 61, subparts J and V; 40 CFR part 60, subpart VV; and 40 CFR part 63, subpart H. To address this overlap, the regulations provide that in cases where 40 CFR part 63, subpart UU, overlaps the other requirements, the equipment need only comply with the subpart UU requirements, since subpart UU is at least as stringent as the overlapping regulations. For ease in compliance, we understand that some affected sources may wish to comply with subpart UU requirements for equipment leaks for the entire EMPU, even for equipment not in HAP service. In these cases, the owner or operator should specify the use of 40 CFR part 63, subpart UU, for the entire EMPU in the Notification of Compliance Status report required by 40 CFR 63.1110(a)(4).

We are clarifying the intent of the exclusions contained in 40 CFR 63.1100(e)(1)(iii) and how they relate to the overlap requirements. For process units that are currently regulated under other subparts of 40 CFR part 63, § 63.1100(g) provides provisions when applicability of 40 CFR part 63, subpart YY, and other subparts of 40 CFR parts 60, 61 and 63 overlap, allowing sources to elect which subpart to comply with in some cases. In respect to facilities that produce ethylene, these exclusions and overlap provisions were intended for facilities that have collocated process units currently subject to other 40 CFR part 63 subparts in addition to their ethylene production units. For example, a facility could have a refinery subject to 40 CFR part 63, subpart CC (Petroleum Refinery NESHAP), in addition to an ethylene production unit, and within the refinery operations there is equipment that separates propylene from the refinery gas stream, but the product propylene is not intended for, or used in, ethylene production. The equipment in question, while performing a function that is common to ethylene manufacturing, is already regulated under the Petroleum Refinery NESHAP (40 CFR part 63, subpart CC) and may be excluded from the Ethylene Production NESHAP (40 CFR part 63, subpart YY) applicability on that basis. Our overall intent is to avoid duplication and confusion in monitoring, recordkeeping and reporting requirements by requiring that process equipment that is potentially subject to more than one 40 CFR part 63 subpart must be in compliance with one subpart, but (pursuant to these exclusion and overlap provisions) need not comply with multiple subparts. These provisions and exclusions do not authorize noncompliance with any of the 40 CFR part 63 requirements for a source that would otherwise be subject to one or more 40 CFR part 63 subparts.

We are clarifying that small containers, portable bins and portable tanks are not included in the definition of "storage vessel or tank" found in 40 CFR 63.1101 since the definition applies to "* * * a stationary unit * * *." It was not our intent to regulate the small containers, portable bins and portable tanks, and we believe that by distinguishing that the vessels must be stationary is adequate for determining regulated vessels.

Section 63.1105(h)(1) of 40 CFR part 63 requires "the pressure test procedures specified in Method 27 of appendix A to 40 CFR part 60" to test for vapor tightness. Vapor tight, as defined in 40 CFR 63.1105(d)(2), means that the pressure in the tank will not drop more than 750 pascals within 5 minutes after it is pressurized to a minimum of 4,500 pascals. This regulatory wording clearly requires you to test for vapor tightness using the pressure test procedures described in Method 27 and does not require a vacuum test. We confirm that it is our intent to require only pressure testing. The appropriate pressure test is described in 40 CFR part 60, appendix A, section 8.2.2 of Method 27, and the vacuum test described in section 8.2.3 of Method 27 is not required.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is "significant" and, therefore, subject to review by the Office of Management and Budget (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 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.

It has been determined that the direct final rule amendments are not a "significant regulatory action" under the terms of Executive Order 12866 and, therefore, are not subject to review by OMB.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The direct final rule amendments result in no changes to the information collection requirements of the standards or guidelines and will have no impact on the information collection estimate of project cost and hour burden made at the time these rule were promulgated. Therefore, the information collection requests have not been revised. The OMB has previously approved the information collection requirements contained in 40 CFR part 63, subpart YY under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq, and assigned OMB control number 2060–0420 (EPA ICR 1871.02) for Acrylic and Modacrylic Fiber Production, and OMB control number 2060–0489 for Ethylene Production (EPA ICR 1983.02).

Copies of the Information Collection Request (ICR) document(s) may be obtained from Susan Auby by mail at U.S. EPA, Office of Environmental Information, Collection Strategies Division (2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by e-mail at *auby.susan@epa.gov*, or by calling (202) 566–1672. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr*.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with the direct final rule amendments. For purposes of assessing the impacts of today's direct final rule amendments on small entities, a small entity is defined as: (1) A small business in the North American Industrial Classification System (NAICS) code 325 that has up to 500; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's direct final rule amendments on small entities, we have concluded that this action will not have a significant economic impact on a substantial number of small entities. The direct final rule amendments will not impose any requirements on small entities. The direct final rule amendments provide clarifications and corrections to previously issued rules. Before promulgating the rule on acrylic and modacrylic fiber production in 1999 (64 FR 34863), we concluded that each standard applied to five or fewer major sources. In addition, we conducted a limited assessment of the economic effect of the proposed standards on small entities that showed no adverse economic effect for any small entities within any of these source categories. Similarly, before promulgating the rules on ethylene production in 2002 (67 FR 46258), we determined that there were no small entities affected by those rules.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, 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 by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires 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 we publish 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 our regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the direct final rule amendments do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Thus, the direct final rule amendments are not subject to the requirements of section 202 and 205 of the UMRA. In addition, we have determined that the direct final rule amendments contain no regulatory requirements that might significantly or uniquely affect small governments because they contain no requirements that apply to small governments or impose obligations on them.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and

responsibilities among the various levels of government."

The direct final rule amendments do not have federalism implications. 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, as specified in Executive Order 13132. The direct final rule amendments will not impose substantial direct compliance costs on State or local governments and will not preempt State law. Thus, Executive Order 13132 does not apply to the direct final rule amendments.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 9, 2000) requires us 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 direct final rule amendments do not have tribal implications, as specified in Executive Order 13175. They will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to the direct final rule amendments.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives we considered.

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 direct final rule amendments are not subject to Executive Order 13045 because they are based on technology performance and not on health and safety risks. Also, the direct final rule amendments are not "economically significant."

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

The direct final rule amendments are not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act (NTTAA)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d)(15 U.S.C. 272 note) directs us to use voluntary consensus standards in our regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, material specifications, test methods, sampling procedures, and business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

The direct final rule amendments do not involve modifications to the technical standards specified in the final rules for Acrylic and Modacrylic Fiber Production and Ethylene Production. Therefore, we did not consider the use of any voluntary consensus standards.

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 Congress and to the Comptroller General of the United States. We will submit a report containing the direct final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the direct final rule amendments in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. These direct final rule amendments are not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and Procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: April 7, 2005.

Stephen L. Johnson,

Acting Administrator.

■ For 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 XX—[Amended]

■ 2. Section 63.1086 is amended by:
■ a. Revising paragraph (a)(2)(ii);
■ b. Revising paragraph (a)(5);
■ c. Revising paragraph (b)(1)(ii); and
■ d. Revising paragraph (b)(4).

The revisions read as follows:

§ 63.1086 How must I monitor for leaks to cooling water?

* * * * *

(a) * * *

(2) * * *

(ii) Monitor weekly for 6 months, both initially and following completion of a leak repair. Then monitor as provided in paragraph (a)(2)(ii)(A) or (B) of this section, as appropriate.

(A) If no leaks are detected by monitoring weekly for a 6-month period, monitor monthly thereafter until a leak is detected.

(B) If a leak is detected, monitor weekly until the leak has been repaired. Upon completion of the repair, monitor according to the specifications in paragraph (a)(2)(ii) of this section.

* * * * *

(5) Calculate the average entrance and exit concentrations, correcting for the addition of make-up water and evaporative losses, if applicable. Using a one-sided statistical procedure at the 0.05 level of significance, if the exit mean concentration is at least 10 percent greater than the entrance mean of the HAP (total or speciated) in Table 1 to this subpart or other representative substance, and the leak is at least 3.06 kg/hr, you have detected a leak.

(b) * * *

(1) * * *

(ii) Monitor weekly for 6 months, both initially and following completion of a leak repair. Then monitor as provided in paragraph (b)(1)(ii)(A) or (B) of this section, as appropriate.

(A) If no leaks are detected by monitoring weekly for a 6-month period, monitor monthly thereafter until a leak is detected.

(B) If a leak is detected, monitor weekly until the leak has been repaired. Upon completion of the repair, monitor according to the specifications in paragraph (b)(1)(ii) of this section.

* * * * *

(4) Calculate the average entrance and exit concentrations, correcting for the addition of make-up water and evaporative losses, if applicable. Using a one-sided statistical procedure at the 0.05 level of significance, if the exit mean concentration is at least 1 ppmw or 10 percent greater than the entrance mean, whichever is greater, you have detected a leak.

* * * * *

■ 3. Section 63.1095 is amended by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising paragraph (b) introductory text; and

■ c. Revising paragraph (b)(2).

The revisions read as follows:

§ 63.1095 What specific requirements must I comply with?

* * * * *

(a) *Continuous butadiene waste streams.* Manage and treat continuous butadiene waste streams that contain greater than or equal to 10 ppmw 1,3-butadiene and have a flow rate greater than or equal to 0.02 liters per minute, according to either paragraph (a)(1) or (2) of this section. If the total annual benzene quantity from waste at your facility is less than 10 Mg/yr, as determined according to 40 CFR 61.342(a), the requirements of paragraph (a)(3) of this section apply also.

* * * * *

(b) *Waste streams that contain benzene.* For waste streams that contain benzene, you must comply with the requirements of 40 CFR part 61, subpart FF, except as specified in Table 2 to this subpart. You must manage and treat waste streams that contain benzene as specified in either paragraph (b)(1) or (2) of this section.

* * * * *

(2) If the total annual benzene quantity from waste at your facility is greater than or equal to 10 Mg/yr, as determined according to 40 CFR 61.342(a), you must manage and treat waste streams according to any of the options in 40 CFR 61.342(c)(1) through (e) or transfer waste off-site. If you elect to transfer waste off-site, then you must comply with the requirements of § 63.1096.

Subpart YY—[Amended]

■ 4. Section 63.1100 is amended by:

■ a. Revising paragraph (g)(1)(i); and

■ b. Revising paragraph (g)(3) to read as follows:

§ 63.1100 Applicability.

* * * * *

(g) * * *

(1) * * *

(i) After the compliance dates specified in § 63.1102, a storage vessel subject to this subpart YY that is also subject to subpart G or CC of this part is required to comply only with the provisions of this subpart YY.

* * * * *

(3) *Overlap of this subpart YY with other regulations for transfer racks.* After the compliance dates specified in § 63.1102, a transfer rack that must be controlled according to the requirements of this subpart YY and either subpart G of this part or subpart BB of 40 CFR part 61 is required to comply only with the transfer rack requirements of this subpart YY.

* * * * *

■ 5. Section 63.1103 is amended by:

■ a. Revising paragraph (e)(1)(ii)(J); and

■ b. Adding the term "Organic HAP" in alphabetical order to paragraph (e)(2) to read as follows:

§ 63.1103 Source category-specific applicability, definitions, and requirements.

* * * * *

(e) * * *

(1) * * *

(ii) * * *

(J) Air emissions from all ethylene cracking furnaces, including emissions during decoking operations.

* * * * *

(2) * * *

Organic HAP means the compounds listed in Table 1 to subpart XX of this part.

* * * * *

■ 6. Table 3 to § 63.1103(B)(3)(ii) is amended by revising the title and entries (1)(a) and (2)(a) to read as follows:

TABLE 3 TO SECTION 63.1103(b)(3)(ii)—WHAT ARE MY REQUIREMENTS IF I OWN OR OPERATE AN ACRYLIC AND MODACRYLIC FIBER PRODUCTION EXISTING OR NEW AFFECTED SOURCE AND AM COMPLYING WITH PARAGRAPH (b)(3)(ii) OF THIS SECTION?

If you own or operate . . .	Then you must control total organic HAP emissions from the affected source by . . .
(1) * * *	Meeting all of the following requirements: a. Reduce total acrylonitrile emissions from all affected storage vessels, process vents, wastewater streams associated with the acrylic and modacrylic fibers production process unit as defined in paragraph (b)(2) of this section, and fiber spinning lines operated in your acrylic and modacrylic fibers production facility to less than or equal to 0.5 kilograms (kg) of acrylonitrile per megagram (Mg) of fiber produced. b. * * *
(2) * * *	Meeting all of the following requirements: a. Reduce total acrylonitrile emissions from all affected storage vessels, process vents, wastewater streams associated with the acrylic and modacrylic fibers production process unit as defined in paragraph (b)(2) of this section, and fiber spinning lines operated in your acrylic and modacrylic fibers production facility to less than or equal to 0.25 kilograms (kg) of acrylonitrile per megagram (Mg) of fiber produced. b. * * *

* * * * *

■ 7. Table 7 to § 63.1103(e) is amended by revising the title and entries (b)(1) and (g)(1) to read as follows:

TABLE 7 TO § 63.1103(e).—WHAT ARE MY REQUIREMENTS IF I OWN OR OPERATE AN ETHYLENE PRODUCTION EXISTING OR NEW AFFECTED SOURCE?

If you own or operate . . .	And if . . .	Then you must . . .
* * *	* * *	* * *
(b) * * *	(1) The maximum true vapor pressure of total organic HAP is ≥3.4 kilopascals but <76.6 kilopascals; and the capacity of the vessel is ≥95 cubic meters.	(i) * * * (ii) * * *
* * *	* * *	* * *
(g) * * *	(1) The waste stream contains any of the following HAP: benzene, cumene, ethyl benzene, hexane, naphthalene, styrene, toluene, o-xylene, m-xylene, p-xylene, or 1,3-butadiene.	(i) * * *
* * *	* * *	* * *

* * * * *

[FR Doc. 05–7404 Filed 4–12–05; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–7899–3]

RIN 2060–AM51

Protection of Stratospheric Ozone: Substitute Refrigerant Recycling; Amendment to the Definition of Refrigerant

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating this direct final rule to correct the final rule published in the **Federal Register** on March 12, 2004. Specifically, EPA is amending the regulatory text for the definitions of refrigerant and technician. EPA is also amending the prohibition against venting substitute refrigerants to reflect the changes in the definitions. These changes are being finalized to make certain that the regulations promulgated on March 12, 2004 cannot be construed as a restriction on the sales of substitutes that do not consist of an ozone-depleting substance (ODS), such as pure hydrofluorocarbon (HFC) and perfluorocarbon (PFC) substitutes.

DATES: This direct rule is effective on June 13, 2005, without further notice, unless EPA receives adverse comment by May 13, 2005. If EPA receives adverse comment, the Agency will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0070 by one of the following methods:

- Federal eRulemaking portal *http://www.regulations.gov*. Follow the on-line instructions for submitting comments;
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments;
- Fax comments to (202) 566–1741; or
- Mail/hand delivery: Submit comments to Air and Radiation Docket at EPA West, 1301 Constitution Avenue, NW., Room B108, Mail Code 6102T, Washington, DC 20460, phone: (202) 566–1742.

Instructions: Direct your comments to Docket ID No. OAR–2004–0070. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air and Radiation Docket EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Julius Banks; (202) 343–9870; Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205J); 1200 Pennsylvania Avenue, NW., Washington, DC 20460. The Stratospheric Ozone Information Hotline, 800–296–1996, and the Ozone Web page, *http://www.epa.gov/ozone/title6/608/regulations/index.html*, can also be contacted for further information concerning this correction.

SUPPLEMENTARY INFORMATION: EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comment. EPA

emphasizes that it is not re-proposing the June 11, 1998, proposal (63 FR 32044) to restrict the sale of hydrofluorocarbon (HFC) and perfluorocarbon (PFC) substitutes, but is only taking action to correct the definitions of refrigerant and technician at § 82.152 and amend the venting prohibition at § 82.154(a) to make certain that the definitions and prohibition are consistent with the expressed intent of the March 12, 2004 (69 FR 11946) final rule to not restrict the sales of such substitutes. EPA discussed and responded to comments concerning the sales restrictions on substitutes for refrigerants, and its extension to substitutes for refrigerants that consist in part or whole of a class I or class II ozone-depleting substance in the March 12, 2004, final rulemaking (69 FR 11969).

In the "Proposed Rules" section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to amend the definitions of refrigerant and technician and prohibit the knowing venting of HFC and PFC substitutes. This direct final rule will become effective on June 13, 2005, without further notice unless we receive adverse comment regarding the intent of the amended definitions by May 13, 2005. If EPA receives adverse comment on the intent of the corrected definitions and the amended prohibition, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments on the proposed rule in a subsequent final rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

Table of Contents

I. Regulated Entities

Entities potentially regulated by this action include those that manufacture, own, maintain, service, repair, or dispose of all types of air-conditioning and refrigeration equipment (*i.e.*, appliances as defined by § 82.152); those who sell, purchase, or reclaim refrigerants and their substitutes; and those who own refrigerant recycling or recovery equipment. This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your company is regulated by this action, you should carefully examine the applicability criteria contained in section 608 of the Clean Air Act Amendments of 1990 (the Act). The applicability criteria are discussed below and in regulations published on December 30, 1993 (58 FR 69638). If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Overview

On March 12, 2004 (69 FR 11946), EPA amended the rule on refrigerant recycling, promulgated under section 608 of the Act, to clarify how the requirements of section 608 apply to substitutes for chlorofluorocarbon (CFC) and hydrochlorofluorocarbon (HCFC) refrigerants. This rule explicated the self-effectuating statutory prohibition against the knowing venting of substitutes to the atmosphere during the maintenance, service, repair, and disposal of appliances that became effective on November 15, 1995. The rule also exempted certain substitutes from the venting prohibition on the basis of current evidence that their release is adequately addressed by other authorities; hence, such release does not pose a threat to the environment under section 608 (69 FR 11949).

EPA also amended the refrigerant recovery and recycling requirements for CFC and HCFC refrigerants to accommodate the proliferation of new substitutes for these refrigerants on the market, and to clarify that the venting prohibition applies to all substitutes and refrigerants for which EPA has not made a determination that their release "does not pose a threat to the environment," including HFC and PFC substitutes. The March 12, 2004 final rule was not intended to either mandate section 608 technician certification for those maintaining, repairing, or servicing appliances using substitutes that do not consist of a class I or class II ODS or to restrict the sale of substitutes that do not contribute to the depletion of the stratospheric ozone layer, such as pure HFC and PFC substitutes (69 FR 11946).

III. Today's Action

With this action, EPA is correcting the definitions of refrigerant and technician at § 82.152 and amending the prohibition against the knowing venting of substitutes at § 82.154(a). These amendments are being made to reflect the intent of the March 12, 2004 final rule to not regulate the sale of substitutes that do not consist of a class I or class II ozone-depleting substance.

A. Correction to the Definition of Refrigerant

While the intent of the March 12, 2004 final rule was not to restrict the sale of refrigerant substitutes that do not contribute to the depletion of the stratospheric ozone layer (69 FR 11946), the accompanying regulatory text could be construed as having the opposite effect. Specifically, the final rule's definition of refrigerant at § 82.152 (69 FR 11957) stated that, refrigerant means, for purposes of this subpart, any substance consisting in part or whole of a class I or class II ozone-depleting substance that is used for heat transfer purposes and provides a cooling effect, or any substance used as a substitute for such a class I or class II substance by any user in a given end-use, except for the following substitutes in the following end-uses:

(1) Ammonia in commercial or industrial process refrigeration or in absorption units;

(2) Hydrocarbons in industrial process refrigeration (processing of hydrocarbons);

(3) Chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds);

(4) Carbon dioxide in any application;

(5) Nitrogen in any application; or

(6) Water in any application.

EPA is aware that the above definition of refrigerant could be construed as being at odds with the preamble that discusses the Agency's intent to not restrict the sale of substitutes that do not consist of a class I or class II ODS. The unintentional inclusion of the phrase or any substance used as a substitute for such a class I or class II substance * * *, implies that any substance, including pure HFCs and PFCs, used as a substitute for such a class I or class II

substance would be captured under the definition of refrigerant. If left uncorrected, this could create ambiguity about the interpretation of the regulations promulgated at 40 CFR part 82, subpart F (*i.e.*, section 608 regulations) and could have unintended implications on the prohibitions, required practices, and reporting and recordkeeping requirements of the regulations promulgated under section 608 of Title VI of the Clean Air Act (*e.g.*, mandatory certification of technicians servicing appliances using pure HFC refrigerants and a restriction on the sale of HFC substitutes to certified technicians).

Therefore, EPA is correcting the definition of refrigerant by deleting the aforementioned phrase. The corrected definition at § 82.152 reads: Refrigerant means, for purposes of this subpart, any substance consisting in part or whole of a class I or class II ozone-depleting substance that is used for heat transfer purposes and provides a cooling effect. EPA has deleted the text specifying the exempted substitutes (namely, ammonia in commercial or industrial process refrigeration or in absorption units; hydrocarbons in industrial process refrigeration (processing of hydrocarbons); chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds); carbon dioxide in any application; nitrogen in any application; or water in any application). Since these substances do not contain a class I or class II ODS, such a level of specificity is not required within the amended definition.

B. Amendment to the Prohibition Against Venting Substitutes

The correction to the definition of refrigerant requires an amendment to the regulatory venting prohibition at § 82.154(a). The March 12, 2004 amendment to the section 608 regulatory venting prohibition (69 FR 11979) states that, Effective May 11, 2004, no person maintaining, servicing, repairing, or disposing of appliances may knowingly vent or otherwise release into the environment any refrigerant from such appliances. * * * If not addressed, the corrected definition of refrigerant would exclude pure HFC and PFC substitutes [1] from the venting prohibition, because they do not consist in part or whole of a class I or class II ozone-depleting substance. The preamble to the March 12, 2004, final rule made clear that the Agency intended to exempt certain substitutes, namely, ammonia in commercial or industrial process refrigeration or in absorption units; hydrocarbons in industrial process refrigeration (processing of hydrocarbons); chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds); carbon dioxide in any application; nitrogen in any application; or water in any application (69 FR 11949–54) from the statutory venting prohibition, because their release is adequately addressed by other entities; therefore, their release does not pose a threat to the environment under section 608 of Title VI of the Clean Air Act. However, EPA did not make such a finding for substitutes consisting in part or whole of an HFC or PFC substitute. So it remains illegal to knowingly vent substitutes consisting in part or whole of an HFC or PFC substitute during the maintenance, service, repair, or disposal of appliances (69 FR 11947).

In accordance with section 608(c)(2) of Title VI of the Clean Air Act (as amended in 1990), *de minimis* releases associated with good faith attempts to recapture and recycle or safely dispose of such substitutes shall not be subject to the prohibition. EPA has not promulgated regulations mandating certification of refrigerant recycling/recovery equipment intended for use with substitutes; therefore, EPA is not including a regulatory provision for the mandatory use of certified recovery/recycling equipment as an option for determining *de minimis* releases of substitutes. However, the lack of a regulatory provision should not be interpreted as an exemption to the venting prohibition for non-exempted substitutes. The regulatory prohibition at § 82.154(a) reflects the statutory reference to *de minimis* releases of substitutes as they pertain to good faith attempts to recapture and recycle or safely dispose of such substitutes.

In order to emphasize that the knowingly venting of HFC and PFC substitutes remains illegal during the maintenance, service, repair, and disposal of appliances and to make certain that the *de minimis* exemption for refrigerants remains in the regulatory prohibition, § 82.154(a) is amended to reflect the venting prohibition of section 608(c)(2) of the Act. Therefore, the amended definition of refrigerant means that refrigerant releases shall be considered *de minimis* only if they occur when: (1) The required practices set forth in § 82.156 are observed, recovery or recycling machines that meet the requirements set forth in § 82.158 are used, and the technician certification provisions set forth in § 82.161 are observed; or (2) the requirements set forth for the service of motor vehicle air-conditioners (MVACs) in subpart B (*i.e.*, section 609) of this part are observed. EPA is also specifying, in the regulatory prohibition at § 82.154(a), the substitutes that have been exempted from the statutory venting prohibition. EPA has made this edit in order to clarify which substitutes are exempt from the venting prohibition. Hence, EPA is amending the prohibition at § 82.154(a) to read: (a) Effective June 13, 2005, no person maintaining, servicing, repairing, or disposing of appliances may knowingly vent or otherwise release into the environment any refrigerant or substitute from such appliances, with the exception of the following substitutes in the following end-uses:

(1) Ammonia in commercial or industrial process refrigeration or in absorption units;

(2) Hydrocarbons in industrial process refrigeration (processing of hydrocarbons);

(3) Chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds);

(4) Carbon dioxide in any application;

(5) Nitrogen in any application; or

(6) Water in any application.

The knowing release of a refrigerant or non-exempt substitute subsequent to its recovery from an appliance shall be considered a violation of this prohibition. De minimis releases associated with good faith attempts to recycle or recover refrigerants or non-exempt substitutes are not subject to this prohibition. Refrigerant releases shall be considered de minimis only if they occur when: (1) The required practices set forth in § 82.156 are observed, recovery or recycling machines that meet the requirements set forth in § 82.158 are used, and the technician certification provisions set forth in § 82.161 are observed; or (2) The requirements set forth in subpart B of this part are observed.

C. Correction to the Definition of Technician

In 1994, EPA finalized the definition of technician at § 82.152 to read: Technician means any person who performs maintenance, service, or repair that could be reasonably expected to release class I or class II refrigerants from appliances, *except for MVACs,* into the atmosphere. * * * (59 FR 55912 (November 9, 1994)). On June 11, 1998 (63 FR 32089), EPA proposed an amendment to the definition of technician to include persons who perform maintenance, service, repair, or

[1] As defined at § 82.152, Substitute means any chemical or product, whether existing or new, that is used by any person as an EPA approved replacement for a class I or II ozone-depleting substance in a given refrigeration or air-conditioning end-use.

disposal that could be reasonably expected to release class I substances, class II substances, or substitutes from appliances into the atmosphere (63 FR 32059). The intent of proposed amendment to the definition was to require section 608 technician certification for persons maintaining, repairing, servicing, or disposing of appliances containing non-exempt substitutes; however, EPA did not intend to remove the phrase except for MVACs from the definition of technician.

A petition for review challenging the March 12, 2004 final rule stated that the amended definition of technician could be misinterpreted to mean that technicians servicing and maintaining MVACs must also have section 608 technician certification. In the course of finalizing the March 12, 2004 rulemaking (69 FR 11979), EPA inadvertently removed the text except for MVACs from the definition of technician, at § 82.152. Since EPA did not intend for the amended definition of technician to include persons servicing or repairing MVACs, the Agency is reverting to the original definition.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51,735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to Executive Order 12866 review.

B. Paperwork Reduction Act

OMB has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 82, subpart F under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB Control Number 2060–0256, EPA ICR number 1626.07. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672. This action does not impose any new information collection burden beyond the already-approved ICR.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Analysis

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this direct final rule. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by Small Business Administration size standards primarily engaged in the supply and sale of motor vehicle air-conditioning refrigerants as defined by NAIC codes 42114, 42193, and 441310; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. EPA has determined that approximately 819 small entities will experience an impact ranging from 0.001 percent to 0.163 percent, based on their annual sales and revenues.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. EPA is finalizing this rulemaking to make certain that the regulatory text in the March 12, 2004 rulemaking (63 FR 11946) is consistent with the intent to not regulate the use or sale of substitutes that do not consist of a class I or class II ozone-depleting substance, while making certain that the statutory prohibition against knowingly releasing such substitutes remains. This rule corrects the definitions of refrigerant and technician and makes certain that only substances consisting whole or in part of a class I or class II ODS are covered under the section 608 refrigerant regulations. Hence any burden associated with technician certification or sales of refrigerant substitutes not consisting of an ODS is removed.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative

was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government Agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule supplements the statutory self-effectuating prohibition against venting refrigerants by ensuring that certain service practices are conducted that reduce emissions and establish equipment and reclamation certification requirements. These standards are amendments to the recycling standards under section 608 of the Clean Air Act. Many of these standards involve reporting requirements and are not expected to be a high cost issue. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

For the reasons outlined above, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255 (August 10, 1999)), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This direct 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 regulations promulgated under today's action are done so under Title VI of the Act which does not grant delegation rights to the States. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249 (November 9, 2000)), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This direct final rule does not have tribal implications, as specified in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045: Protection of Children from Environmental Health & Safety Risks (62 FR 19885 (April 23, 1997)) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This direct final rule is not subject to the Executive Order because it does not concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. This rule amends the recycling standards for refrigerants to protect the stratosphere from ozone depletion, which in turn protects human health and the environment from increased amounts of UV radiation.

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve voluntary consensus standards.

J. The Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). It will become effective June 13, 2005.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Exports, Imports, Reporting and recordkeeping requirements.

Dated: April 7, 2005.

Stephen L. Johnson,

Acting Administrator.

■ Part 82, chapter I, title 40, of the Code of Federal Regulations, is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

■ 1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

Subpart F—[Amended]

■ 2. Section 82.152 is amended by revising the definitions of "refrigerant" and "technician" to read as follows:

§ 82.152 Definitions.

* * * * *

Refrigerant means, for purposes of this subpart, any substance consisting in part or whole of a class I or class II ozone-depleting substance that is used for heat transfer purposes and provides a cooling effect.

* * * * *

Technician means any person who performs maintenance, service, or repair, that could be reasonably expected to release refrigerants from appliances, except for MVACs, into the atmosphere. Technician also means any person who performs disposal of appliances, except for small appliances, MVACs, and MVAC-like appliances, that could be reasonably expected to release refrigerants from the appliances into the atmosphere. Performing maintenance, service, repair, or disposal could be reasonably expected to release refrigerants only if the activity is reasonably expected to violate the integrity of the refrigerant circuit. Activities reasonably expected to violate the integrity of the refrigerant circuit include activities such as attaching and detaching hoses and gauges to and from the appliance to add or remove refrigerant or to measure pressure and adding refrigerant to and removing refrigerant from the appliance. Activities such as painting the appliance, rewiring an external electrical circuit, replacing insulation on a length of pipe, or tightening nuts and bolts on the appliance are not reasonably expected to violate the integrity of the refrigerant circuit. Performing maintenance, service, repair, or disposal of appliances that have been evacuated pursuant to § 82.156 could not be reasonably expected to release refrigerants from the appliance unless the maintenance, service, or repair consists of adding refrigerant to the appliance. Technician includes but is not limited to installers, contractor employees, in-house service personnel, and in some cases owners and/or operators.

* * * * *

■ 3. Section 82.154 is amended by revising paragraph (a) to read as follows:

§ 82.154 Prohibitions.

(a)(1) Effective June 13, 2005, no person maintaining, servicing, repairing, or disposing of appliances may knowingly vent or otherwise release into the environment any refrigerant or substitute from such appliances, with the exception of the following substitutes in the following end-uses:

(i) Ammonia in commercial or industrial process refrigeration or in absorption units;

(ii) Hydrocarbons in industrial process refrigeration (processing of hydrocarbons);

(iii) Chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds);

(iv) Carbon dioxide in any application;

(v) Nitrogen in any application; or

(vi) Water in any application.

(2) The knowing release of a refrigerant or non-exempt substitute subsequent to its recovery from an appliance shall be considered a violation of this prohibition. De minimis releases associated with good faith attempts to recycle or recover refrigerants or non-exempt substitutes are not subject to this prohibition. Refrigerant releases shall be considered de minimis only if they occur when:

(i) The required practices set forth in § 82.156 are observed, recovery or recycling machines that meet the requirements set forth in § 82.158 are used, and the technician certification provisions set forth in § 82.161 are observed; or

(ii) The requirements set forth in subpart B of this part are observed.

* * * * *

[FR Doc. 05–7407 Filed 4–12–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0397; FRL–7708–4]

Paecilomyces lilacinus strain 251; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the fungus *Paecilomyces lilacinus* (*P. lilacinus*) strain 251 in or on food commodities when applied or used in accordance with label directions. Prophyta Biologischer Pflanzenschutz GmbH, Germany submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. Notification that EPA had received the petition was published on November 7, 2003 (68 FR 63088–92) (FRL–7331–7). This regulation eliminates the need to establish a maximum permissible level for residues of *P. lilacinus* strain 251.

DATES: This regulation is effective April 13, 2005. Objections and requests for hearings must be received on or before June 13, 2005.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION**. EPA has established a docket for this action under Docket ID number OPP–2004–0397. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Barbara Mandula, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–7378; e-mail address: *mandula.barbara@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop Production/ Agriculture (NAICS 111)

- Animal production (NAICS 112)
- Food manufacturing (NAICS 311),
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

In addition to using EDOCKET (*http://www.epa.gov/edocket/*), you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

II. Background and Statutory Findings

In the **Federal Register** of November 7, 2003 (68 FR 63088–92) (FRL–7331–7), EPA issued a notice pursuant to section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 3F6737) by (Prophyta Biologischer Pflanzenschutz GmbH, Germany: US Agent: WF Stoneman Co., LLC, PO Box 465, McFarland, WI 53558–0465. This notice included a summary of the petition prepared by the petitioner, Prophyta Biologischer Pflanzenschutz GmbH, Germany. The petition requested that 40 CFR part 180 be amended by establishing a permanent exemption from the requirement of a tolerance for residues of *P. lilacinus* strain 251 in or on food commodities when applied or used in accordance with label directions as a nematicide for the control of plant parasitic nematodes. There were no comments received in response to the notice of filing.

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

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

III. Toxicological Profile

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

P. lilacinus strain 251 is a naturally occurring fungus commonly found in soil. Unlike many other *P. lilacinus* strains, *P. lilacinus* strain 251 does not produce mycotoxins or paecilotoxins. In addition, the results of acute toxicology and pathogenicity studies submitted by the petitioner in support of its petition for an exemption from the requirement of a tolerance for *P. lilacinus* strain 251 indicate negligible to no mammalian toxicity. Moreover, no pathogenicity was observed in any of the tests conducted with *P. lilacinus* strain 251. Accordingly, the toxicology and pathogenicity data generated by Prophyta Biologischer Pflanzenschutz GmbH, Germany support an exemption from the requirements of a tolerance. The data relevant to and in support of this tolerance exemption are presented in more detail below.

1. *Acute toxicity*—i. *acute oral toxicity-rat (OPPTS Guideline 870.1100; MRID 462832–01).* The test material (2,000 mg/kg body weight) was given to five male and five female rats by gavage in a 10% w/w suspension in water. All animals were necropsied and organ weights were recorded after 14 days. No clinical signs of toxicity were seen. The oral LD_{50} for males, females, and combined was greater than 2,000 mg/kg. Classification: acceptable; Toxicity Category III.

ii. *Acute dermal toxicity-rat (OPPTS Guideline 870.1200; MRID 462832–02).* The test material (2,000 mg/kg body weight) was applied to the clipped dorsal trunk of five male and five female rats on an area 36 cm^2 for 24 hours. No abnormal clinical signs were seen during 14 days of observation. The acute lethal dose (LD_{50}) is greater than 2,000 mg/kg. Classification: acceptable; Toxicity Category III.

iii. *Acute pulmonary toxicity/pathogenicity-rat (OPPTS Guideline 885.3150; MRID 459418–04).* Test material was administered by a single intratracheal dose of 0.05 milliliters (mL) containing 2.5×10^8 conidia, to 35 male and 35 female rats. No clinical signs were seen during 15 days of observation. *P. lilacinus* strain 251 was detected in lungs and lung lymph nodes with clearance after 15 days, and in tracheal lymph nodes with clearance after 4 days. Based on this study, the test organism was not toxic, infective, or pathogenic to rats at the applied dose. Classification: acceptable; Toxicity Category III.

iv. *Primary eye irritation-rabbit (OPPTS Guideline 870.2400; MRID 460042–07).* Test material (100 mg/eye/animal) was applied in the conjunctival sac of one eye, and 0.1 mL distilled water as a control in the other eye of three male rabbits. After 72 hours, no corneal opacity, iritis, or other signs of irritation were seen. Classification: acceptable; Toxicity category IV.

v. *Hypersensitivity study-guinea pig (OPPTS Guideline 870.2600; MRID 459418–07).* The animals were induced and challenged according to the method of Buehler. Twenty animals were test animals, and 25 animals served as positive and negative controls. Once per week for 3 weeks, approximately 0.5 grams(g) of test material was applied to the shaved skin of test guinea pigs for 6 hours. When challenged with 0.25 g

test material 12 days after the last induction, no signs of sensitization appeared. The test material is not a dermal sensitizer. Classification: acceptable.

vi. *Reporting hypersensitivity incidents (OPPTS Guideline 885.3400).* The registrant has reported no incidents to date. Nonetheless, pursuant to FIFRA section 6(a)(2), the registrant is required to report to the Agency any future incidents of hypersensitivity associated with *P. lilacinus* strain 251.

vii. *Primary dermal irritation-rabbit (OPPTS Guideline 870.2500; MRID 459418–06).* Three female rabbits were each dosed with 0.5 g test material applied on gauze to clipped skin for 4 hours. During the next 72 hours, no clinical signs or irritation were seen. *P. lilacinus* strain 251 was non-irritating at the test dose. Classification: acceptable; Toxicity Category IV.

viii. *Acute intraperitoneal toxicity/pathogenicity-rat (OPPTS Guideline 885.3200; MRID 460042–01).* The testing laboratory reported that the test material was administered to five male and five female rats by a single intraperitoneal dose of 2,000 mg/kg body weight. The laboratory did not confirm the titre of the test substance. No clinical signs of toxicity or pathogenicity were observed in any of the treated or control rats during the 14–day observation period. All rats survived for 14 days. Both control and test animals showed evidence of mycoplasmosis infection on necropsy, but no evidence of abnormalities attributable to the test substance. No test organisms were detected in any of the test animals or in the two control animals examined when the following organs were analyzed: liver, kidney, spleen, lungs, brain, urinary bladder, lymphatic ganglia, or thymus. The digestive tract of one test male and one test female had 270 and 290 cfu/organ respectively, which is attributed to environmental contamination rather than to infectivity. Because the testing laboratory did not analyze the test material for viable conidia before dosing, there is some uncertainty about the viability and dose of the test material. However, 3.89×10^9 cfu/g was found when the registrant analyzed a portion of the test production batch in November 2001, when the lab did its testing. If the test laboratory sample was appropriately shipped and stored, the test sample should have contained a concentration of 3.89×10^9 cfu/g sample, an adequate concentration for testing. Also, while the organ analyses suggest a low level of laboratory environmental contamination with the test organism, the detection of this contamination indicates that the laboratory was capable of detecting the microbe in the various organs if it had been present. While the study is flawed because the test laboratory did not analyze the viability of the test material before dosing, EPA believes that a sufficient concentration of viable microbes was likely used in testing. EPA classifies the study as supplemental because it provides supporting evidence that *P. lilacinus* strain 251 is not toxic or pathogenic to mammals. Classification: supplementary.

ix. *Immune response (OPPTS Guideline 880.3800).* The registrant submitted a waiver request for the immune response study. The waiver was granted, based on results of various rodent studies that showed no evidence of adverse effects to the immune system (MRID 462832–01; 459418–04). Animal behavior and weight gain remained normal, and there was no excess morbidity or mortality in the studies. No organ abnormalities attributed to the test material were seen on necropsy. In a pulmonary pathogenicity study, the fungal titre in various organs decreased during the first 8 days after dosing, and clearance was complete by 14 days. This clearance provides evidence that the immune system was functioning, although a concomitant explanation is that the conidia became non-viable over time because they do not survive more than a few days at temperatures above 36 °C. Taken together, these data indicate that *P. lilacinus* strain 251 does not interfere with immune system function.

2. *Dose response assessment.* No toxicological responses have been identified. Therefore, a dose response assessment could not be performed.

3. *Subchronic and chronic toxicity.* Based on the data generated in accordance with the Tier I toxicology data requirements set forth in 40 CFR 158.740(c), the Tier II and Tier III toxicology data requirements also set forth therein were not triggered and, therefore, not required in connection with this action. In addition, because the Tier II and Tier III toxicology data requirements were not required, the residue data requirements set forth in 40 CFR 158.740(b) also were not required.

IV. Aggregate Exposures

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

A. Dietary Exposure

Humans may be exposed dermally and orally to the common soil microbe *P. lilacinus* strain 251 when they get soil on their hands or clothing, or handle pets that have played in soil. Importantly, however, no toxicological endpoints were identified for *P. lilacinus* strain 251 and there is no evidence of adverse effects from oral, dermal, or pulmonary exposure to this microbial agent. The low toxicity and non-pathogenicity/infectivity of *P. lilacinus* strain 251 are demonstrated by the data summarized in Unit III of this preamble.

1. *Food.* While the proposed use pattern may result in dietary exposure with possible residues in or on certain agricultural commodities, negligible, to no risk, is expected for the general population, including infants and children, or animals because *P. lilacinus* strain 251 demonstrated no pathogenicity or oral toxicity at the maximum dose tested, as noted above in Unit III.

2. *Drinking water exposure.* The potential for transfer of *P. lilacinus* strain 251 to surface or ground water during run-off associated with intended use applications is considered minimal, due to its percolation through and resulting capture in soil, and its attachment to plant root nematodes. Accordingly, the use of this microbial pest control agent on terrestrial plants is not anticipated to lower the quality of drinking water. Even if low levels of the microbe were present in drinking water, no risk to the general public would be expected because *P. lilacinus* strain 251 demonstrated no oral pathogenicity or toxicity at the maximum dose tested.

B. Other Non-Occupational Exposures

Based on the proposed use patterns, in which *P. lilacinus* strain 251 is applied directly to soil of agricultural and ornamental crops, the potential for non-dietary, non-occupational exposures to *P. lilacinus* strain 251 pesticide residues by the general population, including infants and children, is low. Moreover, even in the unlikely event of non-dietary, non-occupational exposures to *P. lilacinus* strain 251 pesticide residues, no harm is expected because no toxicity or pathogenicity was found in mammalian studies that included high levels of oral, pulmonary, and dermal exposure.

1. *Dermal exposure.* The potential for dermal exposure to *P. lilacinus* strain 251 pesticide residues for the general population, including infants and

children, is low because there are no residential uses for this pesticide, which will be applied directly to soils used for growing agricultural and ornamental crops. In addition, because *P. lilacinus* strain 251 is a naturally-occurring bacterium in soil, which means there is a great likelihood of prior exposure for most, if not all, individuals, any actual increase in dermal exposure due to the pesticidal use of *P. lilacinus* strain 251 would be negligible. Furthermore, and as demonstrated in Unit III of this preamble, the organism shows low to no dermal toxicity, the acute lethal dose (LD_{50}) is greater than 2000 mg/kg (Toxicity Category III), and *P. lilacinus* strain 251 is essentially non-irritating (Toxicity Category IV). Accordingly, the risks anticipated for this route of exposure, should it occur, are minimal to non-existent.

2. *Inhalation exposure.* Inhalation exposure to *P. lilacinus* strain 251 pesticide residues for the general population, including infants and children, is unlikely because there are no residential use sites and the pesticide is applied directly to soil as a liquid preparation. In addition, because *P. lilacinus* strain 251 is a naturally-occurring bacterium in soil, which means there is a great likelihood of prior exposure for most, if not all, individuals, any actual increase in inhalation exposure due to the pesticidal use of *P. lilacinus* strain 251 would be negligible. Furthermore, and as demonstrated in Unit III of this preamble, the acute pulmonary toxicity/pathogenicity testing performed on the active ingredient did not demonstrate pathogenicity or toxicity of *P. lilacinus* strain 251. (See Unit III of this preamble.) Accordingly, the risks anticipated for this route of exposure, should it occur, are considered minimal.

V. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." These considerations include the possible cumulative effects of such residues on infants and children. The Agency has considered the potential for cumulative effects of *P. lilacinus* strain 251 and other substances in relation to a common mechanism of toxicity. *P. lilacinus* strain 251 is practically non-toxic to mammals. Because no mechanism of pathogenicity or toxicity in mammals has been identified for this organism (see Unit III of this preamble.), no cumulative effects to humans, including infants and children, from the interaction of residues of this product with other related microbial pesticides are anticipated when this product is used as directed on the label and in accordance with good agricultural practices.

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

There is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of *P. lilacinus* strain 251 due to its use as a nematicide. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. As discussed previously, *P. lilacinus* strain 251 is not pathogenic or infective and is practically non-toxic to mammals. (See Unit III of this preamble.) Accordingly, exempting *P. lilacinus* strain 251 from the requirement of a tolerance should be considered safe and pose no significant risk.

FFDCA section 408(b)(2)(C) provides that EPA shall apply an additional tenfold margin of exposure (safety) for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure, unless EPA determines that a different margin of exposure (safety) will be safe for infants and children. Margins of exposure (safety) are incorporated into EPA risk assessments either by using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans, or using a margin of exposure analysis.

Human exposure is expected to be negligible if users follow label directions for this pesticide agent. Moreover, considering the ubiquitous nature of *P. lilacinus* strain 251 in the soil, residues of this microbial pesticide in or on agricultural commodities are not expected to significantly increase the exposure of the U.S. population, including infants and children, to *P. lilacinus* strain 251. Furthermore, high doses of *P. lilacinus* strain 251, as demonstrated in Unit III of this preamble, show virtually no mammalian toxicity and no pathogenicity when tested by several routes of exposure, including oral and dermal. Hence, EPA concludes that the toxicity and exposure data are sufficiently complete to adequately address the potential for additional sensitivity of infants and children to residues of *P. lilacinus* strain 251 and that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to *P. lilacinus* strain 251 residues. Thus, the Agency has determined that the additional margin of safety is not necessary to protect infants and children.

VII. Other Considerations

A. Endocrine Disruptors and Immune System

1. *Endocrine disrupters.* EPA is required under section 408(p) of the FFDCA, as amended by FQPA, to develop a screening program to determine whether certain substances (including all pesticide active and other ingredients) "may have an effect in humans that is similar to an effect produced by a naturally-occurring estrogen, or other such endocrine effects as the Administrator may designate." Following the recommendations of its Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC), EPA determined that there is no scientific basis for including, as part of the screening program, the androgen and thyroid hormone systems in addition to the estrogen hormone system. EPA also adopted EDSTAC's recommendation that the program include evaluations of potential effects in wildlife. For pesticide chemicals, EPA will use FIFRA and, to the extent that effects in wildlife may help determine whether a substance may have an effect in humans, FFDCA authority to require wildlife evaluations. As the science develops and resources allow, screening of additional hormone systems may be added to the Endocrine Disruptor Screening Program (EDSP). When the appropriate screening and/or testing protocols being considered under the Agency's EDSP have been developed, *P. lilacinus* strain 251 may be subjected to additional screening and/or testing to better characterize effects related to endocrine disruption. Based on the weight of the evidence of available data, no endocrine system-related effects have been identified for *P. lilacinus* strain 251. As a result, the Agency has determined that there is no impact via endocrine-related effects on the Agency's safety finding set forth in this Final Rule for *P. lilacinus* strain 251.

2. *Immune system.* To date, the Agency has no information to suggest that *P. lilacinus* strain 251 has an adverse effect on the immune system, the physiologic system that protects humans and other organisms from infections and other diseases. As is expected from a non-pathogenic microorganism that is practically non-

toxic to mammals, the submitted toxicity/pathogenicity studies in rodents indicate that following various routes of exposure, the immune system is still intact. For example, lack of morbidity, mortality, weight loss or behavior changes in the test animals provides evidence that the immune system continues to function after dosing.

B. Analytical Method(s)

The Agency proposes to establish an exemption from the requirement of a tolerance without any numerical limitation for the reasons stated above (see Unit III of this preamble), including a lack of mammalian toxicity for *P. lilacinus* strain 251. For the same reasons, the Agency has concluded that an analytical method is not required for enforcement purpose for *P. lilacinus* strain 251.

C. Codex Maximum Residue Level

There is no Codex Alimentarius Commission Maximum Residue Level (MRL) for *P. lilacinus* strain 251.

VIII. Objections and Hearing Requests

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

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

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0397 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before June 13, 2005.

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

Mail your written request to: Office of the Hearing Clerk (1900C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Rm.104, Crystal Mall #2, 1801 Bell St. S, Arlington, VA. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (703) 603–0061.

2. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VIII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0397, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

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

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

IX. Statutory and Executive Order Reviews

This final rule establishes an exemption from the requirement of a tolerance under section 408(d) of the FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of the FFDCA, such as the exemption in this final rule,

do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive order to include regulations that have " substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this rule does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

X. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule " as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: March 29, 2005.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.1257 is added to subpart D to read as follows:

§ 180.1257 Paecilomyces lilacinus strain 251; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of the microbial pesticide *Paecilomyces lilacinus* strain 251 when used in or on all agricultural commodities when applied/used in accordance with label directions.

[FR Doc. 05–7226 Filed 4–12–05; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2005–0029; FRL–7705–7]

Acetamiprid; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of acetamiprid in or on tuberous and corm vegetables. Nippon Soda Company c/o Nisso America Inc. requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective April 13, 2005. Objections and requests for hearings must be received on or before June 13, 2005.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket identification (ID) number OPP–2005–0029. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Akiva Abramovitch, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8328; e-mail address: *abramovitch.akiva@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be

affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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In addition to using EDOCKET *(http://www.epo.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epo.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epo.gpo/opptsfrs/home/guidelin.htm/*.

II. Background and Statutory Findings

In the **Federal Register** of August 4, 2004 (69 FR 47145) (FRL–7369–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 3F6575) by Nippon Soda Company c/o Nisso America, 42 Broadway, Suite 2120, New York, NY 10006. The petition requested that 40 CFR 180.578 be amended by establishing a tolerance for residues of the insecticide acetamiprid, in or on tuberous and corm vegetables at 0.01 parts per million (ppm). That notice included a summary of the petition prepared by Nisso America, Inc.. There were two comments to the Acetamiprid Notice of Filing and they are addressed in Unit IV.D..

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 of FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of FFDCA, for a tolerance for residues of acetamiprid on tuberous and corm vegetables at 0.01 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicologicol Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by acetamiprid are discussed in Table 1 of this unit as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies reviewed.

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY

Guideline No.	Study Type	Results
870.3100	90 days oral toxicity - rodents	NOAEL: 12.4/14.6 milligrams/kilograms (mg/kg)/day - Male/Female (M/F) LOAEL: 50.8/56.0 mg/kg/day (M/F) based on decreased Body Weight (BW), BW gain and food consumption.
870.3100	90 days oral toxicity - mouse	NOAEL: 106.1/129.4 mg/kg/day (M/F) LOAEL: 211.1/249.1 mg/kg/day (M/F) based on reduced BW and BW gain, decreased glucoseand cholesterol levels, reduced absolute organ weights.
870.3150	90–day oral toxicity in nonrodents	NOAEL: 13/14 mg/kg/day (M/F) LOAEL: 32 mg/kg/day based on reduced BW gain in both sexes.
870.3200	21–day dermal toxicity - rabbit	NOAEL: 1,000 mg/kg/day - Highest Dose Tested (HDT) LOAEL: >1,000 mg/kg/day
870.3700	Prenatal developmental toxicity in rodents	Maternal NOAEL: 16 mg/kg/day Maternal LOAEL: 50 mg/kg/day based on reduced BW and BW gain and food consumption, increased liver weights. Developmental NOAEL: 16 mg/kg/day Developmental LOAEL: 50 mg/kg/day based on increased incidence of shortening of the 13th rib.

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY—Continued

Guideline No.	Study Type	Results
870.3700	Prenatal developmental toxicity in nonrodents	Maternal NOAEL: 15 mg/kg/day Maternal LOAEL: 30mg/kg/day based on BW loss and decreased food consumption. Developmental NOAEL: 30 mg/kg/day (HDT) Developmental LOAEL: > 30 mg/kg/day
870.3800	Reproduction and fertility effects	Parental systemic NOAEL: 17.9/21.7 mg/kg/day (M/F) Parental systemic LOAEL: 51.0/60.1 mg/kg/day (M/F) based on decreased BW, BW gain and food consumption. Offspring systemic NOAEL: 17.9/21.7 mg/kg/day (M/F) Offspring systemic LOAEL: 51.0/60.1 mg/kg/day (M/F) based on reductions in pup weight, litter size, viability and weaning indices; delay in age to attain preputial separation and vaginal opening. Reproductive NOAEL: 17.9/21.7 mg/kg/day (M/F) Reproductive LOAEL: 51.0/60.1 mg/kg/day (M/F) based on reductions in litter weights and individual pup weights on day of delivery.
870.4100	Chronic toxicity dogs	NOAEL: 20/21 mg/kg/day (M/F) LOAEL: 55/61 mg/kg/day (M/F) based on initial BW loss and overall reduction in BW gain.
870.4100/870.4200	Chronic toxicity/Carcinogenicity - rats	NOAEL: 7.1/8.8 mg/kg/day (M/F) LOAEL: 17.5/22.6 mg/kg/day (M/F) based on decreases in mean BW and BW gain (F) and hepatocellular vacuolation (M) Evidence of treatment-related increase in mammary tumors. There was an absence of a dose - response and a lack of statistically significant increase in the mammary adenocarcinoma incidence by pair with comparison of the mid- and the high-dose groups with the controls. Although the incidence exceeded the historical control data from the same laboratory, it was within the range of values from the supplier.
870.4300	Carcinogenicity mice	NOAEL: 20.3/75.9 mg/kg/day (M/F) LOAEL: 65.6/214.6 mg/kg/day (M/F) based on decreased BW and BW gain and amyloidosis in numerous organs (M) and decreased BW and BW gain (F). Not oncogenic under conditions of study.
870.5100	Reverse gene mutation assay	*Salmonella typhimurium/E. coli* - Not mutagenic under the conditions of the study.
870.5300	Mammalian cells in culture Forward gene mutation assay - CHO cells	Not mutagenic under the conditions of the study.
870.5375	*In vitro* mammalian chromosomal aberrations - CHO cells	Acetamiprid is a clastogen under the conditions of the study.
870.5385	*In vivo* mammalian chromosome aberrations - rat bone marrow	Acetamiprid did not induce a significant increase in chromosome aberrations in bone marrow cells when compared to the vehicle control group.
870.5395	*In vivo* mammalian cytogenetics - micronucleus assay in mice	Acetamiprid is not a clastogen in the mouse bone marrow micronucleus test.
870.5550	UDS assay in primary rat hepatocytes/ mammalian cell culture	Acetamiprid tested negatively for UDS in mammalian hepatocytes *in vivo*.
870.6200	Acute neurotoxicity - rat	NOAEL: 10 mg/kg LOAEL: 30 mg/kg based on reduction in locomotor activity.
870.6200	Subchronic neurotoxicity - rat	NOAEL: 14.8/16.3 mg/kg/day (M/F) LOAEL: 59.7/67.6 mg/kg/day (M/F) based on reductions in BW, BW gain, food consumption and food efficiency.
N/A	28–day feeding - dog	NOAEL: 16.7/19.1 mg/kg/day (M/F) LOAEL: 28.0/35.8 mg/kg/day based on reduced BW gain.

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY—Continued

Guideline No.	Study Type	Results
870.7485(SS)	Metabolism - mouse, rat, rabbit Special Study (SS)	Male mice, rats or rabbits were administered single doses of acetamiprid by gavage, intraperitoneal injection (i.p.) or intravenous injection (i.v.) up to 60 mg/kg. The animals were assessed for a variety of neurobehavioral parameters. *In vitro* experiments were also done using isolated ileum sections from guinea pigs to assess contractile responses in the absence and presence of agonists (acetylcholine, histamine diphosphate, barium chloride and nicotine tartrate). Acetamiprid was also assessed via i.v. in rabbits for effects on respiratory rate, heart rate and blood pressure; via gavage in mice for effects on gastrointestinal motility; and via i.p. in rats for effects on water and electrolyte balance in urine, and blood coagulation, hemolytic potential and plasma cholinesterase activity. Based on a number of neuromuscular, behavioral and physiological effects of acetamiprid in male mice, under the conditions of this study, a overall NOAEL of 10 mg/kg (threshold) and LOAEL of 20 mg/kg could be estimated for a single dose by various exposure routes.
870.7485	Metabolism and pharmaco-kinetics - rat	Extensively and rapidly metabolized. Metabolites 79–86% of administered dose. Profiles similar for males and females for both oral and intravenous dosing. Three to seven percent of dose recovered in urine and feces as unchanged test article. Urinary and fecal metabolites from 15–day repeat dose experiment only showed minor differences from single-dose test. Initial Phase I biotransformation: demethylation of parent. 6-chloronicotinic acid most prevalent metabolite. Phase II metabolism shown by increase in glycine conjugate.
870.7600	Dermal absorption	The majority of the dose was washed off with the percent increasing with dose. Skin residue was the next largest portion of the dose with the percent decreasing with dose. In neither case was there evidence of an exposure related pattern. Absorption was small and increased with duration of exposure. Since there are no data to demonstrate that the residues remaining on the skin do not enter the animal, then as a conservative estimate of dermal absorption, residues remaining on the skin will be added to the highest dermal absorption value. The potential total absorption at 24 hours could be approximately 30%.

B. Toxicological Endpoints

The dose at which no adverse effects are observed (the NOAEL) from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological level of concern (LOC). However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences.

Three other types of safety or uncertainty factors may be used: "Traditional uncertainty factors;" the " special FQPA safety factor;" and the "default FQPA safety factor." By the term "traditional uncertainty factor," EPA is referring to those additional uncertainty factors used prior to FQPA passage to account for database deficiencies. These traditional uncertainty factors have been incorporated by the FQPA into the additional safety factor for the protection of infants and children. The term "special FQPA safety factor" refers to those safety factors that are deemed necessary for the protection of infants and children primarily as a result of the FQPA. The "default FQPA safety factor" is the additional 10X safety factor that is mandated by the statute unless it is decided that there are reliable data to choose a different additional factor (potentially a traditional uncertainty factor or a special FQPA safety factor).

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by an UF of 100 to account for interspecies and intraspecies differences and any traditional uncertainty factors deemed appropriate (RfD = NOAEL/UF). Where a special FQPA safety factor or the default FQPA safety factor is used, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of safety factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the LOC. For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure

will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk). An example of how such a probability risk is expressed would be to describe the risk as one in one hundred thousand (1×10^{-5}), one in a million (1×10^{-6}), or one in ten million (1×10^{-7}). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a "point of departure" is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated.

A summary of the toxicological endpoints for acetamiprid used for human risk assessment is shown in Table 2 of this unit:

TABLE 2.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR ACETAMIPRID FOR USE IN HUMAN RISK ASSESSMENT.

Exposure/Scenario	Dose Used in Risk Assessment, UF	FQPA SF[1] and Endpoint for Risk Assessment	Study and Toxicological Effects
Acute dietary General population including infants and children	NOAEL = 10 mg/kg UF = 100 Acute RfD = 0.10 mg/kg/day	FQPA SF = 1 aPAD = 0.10 mg/kg/day	Acute mammalian neurotoxicity study in the rat LOAEL = 30 mg/kg based on reduction in locomotor activity in males.
Chronic dietary All populations	NOAEL= 7.1 mg/kg/day UF = 100 Chronic RfD = 0.071 mg/kg/day	FQPA SF = 1 cPAD = 0.071 mg/kg/day	Chronic/oncogenicity study in the rat LOAEL = 17.5 mg/kg/day based on reduced body weight and body weight gain (females) and hepatocellular vacuolation (males).
Short- and Intermediate-Term Incidental oral (1 to 30 days and 1 month to 6 months) (Residential)	NOAEL = 15 mg/kg/day	LOC for MOE = 100 (Residential)	Co-critical studies: subchronic oral (rat); subchronic neurotoxicity (rat) developmental toxicity (rat); LOAEL = 50 mg/kg/day based on reductions in body weight, body weight gain and food consumption.
Short- and Intermediate-Term Dermal (1 to 30 days; and 1 month to 6 months) (Residential)	Oral study NOAEL= 17.9 mg/kg/day (dermal absorption rate = 30%)	LOC for MOE = 100 (Occupational) 100 (Residential)	2-generation reproduction study (rat) LOAEL = 51.0 mg/kg/day based on reductions in pup weights in both generations, reductions in litter size and viability and weaning indices among F2 offspring, significant delays in age to attain vaginal opening and preputial separation.
Long-Term Dermal (6 months to lifetime) (Residential)	Oral study NOAEL= 7.1 mg/kg/day (dermal absorption rate = 30%)	LOC for MOE = 100 (Occupational) 100 (Residential)	Chronic/oncogenicity study in the rat LOAEL = 17.5 mg/kg/day based on reduced body weight and body weight gain (females) and hepatocellular vacuolation (males).
Short- and Intermediate-Term Inhalation (1 to 30 days and 1 month to 6 months) (Residential)	Oral study NOAEL= 17.9 mg/kg/day (inhalation absorption rate = 100%)	LOC for MOE = 100 (Occupational) 100 (Residential)	2-generation reproduction study (rat) LOAEL = 51.0 mg/kg/day based on reductions in pup weights in both generations, reductions in litter size and viability and weaning indices among F2 offspring, significant delays in age to attain vaginal opening and preputial separation.

TABLE 2.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR ACETAMIPRID FOR USE IN HUMAN RISK ASSESSMENT.—Continued

Exposure/Scenario	Dose Used in Risk Assessment, UF	FQPA SF[1] and Endpoint for Risk Assessment	Study and Toxicological Effects
Long-Term Inhalation (6 months to lifetime) (Residential)	Oral study NOAEL = 7.1 mg/kg/day (inhalation absorption rate = 100%)	LOC for MOE = 100 (Occupational) 100 (Residential)	Chronic/oncogenicity study in the rat LOAEL = 17.5 mg/kg/day based on reduced body weight and body weight gain (females) and hepatocellular vacuolation (males).
Cancer (oral, dermal, inhalation)	Not likely to be carcinogenic.		

[1] The reference to the FQPA Safety Factor refers to any additional safety factor that is retained due to concerns unique to the FQPA. The PAD (Population-adjusted Dose) incorporates the FQPA Safety Factor into the dose for use in risk assessment: PAD = RfD/FQPA SF.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Tolerances have been established (40 CFR 180.578) for the residues of acetamiprid, in or on a variety of raw agricultural commodities. Risk assessments were conducted by EPA to assess dietary exposures from acetamiprid in food as follows:

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

In conducting the acute dietary risk assessment EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID™ version 1.3), which incorporates food consumption data as reported by respondents in the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII), and accumulated exposure to the chemical for each commodity. The assumptions made for the acute exposure assessments are discussed in Unit III.C.1.ii.

ii. *Chronic exposure.* In conducting the chronic dietary risk assessment EPA used the DEEM-FCID™, which incorporates food consumption data as reported by respondents in the USDA 1994–1996 and 1998 CSFII, and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments:

For both the acute and chronic analyses, tolerance-level residues were assumed for all food commodities with current and proposed acetamiprid tolerances, and it was assumed that all of the crops included in the analysis were treated (i.e., 100% crop treated). These assumptions result in highly conservative estimates of dietary exposure and risk. In calculating dietary risk estimates, the Agency has compared the acute and chronic population-adjusted doses (aPAD, cPAD) to the estimated dietary exposures from the models. Typically, the Agency has concerns regarding dietary risk when the exposure estimates exceed 100% of the aPAD and/or cPAD. Even with the conservative assumptions noted above, risk estimates associated with dietary exposure to acetamiprid are below the Agency's LOC.

iii. *Cancer.* Acetamiprid has been classified as not likely to be carcinogenic to humans; therefore, a dietary assessment for cancer risk was not conducted. This classification is based on the absence of a dose-response and a lack of a statistically significant increase in the mammary adenocarcinoma incidence by pair-wise comparison of the mid- and high-dose groups with the controls. Although the incidence exceeded the historical control data from the same lab, it was within the range of values from the supplier.

2. *Dietary exposure from drinking water.* The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for acetamiprid in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of acetamiprid.

Tier 1 simulated estimated drinking water concentrations (EDWCs) for acetamiprid in surface water using the FQPA Index Resevoir Screening Test (FIRST) to calculate surface water concentrations and screening concentration in ground water (SCI-GROW) to calculate ground water concentrations.

For the surface water assessment, the application rate for citrus was used, which represents the highest label rate for a single application of any crop (0.55 lb a.i./A/season). However, it is important to note that due to limitations imposed by the use of two applications at the highest single application rate (0.25 lb a.i./A), the modeled application rate was equal to only 0.50 lb a.i./A.

The proposed applications of acetamiprid on tuberous and corm vegetables would result in lower EDWCs than citrus, and thus has little effect on the drinking water assessment for this chemical. By using the application rate for citrus crops, the surface and ground water estimated concentrations are conservative estimates for the proposed new use scenarios (tuberous and corm vegetables) because of the higher application rate.

The primary use of these models by the Agency at this stage is to provide a screen for sorting out pesticides for which it is unlikely that drinking water concentrations would exceed human health levels of concern.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs), which are the model estimates of a pesticide's concentration in water. EECs derived from these models are used to quantify drinking water exposure and risk as a %RfD or %PAD. Instead drinking water levels of comparison (DWLOCs) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to acetamiprid they are further discussed in the aggregate risk sections.

Based on the FIRST and SCI-GROW models, the EECs of acetamiprid for acute exposures are estimated to be 17 parts per billion (ppb) for surface water and 0.0008 ppb for ground water. The EECs for chronic exposures are estimated to be 4 ppb for surface water and 0.0008 ppb for ground water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Acetamiprid is currently registered for use on the following residential non-dietary sites: Ornamentals and flowers. The risk assessment was conducted using the following residential exposure assumptions:

Acetamiprid is currently registered for use on the following residential non-dietary sites: Ornamentals and flowers. No chemical specific data were available to estimate exposure and risk for homeowners applying acetamiprid to ornamentals and flowers. The risk assessment was conducted using the following conservative residential exposure assumptions: Little use of any protective equipment by residential applicators, the use of agricultural transfer coefficients which incorporate larger acreage and greater foliar contact for dermal exposure, and postapplication exposure to the maximum levels of residues on the day of application. Using such assumptions for residential applicators, total MOEs for short- and intermediate-term residential dermal and inhalation exposures range from 1.2×10^5 to 6×10^5. For post-application activities, short- and intermediate-term MOEs range from 1.8×10^4 to 1.8×10^5 for adults and from 2.3×10^4 to 2.2×10^5 for youth ages 10–12 years. The residential uses for acetamiprid are not expected to result in long-term exposures.

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

EPA does not have, at this time, available data to determine whether acetamiprid has a common mechanism of toxicity with other substances. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to acetamiprid and any other substances and acetamiprid does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that acetamiprid has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's web site at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

1. *In general.* Section 408 of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different safety factor value based on the use of traditional uncertainty factors and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity.* In the developmental toxicity studies in rats and rabbits, the Agency determined that neither quantitative nor qualitative evidence of increased susceptibility of fetuses to in utero exposure to acetamiprid were observed. However, in the multigeneration reproduction study, qualitative evidence of increased susceptibility of rat pups is observed. Considering the overall toxicity profile and the doses and endpoints selected for risk assessment for acetamiprid, the Agency characterized the degree of concern for the effects observed in this study as low, noting that:

i. There is a clear NOAEL for the offspring, and;

ii. These effects occurred in the presence of parental toxicity and only at the highest dose tested. No residual uncertainties were identified.

The NOAEL for offspring effects is used for short- and intermediate-term dermal and inhalation exposure scenarios. All other toxicology endpoints established for acetamiprid are based on a lower NOAEL than this, and are thus protective of offspring effects.

3. *Conclusion.* The Agency concluded that there is concern for neurotoxicity resulting from exposure to acetamiprid because:

i. Clinical signs of neurotoxicity were observed in the acute neurotoxicity study on the day of dosing, and;

ii. Studies in literature with structurally similar chemicals from the same chemical class (neonicotinoids) suggest that nicotine, when administered to humans and/or animals in utero causes developmental toxicity, including functional deficits.

The Agency concluded that the toxicology database for acetamiprid is not complete for FQPA assessment, since a developmental neurotoxicity (DNT) study in rats is currently under review and has not yet been finalized and is part of a comprehensive evaluation of many DNT studies of various pesticides, some of which have not yet been submitted. The preliminary review of the study indicates the results are not likely to have a significant impact on risks for the currently proposed use, or on existing uses of acetamiprid. Based on weight of the evidence, an uncertainty factor UFDB is not needed (1X) since developmental neurotoxicity data received and reviewed for other compounds in this chemical class indicate that the results of the required DNT will not likely impact the regulatory doses selected for the proposed uses of acetamiprid.

E. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against EECs. DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water (e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average

food + residential exposure)). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the EPA's Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: Acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and ground water are less than the calculated DWLOCs, EPA concludes with reasonable certainty that exposures to the pesticide in drinking water (when considered along with other sources of exposure for which EPA has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because EPA considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, EPA will reassess the potential impacts of residues of the pesticide in drinking water as a part of the aggregate risk assessment process.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food to acetamiprid will occupy 18 % of the aPAD for the U.S. population, 12 % of the aPAD for females 13 years and older, 44 % of the aPAD for all infants less than one year old, and 61 % of the aPAD for 1–2 years old children. In addition, there is potential for acute dietary exposure to acetamiprid in drinking water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD, as shown in Table 3 of this unit:

TABLE 3.—AGGREGATE RISK ASSESSMENT FOR ACUTE EXPOSURE TO ACETAMIPRID

Population/Subgroup	aPAD (mg/kg)	% aPAD/(Food)	Surface Water EEC/(ppb)	Ground Water EEC/(ppb)	Acute DWLOC/(ppb)
US Population	0.10	18	17	0.0008	2,900
All Infants < 1 year	0.10	44	17	0.0008	540
Children 1–2 years	0.10	61	17	0.0008	370
Children 3–5 years	0.10	42	17	0.0008	560
Children 6–12 years	0.10	22	17	0.0008	790
Youth 13–19 years	0.10	14	17	0.0008	2,600
Adults 20–49 years	0.10	11	17	0.0008	3,100
Adults 50+ years	0.10	10	17	0.0008	3,100
Females 13–49 years	0.10	12	17	0.0008	2,600

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to acetamiprid from food will utilize 8% of the cPAD for the U.S. population, 16% of the cPAD for all infants <1 year old, and 31% of the cPAD for children 1–2 year old. Based the use pattern, chronic residential exposure to residues of acetamiprid is not expected. In addition, there is potential for chronic dietary exposure to acetamiprid in drinking water. After calculating DWLOCs and comparing them to the EECs for surface water and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in Table 4 of this unit:

TABLE 4.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO ACETAMIPRID

Population/Subgroup	cPAD/mg/kg/day	%/cPAD/(Food)	Surface Water EEC/(ppb)	Ground/Water EEC/(ppb)	Chronic/DWLOC (ppb)
US Population	0.071	8	4	0.0008	2,300
All Infants < 1 year	0.071	16	4	0.0008	600
Children 1–2 years	0.071	31	4	0.0008	490
Children 3–5 years	0.071	21	4	0.0008	560
Children 6–12 years	0.071	11	4	0.0008	630
Youth 13–19 years	0.071	6	4	0.0008	2,000

TABLE 4.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO ACETAMIPRID—Continued

Population/Subgroup	cPAD/mg/kg/day	%/cPAD/(Food)	Surface Water EEC/(ppb)	Ground/Water EEC/(ppb)	Chronic/DWLOC (ppb)
Adults 20–49 years	0.071	5	4	0.0008	2,400
Adults 50+ years	0.071	5	4	0.0008	2,000
Females 13–49 years	0.071	5	4	0.0008	2,400

3. *Short and intermediate-term risk.* Short and intermediate-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Acetamiprid is currently registered for use that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic food and water and short-term exposures for acetamiprid.

Using the exposure assumptions described in this unit for short and intermediate-term exposures, EPA has concluded that food and residential exposures aggregated result in aggregate MOEs of 810–820 for adults male and female. These aggregate MOEs do not exceed the Agency's LOC for aggregate exposure to food and residential uses. In addition, short-term DWLOCs were calculated and compared to the EECs for chronic exposure of acetamiprid in ground water and surface water. After calculating DWLOCs and comparing them to- the EECs for surface water and ground water, EPA does not expect short-term aggregate exposure to exceed the Agency's level of concern, as shown in Table 5 of this unit:

TABLE 5.—AGGREGATE RISK ASSESSMENT FOR SHORT-TERM AND INTERMEDIATE TERM EXPOSURE TO ACETAMIPRID

Population/Subgroup	Aggregate/MOE/(Food + Residential)	Aggregate Level of Concern/(LOC)	Surface Water EEC/(ppb)	Ground/Water EEC/(ppb)	Short-Term DWLOC (ppb)
Adult male	820	100	4	0.0008	5,500
Adult female	810	100	4	0.0008	4,700
Adult 50+	810	100	4	0.0008	4,700

4. *Aggregate cancer risk for U.S. population.* Acetamiprid is not likely to be carcinogenic to humans.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to acetamiprid residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate analytical methods are available for enforcement of tolerances for plant commodities (GC/ECD and HPLC/UV) and animal comodities (HPLC/UV). However, the registrant also proposed that an HPLC/MS method be used for enforcement of plant commodities tolerances. The proposed HPLC/MS/MS enforcement method for plant commodities should undergo independent laboratory validation (ILV) as a condition of registration, and possibly Agency method validation.

B. International Residue Limits

There are no CODEX, or Canadian Maximum Residue Limits for acetamiprid on tuberous and corm vegetables.

C. Conditions

A Developmental Neurotoxicity study (DNT) study is currently under review.

The proposed HPLC/MS/MS enforcement method for plant commodities should undergo independent laboratory validation (ILV) as a condition of registration, and possibly Agency method validation.

D. Response to Comments

One commenter expressed a general objection to the approval of pesticide tolerances and also criticized the use of animal testing to determine the safety of pesticides. This commenter's concerns have been addressed in previous tolerance documents. See the **Federal Register** of October 29, 2004, (69 FR 63083) (FRL–7681–9). The other comment was from the WTO (World Trade Organization) Enquiry Point in China and asked for extra time to translate the document and prepare comments. This comment was received after the close of the comment period on Sepember 7, 2004 via e-mail. On February 28, 2005 EPA contacted the commenter and requested that if it had any comments to submit them by March 15, 2005. No further response was received by EPA.

V. Conclusion

Therefore, the tolerance is established for residues of acetamiprid, in or on tuberous and corm vegetables at 0.01 ppm.

VI. Objections and Hearing Requests

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

provided in the old sections 408 and 409 of FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

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

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2005–0029 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before June 13, 2005.

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

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

2. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2005–0029, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

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

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

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on

the distribution of power and responsibilities between the Federal Government and Indian tribes." This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: April 1, 2005.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.578 is amended by alphabetically adding the following commodity to the table in paragraph (a)(1) to read as follows:

§ 180.578 Acetamiprid; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
* * *	* *
Tuberous and Corm Vegetables	0.01
* * *	* *

* * * * *

[FR Doc. 05–7225 Filed 4–12–05; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 22, and 90

[WT Docket Nos. 03–103, 05–42; FCC 04–287]

Air-Ground Telecommunications Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission ("Commission") revises rules governing the four megahertz of dedicated spectrum in the 800 MHz commercial Air-Ground Radiotelephone Service band. The Commission adopts a flexible regulatory approach to determine the configuration of the band; adopts rules that enable interested parties to bid on spectrum licenses according to the band configuration that they believe will best meet their needs for the provision of air-ground services; makes available nationwide air-ground licenses in three configurations: band plan 1, comprised of two overlapping, shared, cross-polarized 3 MHz licenses (licenses A and B, respectively), band plan 2, comprised of an exclusive 3 MHz license and an exclusive 1 MHz license (licenses C and D, respectively), and band plan 3, comprised of an exclusive 1 MHz license and an exclusive 3 MHz license (licenses E and F, respectively), with the blocks at opposite ends of the band from the second configuration; and finally, the Commission revises and eliminates certain Public Mobile Services (PMS) rules that are no longer warranted as a result of technological change, increased competition in Commercial Mobile Radio Services (CMRS), supervening changes to related Commission rules, or a combination of these factors.

DATES: Effective May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Richard Arsenault, Chief Counsel, Mobility Division, Wireless Telecommunications Bureau, at 202–418–0920 or via e-mail at *Richard.Arsenault@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order portion (*Report and Order*) of the Commission's *Report and Order and Notice of Proposed Rulemaking,* FCC 04–287, in WT Docket Nos. 03–103 and 05–42, adopted December 15, 2004, and released February 22, 2005. Contemporaneous with this document, the Commission publishes a Notice of Proposed Rulemaking (*Notice*) (summarized elsewhere in this publication). The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor: Best Copy & Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 800–378–3160, facsimile 202–488–5563, or via e-mail at *fcc@bcpiweb.com.* The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

Synopsis of the Report and Order

A. 800 MHz Air-Ground Radiotelephone Service

1. The Commission initiated this proceeding, *inter alia,* to reexamine the 800 MHz Air-Ground Radiotelephone Service band plan and service rules. Although the Commission initially licensed six 800 MHz air-ground nationwide licensees, only one licensee (Verizon Airfone) continues to provide service in the band, and our current technical rules allow it to provide only a limited range of narrowband voice and data services. This circumstance led us to question in the *Notice of Proposed Rulemaking* in this proceeding, 68 FR 44003, July 25, 2003, whether our existing rules were impeding the provision of telecommunications services desired by the public onboard aircraft. Nearly all parties commenting on these issues agree that our existing band plan and rules have hindered the efficient, competitive provision of air-ground services desired by the public. Based on our review of the record in this proceeding, we find that the public interest will be served by adopting flexible rules that will enable interested parties to bid on licenses in three possible band configurations. Each of the three band configurations includes at least one spectrum block that will permit the provision of high-speed telecommunications services to the public onboard aircraft.

2. In reexamining the current band plan and service rules, we must address both competitive issues (*i.e.*, how many competitors can the spectrum and the market support) and technical

considerations (*i.e.*, how much spectrum is necessary to efficiently and effectively support a range of air-ground service offerings, including voice and broadband applications, and the technical parameters to minimize the potential for air-ground systems to cause interference). We resolve these interrelated issues by adopting flexible rules to determine the best technological configuration of the band and the number of competitors for air-ground communications over multiple platforms (*i.e.*, terrestrial and satellite). We find that reconfiguration of the 800 MHz air-ground band will facilitate competition with satellite-based offerings in the provision of high-speed air-ground services to commercial and other aircraft. We also note that other spectrum is available for the provision of air-ground communications services. Based on our review of the record developed in this proceeding and for the reasons stated below, we conclude that a flexible licensing approach coupled with flexible technical and operational rules will promote the highest valued use of the 800 MHz air-ground spectrum for the provision of air-ground services that better meet the needs of the public.

1. Background

3. In 1990, the Commission allocated four megahertz of spectrum for commercial Air-Ground Radiotelephone Service, authorizing operation at 849–851 MHz (ground stations) and 894–896 MHz (airborne mobile stations). Each band was divided into ten paired channel blocks, which are allotted to specific geographic locations (essentially a national grid). Each channel block contains 29 narrowband (6 kHz) communications channels and 6 very narrowband (3.2 kHz) control channels. Under the current service rules, each licensee has an exclusive control channel, shares all the communication channels with the other licensees in the band, and must provide nationwide service. To promote interoperable communications and to manage interference, some of the ground station locations in North America and channel block assignments have been predetermined consistent with bilateral agreements with Mexico and with Canada. The number of communications channels limits the number of voice calls that can be simultaneously handled in a particular area, and the narrow bandwidth of these channels limits a service provider to voice and low-speed data services.

4. The current 800 MHz Air-Ground Radiotelephone Service rules contemplate six competing licensees providing voice and low-speed data services. Six entities were originally licensed under these rules, which required all systems to conform to detailed technical specifications to enable shared use of the air-ground channels. Only three of the six licensees built systems and provided service, and two of those failed for business reasons. Only Verizon Airfone remains as an incumbent in the band. The prescriptive command-and-control nature of the current air-ground service rules, the regulatory requirement to share only four megahertz of spectrum among up to six licensees, and the limited data capacity of the narrow bandwidth (6 kHz) communications (slow dial-up modem speed) preclude the provision of broadband services to the public onboard aircraft.

2. Market for Air-Ground Wireless Communications Services

5. There is substantial and rapidly growing consumer, airline, and service provider interest in access to high-speed Internet and other wireless services onboard aircraft. Market research suggests that many frequent flyers are willing to pay for high-speed access to the Internet and their corporate network.

3. Reconfiguration of the 800 MHz Air-Ground Radiotelephone Service Band

a. Available Air-Ground Band Plans

6. We have reviewed the extensive record in this proceeding and conclude that the public interest will be served by adopting a flexible framework that will enable interested parties to bid on spectrum licenses according to the band configuration that they believe will best meet their needs for the provision of air-ground services. Interested parties may bid on spectrum licenses in any of the following three band plans, including two overlapping, shared, cross-polarized spectrum licenses (band plan 1) as advocated by AirCell, Inc. and the Boeing Company and exclusive spectrum licenses (band plans 2 and 3) as proposed by Space Data Corporation and Verizon Airfone. Licenses will have a ten-year term.

Band plan 1—two overlapping, shared, cross-polarized 3 MHz licenses (licenses A and B, respectively).

Band plan 2—an exclusive 3 MHz license and an exclusive 1 MHz license (licenses C and D, respectively).

Band plan 3—an exclusive 1 MHz license and an exclusive 3 MHz license (licenses E and F, respectively), with the blocks at opposite ends of the band from the second configuration.

7. The Commission will award licenses to winning bidders for the licenses comprising the band plan that receives the highest aggregate gross bid, subject to long-form license application review. In order to further competition and ensure maximum use of this frequency band for air-ground services, no party will be eligible to hold more than one of the spectrum licenses being made available.

8. We believe this flexible approach to configuration of the band will promote our goal in this proceeding of facilitating the highest valued use of this scarce spectrum resource, resulting in the provision of wireless communications services that better meet the needs of the traveling public onboard aircraft. We also further our strategic objective to encourage the growth and rapid deployment of innovative and efficient communications technologies and services by adopting rules that will permit licensees to deploy any current or future technology with an occupied bandwidth that fits within its assigned spectrum and to provide any kind of air-ground service to any type of aircraft. As explained below, we also provide a transition period for the incumbent system currently operated by Verizon Airfone.

9. Future licensees in the 800 MHz air-ground band, as well as other interested parties, will have the opportunity to engage in spectrum leasing under our rules. Future licensees will also be permitted to engage in partitioning and/or disaggregation of their licenses. These regulatory opportunities are intended to provide the air-ground marketplace greater flexibility to respond to consumer demand.

10. Below, we address the location of ground stations, the provision of deck-to-deck service (*i.e.*, service from takeoff to landing), competitive considerations, and the provision of services in the air-ground band.

(i) Location of Ground Stations

11. Band plans 2 and 3 provide for exclusive spectrum licensing and will afford new licensees significant flexibility to configure and modify their systems to address current and future market conditions. For example, licensees will be able to initially configure their systems to best meet the needs of their customers, and may flexibly reconfigure or add ground stations to respond to future demand for air-ground services. An exclusive licensee also could deploy new technologies in response to changing market conditions—without having to coordinate its choice of technology with another licensee in the band. If the band

is comprised of two overlapping 3 MHz licenses (band plan 1), the new licensees will be required to jointly file a spectrum sharing and site selection plan with the Wireless Telecommunications Bureau within six months of the initial grant of their spectrum licenses and will be required to notify the Bureau of any changes to the plan. The Wireless Telecommunications Bureau will issue a public notice prior to the Commission's auction of new 800 MHz air-ground spectrum licenses in which it will specify the filing requirements for the plan. This approach would provide parties with overlapping spectrum licenses flexibility to configure their systems without having to adhere to minimum spacing requirements or site locations dictated by the Commission.

(ii) Provision of Deck-to-Deck Service

12. The record reflects that parties desire deck-to-deck service (*i.e.*, service from terminal to terminal). We note that air-ground communications services are currently provided to Federal, State, and local agencies, including the FBI, the U.S. Department of Energy, and the U.S. Customs Service, and that the air-ground spectrum can be used to support aircraft management, other public safety services, and homeland security communications. In view of the foregoing and in light of our statutory mandate to promote the safety of life and property, we have selected three band plans that would enable licensees to provide deck-to-deck service.

13. An exclusive licensing approach (band plans 2 and 3) would facilitate the provision of service continuously because ground stations can be located without inter-system coordination and would not have to be limited in power or sector orientation by the presence of an overlapping licensee. If a spectrum sharing approach (band plan 1) is selected by the auction winners, the record indicates that the parties will have to agree on power limits and sharing rules to facilitate the full provision of deck-to-deck service.

(iii) Competitive Considerations

14. The flexible band configuration approach that we adopt today will enable interested parties to bid on overlapping spectrum licenses (band plan 1) in the event that they believe spectrum sharing will best meet their needs for the provision of air-ground services. Under this approach, the individual licensees—rather than the Commission—would determine the criteria for ground station locations and other technical requirements necessary to facilitate the provision of broadband services on an overlapped basis. Moreover, in lieu of codifying their sharing plan into the Commission's rules, any sharing plan that the winning bidders develop between themselves can be modified at any time without their having to seek a change in the rules. If band plan 1 is implemented, we expect the parties to engage in good faith negotiations in developing and implementing their spectrum sharing plan. If the two licensees cannot agree on a spectrum sharing plan or if a dispute arises under their initial or amended agreement, we would encourage them to use binding arbitration or other alternative dispute resolution procedures. Alternatively, either party may request that the Commission resolve major disputes by filing, for example, a petition for declaratory ruling.

15. In developing the available band plan options, we have considered the potential harms and benefits that may accrue from the possibility of a single provider in this band versus opportunities for multiple service providers. We have also weighed the possible harms and benefits in the context of our goal in this proceeding of facilitating the highest valued use of this spectrum, resulting in the provision of wireless telecommunications services onboard aircraft that better meet the needs of the traveling public. We have considered not only the existence of emerging satellite-based competition but also the availability of other spectrum for the provision of air-ground service. In addition, we have taken into account the fact that our new air-ground band plan and rules will provide an adequate amount of spectrum for the provision of new high-speed wireless services using the 800 MHz air-ground spectrum that cannot be provided under our current rules, and we anticipate that any future provider will take advantage of the new rules to provide services that will compete more directly with broadband air-ground providers operating from different platforms. Therefore, we find that the air-ground band plan and the flexible service rules that we adopt today are likely to enhance intermodal air-ground competition even if ultimately only one entity operates in the 800 MHz air-ground band.

16. Nevertheless, in light of the very limited amount of spectrum (four megahertz) available in the 800 MHz air-ground band, we conclude that the public interest would be served by ensuring access to this spectrum by more than one entrant by prohibiting any single party from controlling more than three megahertz of spectrum in the band. Although other spectrum and platforms will be available for the provision of domestic air-ground service, the 800 MHz air-ground band constitutes the only four megahertz of spectrum dedicated specifically to the commercial air-ground service in the United States. Thus, there is currently no guarantee that any spectrum other than the 800 MHz air-ground band and the spectrum used by satellite services will in fact be used for commercial air-ground service. We accordingly conclude that it is in the public interest to promote competition by ensuring that at least two parties will have an opportunity to provide service in the 800 MHz air-ground band. Other providers will be able to access the spectrum through secondary markets, resale or similar means. In addition, the record demonstrates that no more than three megahertz of spectrum is required to deliver high-speed air-ground services using today's broadband technologies. Permitting one party to control the entire four megahertz of spectrum comprising the band therefore could result in one megahertz of spectrum (25 percent of the band) lying fallow, which would undermine our goal of promoting the highest valued use of this spectrum. A 1 MHz spectrum block could support such applications as email service, Internet access, messaging services, avionic support, and homeland security services. Given the many potential uses of a 1 MHz spectrum block, restricting the access of any single party to three megahertz of the spectrum not only will increase the air-ground service choices available to consumers, but also will ensure the efficient use of this spectrum. We also believe that promoting competition in the band and with satellite-based service providers will serve the public interest by spurring technological innovation. In light of these findings, we conclude that it is in the public interest to have two licensees in this band.

17. In view of the foregoing, we will prohibit any party from obtaining a controlling interest, either at auction or by a post-auction transaction, in more than three megahertz of spectrum (either shared or exclusive) in the 800 MHz air-ground band. Each of the three band configurations contains two licenses and each includes at least one 3 MHz license. Accordingly, no party may have a controlling interest in more than one license in the band plan implemented as a result of the Commission's auction of new air-ground licenses. For purposes of this eligibility restriction, individuals and entities with either *de jure* or *de facto* control of a licensee in the band will be considered to have a controlling

interest in the licensee. *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. *De facto* control is determined on a case-by-case basis.

18. We also will apply the definitions of "controlling interests" and "affiliate" currently set forth in §§ 1.2110(c)(2) and 1.2110(c)(5) of the Commission's rules. These provisions have worked well to identify individuals and entities that have the ability to control applicants for Commission licenses and therefore are well-suited to our goal here of ensuring that no party will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band. We note that § 1.2110(c)(2) includes the requirement that ownership interests generally be calculated on a fully diluted basis, and also provides that any person who manages the operations of an applicant pursuant to a management agreement, or enters into a joint marketing agreement with an applicant, shall be considered to have a controlling interest in the applicant if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, the types of services offered, or the terms or prices of such services. We find that, together with the other provisions of §§ 1.2110(c)(2) and 1.2110(c)(5), these provisions will ensure that no entity will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band.

19. We note that, like other Part 22 licensees, 800 MHz Air-Ground Radiotelephone Service licensees are classified as commercial mobile radio service (CMRS) providers and thus are subject to common carrier regulation under Title II of the Communications Act (Act). While the Commission has previously decided to forbear from applying certain provisions of Title II to CMRS providers, it has determined that it would be inappropriate to exempt CMRS providers from the competitive safeguards embodied in §§ 201 and 202 of the Act. Air-Ground licensees therefore are required to provide service upon reasonable request, and their "charges, practices, classifications, and regulations for and in connection with" service must be just and reasonable. Moreover, Air-Ground licensees may not make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with a like communication service and may not afford any undue or unreasonable preference or advantage to any person or class of persons. Accordingly, if an air-ground licensee were to unreasonably discriminate in its service rates, terms, or conditions, it could be subject to enforcement action by the Commission as well as a complaint proceeding initiated pursuant to § 208 of the Act.

(iv) Air-Ground Services

20. A new licensee may provide any type of air-ground service (*i.e.*, voice telephony, broadband Internet, data, etc.) to aircraft of any type, and serve any or all aviation markets (*e.g.*, commercial, government, and general). A licensee must provide service to aircraft. We note that current bilateral agreements between the United States, Canada, and Mexico provide for coordinated use of air-ground frequencies over North American airspace and are based on a narrow bandwidth channel scheme, and therefore may need to be renegotiated to provide for more flexible use of this spectrum.

21. At this time, we decide not to permit a licensee to provide ancillary land mobile or fixed services in the 800 MHz air-ground spectrum.

4. Technical Standards

22. We are adopting the minimal set of technical rules for the new air-ground service necessary to implement the three alternative band plan configurations that will be subject to auction. Generally, these rules provide licensees flexibility to deploy any type of transmission technology, provided that the radio emissions produced fit within a licensee's assigned spectrum. The new technical rules limit only transmitting power and the power level of unwanted emissions. As a general matter, these new technical rules are crafted to allow sufficient power to provide robust air-ground services, while limiting the potential for harmful interference to services operating in adjacent spectrum.

23. *Interference to air-ground from adjacent services.* Each of the two paired bands comprising the 800 MHz air-ground allocation is adjacent to and just above spectrum allocated to the cellular radiotelephone service. The 849–851 MHz uplink band is adjacent to and just below spectrum allocated to land mobile services including public safety, which will soon become all public safety pursuant to the 800 MHz Order. The 894–896 MHz downlink band is adjacent to and just below spectrum allocated to land mobile services including 900 MHz SMR. These services are heavily used in many areas. Base stations in these adjacent services are authorized to utilize high power levels.

24. The services adjacent to the 849–851 MHz band are subject to rules that limit their potential to cause interference to air-ground service. We do not, at this time, find a need to adopt additional or more stringent rules applicable to the adjacent service licensees to further limit interference potential to the air-ground service. We believe that, under the current rules, new air-ground systems should be able, through careful ground station site selection and technical coordination with the licensees in the adjacent services, to build out their systems. Potential licensees should plan on obtaining qualified engineering advice regarding system design and ground station site selection, taking fully into account the existing radio frequency environment at candidate sites.

25. *Interference to Cellular Block B.* The air-ground ground station transmit band at 849–851 MHz is adjacent to the Cellular Radiotelephone Service Block B band, which is used for cellular base station receivers. We note that no harmful interference problems between the cellular service and the commercial air-ground service have been reported to the Commission during more than ten years of air-ground service operations, despite the fact that the air-ground mobile station and ground station transmit bands are reversed from the adjacent cellular bands. We believe that several factors may explain why there have been no reported interference problems. First, both services have out of band emissions (OOBE) limits to suppress undesired signals from adjacent allocations. Second, there are far fewer ground stations in an air-ground system than in a cellular system (*e.g.*, the entire U.S. airspace can be covered at an altitude of 20,000 feet by fewer than 200 ground stations). Third, an air-ground licensee must employ careful site selection practices for its ground stations, including an unobstructed view of the sky and consideration of the local RF environment (*i.e.*, what other stations are nearby). Further, air-ground antennas also are typically up-tilted whereas cellular antennas are often down-tilted, adding some isolation between the two. The rule changes that we adopt to permit broadband air-ground services will not alter any of these factors and, consequently, we expect that these factors will be effective in avoiding inter-service interference under our new air-ground band plan.

26. Furthermore, we do not believe that the use of wider bandwidth

technologies in the 800 MHz air-ground spectrum will result in increased interference between air-ground operations and cellular operations. Although spread spectrum emissions typically have broader out-of-band noise skirts, the level of this noise is subject to the Commission's OOBE rules. We also note that the broadband spread spectrum based technologies used in the cellular band and those that the parties have proposed for use in the air-ground band are resistant to small amounts of out-of-band noise. In summary, we find that applying our standard OOBE rules here is adequate to limit unwanted emissions between ground stations in the air-ground service and base stations in the cellular service. We note that our standard OOBE rules also provide that the Commission may require greater attenuation of unwanted emissions in the event it is necessary to prevent interference to other services.

27. The airborne mobile transmit band (894–896 MHz) is adjacent on its lower side to the cellular telephone receivers of the Cellular B Block licensee. There have been no reported instances of harmful interference between airborne mobile stations and cellular telephones. This stems from the large distance separation between aircraft and cellular phones on the ground, and our decision today does not change this factor. We conclude that our OOBE limits and the distance separation make it likely that the mobile units in these two services will continue to operate in adjacent spectrum without harmful interference problems. Nevertheless, if an air-ground licensee elects to operate aircraft mobile transmitters on the ground or during approach and take-off, they may find it necessary in some cases to provide additional attenuation of OOBE falling into the spectrum below 894 MHz, in order to avoid interference to cellular phones in use in the immediate vicinity of airports.

28. *Interference to Public Safety.* The upper edge of the air-ground ground station transmit band at 849–851 MHz is adjacent to what are now mobile receivers for interleaved business, industrial and land transportation, SMR, and public safety radio channels, but which will soon become the National Public Safety Plan Advisory Committee (NPSPAC) public safety channels pursuant to our recent *800 MHz Order*, 69 FR 67823, November 22, 2004. Nextel asserts that OOBE from air-ground ground stations could produce a significant amount of noise energy in nearby public safety receivers. Although we have found that emissions from cellular base stations may have contributed to interference problems with public safety and critical infrastructure mobile receivers above 851 MHz, there is no history of similar interference being caused by the existing air-ground ground stations to mobile receivers. There are again several factors that we believe may explain why air-ground caused interference is rare, including the fact that there are so few air-ground ground stations, as compared to cellular base stations, and the deployment characteristics of ground stations (*e.g.*, up tilted antennas). Further, we note that NPSPAC operations above 851 MHz will be protected by our OOBE limit rule, including the provision that allows the Commission to require greater attenuation if necessary to prevent interference.

29. Nevertheless, we believe that it is prudent to adopt a rule providing that ground stations in the Air-Ground Radiotelephone Service that operate in the 849–851 MHz range will be subject to the same interference abatement obligation rules adopted for cellular services in the *800 MHz Order*. The rule we are adopting is essentially the same as that adopted for cellular in the *800 MHz Order*. We will not require air-ground licensees to participate in the establishment of the electronic notification process because we anticipate that this process will be in place by the time that new air-ground licenses are issued.

30. *Interference to 900 MHz SMR base receivers.* The airborne mobile transmit band (894–896 MHz) is adjacent on its upper side to the base station receive band in the 900 MHz SMR service. Distance separation will normally serve to protect 900 MHz SMR base station receivers because airborne stations normally operate at altitudes well above 900 MHz SMR base stations. Nextel, however, contends that there may be a problem where its 900 MHz SMR base stations are located near airport runways, and if there are several aircraft at low altitude nearby at the same time. This possibility appears to be atypical and we find that it would be best addressed on a case-by-case basis rather than by a broad-based rule. Air-ground licensees and 900 MHz SMR licensees should cooperate to resolve any interference problems of this type.

31. *Miscellaneous interference issues.* We do not believe the record justifies adoption of more stringent OOBE limits for the Air-Ground Radiotelephone Service. Accordingly, we will apply our harmonized flexible OOBE limits rule, which currently applies to cellular and broadband PCS, to the 800 MHz Air-Ground Radiotelephone Service. We note that, in the event that band plan 2 or 3 is implemented, the exclusive licensees would be subject to the OOBE standards between their spectrum blocks, as well as outside the air-ground band.

32. *Miscellaneous technical rules.* The existing air-ground rules have provided particular limits on transmitter frequency tolerance and specifications for automated operating procedures. We conclude it is unnecessary to retain such a detailed frequency tolerance rule. Under the legacy band configuration, numerous closely packed air-ground channels were shared by multiple licensees, so we required a frequency tolerance rule that tightly controlled frequency stability to minimize the possibility of adjacent channel interference. By contrast, our new rules establish wider spectrum blocks and we anticipate fewer communications channels. In addition, we expect that the advanced technologies likely to be used in this band will have to be inherently stable in order to work properly, and, in the Air-Ground Radiotelephone Service, possibly to compensate for Doppler shift as well. Thus, we find that we need only require in our rules that the frequency stability of equipment used be sufficient to ensure that, after accounting for Doppler frequency shifts, the occupied bandwidth of the fundamental emissions remains within the authorized frequency bands of operation. In the event that band plan 1 is implemented and licenses for spectrum sharing are issued, the licensees may choose to agree upon any number of miscellaneous technical standards that may be needed to facilitate shared spectrum operation and include them in the spectrum sharing plan that they would file with the Wireless Telecommunications Bureau.

5. Incumbent Station KNKG804

33. Verizon Airfone Inc. is the sole incumbent currently operating in the 800 MHz air-ground band. In April 2004, the company filed an application for renewal of its authorization to operate in the band, Call Sign KNKG804. We grant Verizon Airfone Inc. a non-renewable license for a five-year term commencing on the effective date of this *Report and Order.*

a. Transition of Incumbent System

34. In order to ensure that the air-ground spectrum can be used to provide broadband air-ground services to the public in the near future, it is imperative to clear the incumbent narrowband system from a minimum of three megahertz of spectrum as soon as reasonably practicable. We conclude

that, given the declining and relatively low usage level of Verizon Airfone's system, and because the original 800 MHz air-ground band plan was intended to accommodate six competing licensees, the existing system can be provided comparable spectrum in one megahertz of spectrum in the air ground band.

35. Verizon Airfone's incumbent system must cease operations in the lower 1.5 MHz portion of each 2 MHz air-ground band within 24 months of the initial date of grant of any license, if band plan 1 or 2 is implemented; Verizon Airfone may relocate its incumbent operations to the upper 0.5 MHz portion of each 2 MHz band and may continue to operate under the renewal authorization until the end of the five-year license term. If band plan 3 is implemented, Verizon Airfone's incumbent system must cease operations in the upper 1.5 MHz portion of each 2 MHz air-ground band within 24 months of the initial date of grant of any new license; Verizon Airfone may relocate its incumbent operations to the lower 0.5 MHz portion of each 2 MHz band and may continue to operate under the renewal authorization until the end of the five-year license term. We note that this transition period is consistent with Verizon Airfone's request that we provide it a "limited transitional period" for its narrowband system. In revising our current air-ground rules, we are eliminating all of the command and control technical rules, which enabled dynamic sharing of communication channels under the former licensing scheme. Verizon Airfone may reconfigure the narrowband channelization of its existing system in the upper 0.5 MHz portion of each 2 MHz band (or lower 0.5 MHz portion of each band if band plan 3 is implemented) any way it wants, including using control channel(s) of any authorized bandwidth less than 6 kHz (not limited to 3.2 kHz as they are now). We note that if Verizon Airfone acquires a new spectrum authorization as a result of competitive bidding, it could elect to continue its incumbent operations under such new authorization.

b. Reimbursement of Relocation Costs

36. We conclude that it would not be inequitable for Verizon Airfone to bear costs associated with relocating its narrowband operations within the 24-month period set out above to accommodate a new entrant in the air-ground band. The original 800 MHz air-ground band plan was intended to accommodate six competing licensees in the air-ground band, and Verizon Airfone has never had a right to exclusive use of the band. The new license that we grant Verizon Airfone today, moreover, provides the company a substantial period—two years from the initial grant of any new air-ground license—to relocate its narrowband operations to one megahertz of spectrum in the band.

37. We do not foresee harm to the flying public flowing from Verizon Airfone bearing any relocation expenses it may have. As noted above, demand for Verizon Airfone's service has markedly declined in recent years, and the company's system is approaching technological obsolescence. We note that a new air-ground licensee could seek to negotiate and compensate Verizon Airfone to relocate earlier than required by the terms of Verizon Airfone's new license; Verizon Airfone, however, will not be obligated to engage in such negotiations. On balance, we conclude that any burden that might be incurred by Verizon Airfone to relocate its operations under the conditions we are adopting should be minimal. Accordingly, we require Verizon Airfone to bear any costs for relocating its narrowband operations in the air-ground band at the end of the 24-month transition period.

c. Renewal of Call Sign KNKG804

38. We hereby grant Verizon Airfone Inc. a non-renewable license, Call Sign KNKG804, for a five-year term subject to the following conditions:

- If band plan 1 or 2 is implemented, Verizon Airfone must cease its existing narrowband operations in the lower 1.5 MHz portion of each 2 MHz air-ground band within 24 months of the initial date of grant of a new spectrum license.
- If band plan 1 or 2 is implemented, Verizon Airfone may relocate its incumbent operations to the upper 0.5 MHz portion of each 2 MHz band (0.5 MHz at 850.500–851.000 MHz paired with 0.5 MHz at 895.500–896.000 MHz).
- If band plan 3 is implemented, Verizon Airfone must cease its existing narrowband operations in the upper 1.5 MHz portion of each 2 MHz air-ground band within 24 months of the initial date of grant of a new spectrum license.
- If band plan 3 is implemented, Verizon Airfone may relocate its incumbent operations to the lower 0.5 MHz portion of each 2 MHz band (0.5 MHz at 849.000–849.500 MHz paired with 0.5 MHz at 894.000–894.500 MHz).
- The existing § 22.867 power limits for ground stations (100 Watts ERP) and airborne mobile stations (30 Watts ERP) will become license terms. We are amending § 22.867 and it will apply to the new licensees only.
- The existing § 22.861 out-of-band and spurious emission limits will become license terms. We are amending § 22.861 and it will apply to the new licensees only.
- The authorized emission bandwidth of any transmission from the existing system may not exceed 6 kHz. This license condition replaces § 22.857(a)(2) because we are removing § 22.857. This condition requires that the existing system remain a narrowband system.

39. Verizon Airfone must coordinate any technical changes within 885 kilometers (550 miles) of the U.S.-Canadian or U.S.-Mexican borders with the appropriate air-ground licensees in those countries prior to requesting appropriate governmental approval. Verizon Airfone may locate or relocate ground stations operating at any power level (not exceeding 100 Watts), subject only to international coordination. Verizon Airfone must maintain and provide to the FCC and the new 800 MHz air-ground licensee(s) a current list of the locations and channels used at all ground stations, which will enable the licensee(s) to provide interference protection to the existing system's operations.

40. During the period that the existing system continues to operate and provide service, the licensee of a new spectrum license must not cause harmful interference to it. Protection from interference requires that the signals of the new licensee(s) must not exceed the current adjacent channel emission limit, which is a ground station received power of -130 dBm in 6 kHz, assuming a 0 dBi vertically polarized antenna. This limit will provide full interference protection to the existing system.

6. Construction Requirements

41. We find that a five-year substantial service construction requirement for any new spectrum license—other than the 1 MHz spectrum licenses D and E—will serve the public interest and is consistent with our statutory mandate to prevent stockpiling or warehousing by licensees, and to promote investment in and rapid deployment of new technologies and services. At the end of the five-year construction period, a licensee must provide substantial service to aircraft. We define substantial service as service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal. We establish two safe harbors that would satisfy this substantial service obligation. First, construction and operation of 20 base stations, with at least one base station in each of the ten FAA regions, at the five-year

benchmark would constitute substantial service. Alternatively, the construction and operation of base stations capable of serving the airspace of at least 25 of the 50 busiest airports (as measured by annual passenger boardings) at the five-year benchmark would constitute substantial service.

42. We do not establish a construction requirement for spectrum licenses D and E. If either of these licenses is acquired, the licensee would have to share spectrum with Verizon Airfone's incumbent system until the expiration of Verizon Airfone's non-renewable license term. Depending on system configuration, a licensee of spectrum block D or E might not find it technically desirable to operate an air-ground system while sharing spectrum with the incumbent system. Under these circumstances, a construction requirement could result in a licensee deploying a less than optimal system.

B. 400 MHz Air-Ground Radiotelephone Service

43. The general aviation air-ground service operates in the 454.675–454.975 and 459.675–459.975 MHz bands and involves the provision of telecommunications service to private aircraft such as small single engine craft and corporate jets. As explained by one of the commenters in this proceeding, the channels licensed in this service are used for emergency and other purposes. These channels are interconnected with the public switched telephone network. Pursuant to our biennial review of regulations in the *Notice*, we are revising and eliminating certain rules governing this service. In addition to the rules revised or eliminated as discussed below, we take this opportunity to update and reorganize the general aviation air-ground rules. In particular, we redesignate current § 22.803 of the general rules as new § 22.807 of the general aviation air-ground rules, and delete certain superfluous language therein that relates to the Rural Radiotelephone Service.

1. Form 409, Airborne Mobile Radio Telephone License Application

44. In contrast to most part 22 services, § 22.3(b)(1) requires an individual authorization to operate a general aviation airborne mobile station-an end user unit-in the Air-Ground Radiotelephone Service. This requirement is also reflected in § 1.903(c) of our rules. Individuals must file FCC Form 409 (Airborne Mobile Radio Telephone License Application) to apply for authority to operate an airborne station or to modify or renew an existing license.

45. We do not believe that the continued licensing of individual airborne mobile stations is warranted. At present, and likely for the foreseeable future, members of the public desiring service using the current Air-Ground Radiotelephone Automated Service (AGRAS) system must first purchase and install an AGRAS-compatible mobile telephone aboard their aircraft. Such mobile units are considerably more expensive and not as readily available as mobile telephones typically used with land-based public mobile systems. Coupled with the fact that the number of general aviation users is relatively small, the probability of unauthorized users is minimal.

46. More importantly, a potential air-ground subscriber must first register with the billing service utilized by the various air-ground licensees to obtain an aircraft telephone number in order to receive service. Therefore, the licensee's own billing service would know the number and identification of legitimate users of the air-ground AGRAS system. Presumably, if an un-registered user attempted to place calls over the AGRAS system, service would be denied.

47. In addition, the Commission has received few complaints regarding these stations. Air-Ground equipment is used to communicate with ground facilities that are otherwise licensed by the Commission. Moreover, we believe that the requirement to file Form 409 imposes an unnecessary regulatory burden on end users, because it involves preparation of a form as well as payment of a $50 fee for each subscriber unit.

48. Therefore, in keeping with the Commission's policy of simplifying, where appropriate, its licensing procedures and easing the administrative burden on licensees and other users of Wireless Radio Services, we eliminate, by revising §§ 1.903(c) and 22.3(b), the requirement that an authorization be obtained to operate general aviation airborne mobile stations in the Air-Ground Radiotelephone Service. We also eliminate FCC Form 409 and delete references to that form in §§ 1.1102 and 1.2003 of our rules.

2. Idle Tone

49. Section 22.811 provides that, when a ground station transmitter authorized to transmit on any Air-Ground Radiotelephone Service channel listed in § 22.805 (for general aviation air-ground service) is available for service but idle, it must continuously transmit a modulated signal on that channel with a power between 10 and 20 dB lower than the normal transmitting power. We continue to believe that the deletion of § 22.811 from our rules is warranted. We take this opportunity to point out that the removal of this rule in no way prohibits carriers from employing the idle control tone. To the contrary, the action we take today is permissive. To the extent that idle tone transmissions are deemed valuable by system operators, they are free to continue to use it. In light of today's automated system, however, we do not believe that mandating its continued use is warranted.

3. Construction Period for General Aviation Ground Stations

50. Section 22.815 provides that "[t]he construction period (*see* § 22.142) for general aviation ground stations is 12 months." We correct the reference in § 22.815 to specify the actual rule section, § 1.946.

4. AGRAS

51. Section 22.819 provides that, after January 1, 1996, stations transmitting on the general aviation air-ground service channels must operate in compliance with the requirements set forth in the document, "Technical Reference, Air-ground Radiotelephone Automated Service (AGRAS), System Operation and Equipment Characteristics," dated April 12, 1985. The industry is currently developing a new operating technology that may be superior to AGRAS.

52. We delete § 22.819. Our deletion of the rule does not mean that the AGRAS protocols are prohibited. To the contrary, technological advancements in this area may continue to utilize AGRAS protocols if developers believe it would be appropriate. We are unwilling at this time to mandate the use of a particular technology when the market is more suited to make these decisions. We also believe that it is unlikely that the industry would simply forsake the current users of these systems.

C. Revision of Part 22 Non-Cellular Rules

1. Scope and Authority

a. Authorization Required, General Eligibility, and Definitions

53. Section 22.3(b) provides that, except for certain stations in the Rural Radiotelephone Service and the Air-Ground Radiotelephone Service, the operation by subscribers of mobile or fixed stations in the Public Mobile Services is covered by the authorization held by the common carrier providing service to them. Part 22 also contains other rules that use the term "common carrier." Section 22.7 states that,

"except as otherwise provided in this part, existing and proposed common carriers are eligible to hold authorizations in the Public Mobile Services." We also pointed out that several of the definitions contained in § 22.99 include references to the term "common carrier." Finally, we observed that the distinctions previously drawn between a radio common carrier and a wireline common carrier under the part 22 rules became obsolete in 1984.

54. We revise §§ 22.3(b), 22.7, and 22.99 by replacing the term "common carrier" with the term "licensee," and thus deleting the requirement that licensees in part 22 services be common carriers. We also revise § 22.1(b) to delete the reference to "domestic common carrier," and § 22.401 to delete the words "Communications common carriers" and replace with the words "Eligible entities (*see* § 22.7)." Section 22.351, regarding channel assignments, should be similarly amended. Finally, we delete the definitions for Radio Common Carrier and Wireline Common Carrier, as these terms are no longer used in part 22, and correct references to the term "Air-ground Radiotelephone Service" contained in several definitions in § 22.99 to read "Air-Ground Radiotelephone Service."

2. Licensing Requirements and Procedures

a. Construction Prior to Grant of Application

55. Section 22.143(d)(4) of our rules provides that, for any pre-grant construction or alteration that would exceed the requirements of § 17.7, the licensee must notify the FAA and file a request for antenna height clearance and obstruction and marking specifications (FCC Form 854) with the FCC, PRB, Support Services Branch, Gettysburg, PA 17325. The correct filing location for FCC Form 854 is WTB, Spectrum Management Resources and Technologies Division, 1270 Fairfield Road, Gettysburg, PA 17325. We revise FCC Form 854 accordingly, and we amend § 22.143(d)(4) of our rules to include this updated address.

b. Computation of Distance

56. We recodify § 22.157 as new § 1.958 in part 1, subpart F. This will make the § 22.157 distance calculation method applicable to all Wireless Radio Services described in parts 1 (except parts 21 and 101 as explained below), 20, 22, 24, 27, 80, 87, 90, 95, and 97, and supersede any conflicting regulations in these parts. We note that software used by the Commission to process applications under parts 21 (Domestic Public Fixed Radio Services) and 101 (Fixed Microwave Services) is programmed to round the result of a distance calculation to the nearest tenth of a kilometer. Accordingly, we include language in new § 1.958 to indicate that distance calculations for applications under these parts must be rounded to the nearest tenth of a kilometer.

c. Computation of Terrain Elevation

57. We recodify § 22.159 as new § 1.959 in part 1, subpart F. Part 90 services in the 470–512 MHz band, due to their proximity to TV operations, will continue to be governed by § 90.309(a)(4). Thus, all wireless services under parts 1, 20, 22, 24, 27, 80, 87, 90 (except the 470–512 MHz band), 95, 97 and 101 will be subject to the same computation methodology.

d. ASSB

58. Section 22.161 sets forth application requirements for base stations in the Paging and Radiotelephone Service, Rural Radiotelephone Service, and Offshore Radiotelephone Service where the applicant proposes to employ amplitude compandored single sideband modulation (ASSB). We delete § 22.161. This rule section is obsolete in light of § 22.357, which permits part 22 licensees to use any emission type that complies with applicable emission limits.

3. Operational and Technical Requirements

a. Channel Assignment Policy

59. Section 22.351 sets forth the general policy for the assignment of PMS channels. The third sentence of this section uses the term "common carrier." We amend § 22.351 to replace the term "common carrier" with the term "licensee."

b. Interference Protection

60. Section 22.352 provides, in pertinent part, that PMS licensees shall be considered non-interfering if they operate in accordance with FCC rules that provide technical channel assignment criteria for the radio service or channels involved, all other applicable FCC rules, and the terms and conditions of their authorizations. We modify the relevant portion of § 22.352 to read "Public Mobile Service stations operating in accordance with applicable FCC rules and the terms and conditions of their authorizations are normally considered to be non-interfering." The streamlined wording we adopt more accurately reflects how the Commission currently addresses interference issues, as we make clear that operation consistent with Commission rules and the applicable authorization—whether on a site-by-site basis or on a geographic area basis—creates a presumption of non-interfering operation.

c. Emission Types and Emission Masks

61. An emission mask is defined as "[t]he design limits imposed, as a condition or certification, on the mean power of emissions as a function of frequency both within the authorized bandwidth and in the adjacent spectrum." Section 22.357 provides that any authorized PMS station may use any type of emission provided that it complies with the appropriate emission mask. Section 22.359 is the general emission mask rule. Section 22.861 is the emission limitations and mask rule for commercial aviation air-ground systems. At the time the Commission adopted the part 22 rules, it generally used the emission mask approach to regulate in-band energy distribution. Recently, however, the Commission has been decreasing its reliance on the use of emission masks as a means to limit interference and, instead, increased its reliance on the use of out-of-band emission (OOBE) limits. The salient difference between emission masks and OOBE limits is that OOBE limits do not limit emission levels within a particular frequency band. Rather, they are intended to limit emissions outside of the authorized bandwidth.

62. Consistent with the recent increased use of OOBE limits, we replace the emission mask requirements found in §§ 22.357, 22.359, and 22.861 with an OOBE limitation. We believe that OOBE limitations are preferable to emission masks for the PMS because OOBE limitations do not need to be revised every time a new technology is implemented (unlike emission masks). Moreover, OOBE limitations make more sense with channels that are often combined in blocks, since there is no need for a single licensee on adjacent channels to be required to use an emission mask on each channel to protect itself. OOBE limitations protect services operating beyond the outer edges of the channel block. Emission masks require protection of each individual channel within the block.

d. Standby Facilities

63. Section 22.361 permits PMS licensees to install standby transmitters, without separate authorization, to continue service in the event of transmitter failure or during transmitter maintenance. It is now universally understood in the wireless industry that licensees are not required to obtain a separate authorization to install standby

transmitters. Eliminating § 22.361 is warranted. We also note that doing so is in line with our desire to streamline or eliminate rules that are no longer necessary. Thus, we eliminate § 22.361.

e. Directional Antennas

64. Section 22.363 and Table C–2 to § 22.361 set forth directional antenna technical requirements. These requirements were adopted at a time when the Commission generally considered fixed wireless operations to be secondary to mobile operations. These regulations appear to no longer be necessary because, when the Commission licenses spectrum today, it provides greater flexibility to licensees to use the spectrum for mobile or fixed operations. We eliminate § 22.363 and Table C–2 to § 22.361.

f. Wave Polarization

65. Section 22.367 sets forth polarization requirements for the electromagnetic waves radiated by PMS providers. Where fixed and mobile services operate on a co-channel basis, the polarization restrictions may no longer be necessary or effective in reducing interference. We delete § 22.367.

g. Access to Transmitters

66. Section 22.373 generally requires PMS transmitters to be accessible only to persons authorized by the licensee. We remove § 22.373 from our rules. We believe that the rule is unnecessary due to the fact that licensees have an economic self-interest to prevent unauthorized access to their transmitters.

h. Replacement of Equipment

67. Section 22.379 permits PMS licensees to replace equipment without notifying the Commission, provided that such equipment meets certain technical requirements. Licensees have known since the rule change in 1994 that applications are not required for replacement equipment.

68. We therefore eliminate § 22.379.

i. Auxiliary Test Transmitters

69. Section 22.381 limits the use of auxiliary test transmitters to testing the performance of fixed receiving equipment located remotely from the control point. Section 22.381 further provides that such transmitters may only transmit on channels designated for mobile transmitters. We believe that § 22.381 unnecessarily restricts the use of test equipment, and therefore we eliminate this section from our rules. We are aware of no harm that would arise from operating auxiliary test transmitters on any authorized channel, whether base or mobile, and no commenters have suggested otherwise.

4. Developmental Authorizations

70. Part 22, subpart D—which includes §§ 22.401, 22.403, 22.409, 22.411, 22.413, 22.415, and 22.417—governs grant of developmental authorizations in the PMS. As pointed out in the *Notice*, a review of Commission records indicates that these rules are seldom used and, instead, parties frequently file waiver requests that are tantamount to requests for developmental authorizations.

a. Developmental Authorization of 43 MHz Paging Transmitters

71. Sections 22.411 and 22.531(a) provide that 43 MHz channels can be initially assigned only as developmental authorizations. The requirements of §§ 22.411 and 22.531(a) are intended to mitigate interference with the intermediate frequency stages of receivers in television sets and video recorders. Section 22.411 also requires licensees to conduct and file semi-annual surveys during the first two years of operation to determine the extent of any interference to broadcast television receivers. We believe that §§ 22.411 and 22.531(a) are no longer required. Modern NTSC televisions are no longer particularly vulnerable to interference from the 43 MHz paging frequencies. Previously, television sets utilized an intermediate frequency amplifier that converted the received channel to a frequency between 40 and 46 MHz. New television sets, on the other hand, no longer employ this type of technology. In addition, the number of licensees and new applications for these paging channels is minimal. Consequently, it appears that there is no need for developmental authorizations for 43 MHz paging transmitters, and we delete these sections of our rules.

b. Developmental Authorization of 928–960 MHz Fixed Transmitters

72. Section 22.415 provides that channels in the 928–931 and 952–960 MHz ranges may be assigned to fixed transmitters in point-to-multipoint systems at short-spaced locations (*i.e.*, those that do not meet the 70-mile separation requirement of § 22.625(a)). The Commission cannot issue any developmental authorizations under § 22.415 unless it waives the licensing prohibition of § 22.621. This language would no longer be necessary were we to adopt our proposal to eliminate § 22.415. In light of the prohibition in § 22.621 against licensing any new 900 MHz frequencies, we eliminate § 22.415 and modify § 22.625(a) by eliminating all text following the first sentence that pertains to short-spaced developmental authorizations under § 22.415.

c. Developmental Authorization of Meteor Burst Systems

73. Section 22.417 provides that Rural Radiotelephone Service (RRS) central office and rural subscriber stations in Alaska may use "meteor burst" propagation modes. Meteor burst systems bounce radio signals off the ionized trails of evaporating space rocks to receivers up to 1,000 miles away. Meteor burst technology, however, only works in brief spurts because a typical meteor trail has an average duration of a few hundred milliseconds, while wait times between suitable trails can range from a few seconds to minutes. As such, the technology is well-suited for bursty data transmissions but is not suitable for a continuous voice call. Section 22.725(c) provides that channels 42.40, 44.10, 44.20 and 45.90 MHz may be used for such purposes in Alaska. Section 22.729 governs station operations using meteor burst propagation modes on these channels. There are no part 22 licensees on these channels in Alaska, although there are some licenses issued under part 90.

74. We do not believe that RRS stations in Alaska would benefit from maintaining the licensing option under §§ 22.417, 22.725(c), and 22.729, and we delete these section from our rules. Currently, there are no licensees taking advantage of these rules. In addition, as a practical matter, meteor burst propagation cannot be used to transmit voice calls, which is at the core of the RRS. We also delete the definition of "meteor burst propagation mode" in § 22.99, the § 22.313(a)(3) station identification requirements for Rural Radiotelephone Service subscriber stations using meteor burst propagation, and the § 22.727(f) limits on transmitter output power for meteor burst stations.

5. Paging and Radiotelephone Service Rules

a. Composite Interference Contour Over Water

75. Under § 1.929(c)(1), any increase in the composite interference contour (CIC) of a site-based licensee in the Paging and Radiotelephone Service, Rural Radiotelephone Service, or 800 MHz Specialized Mobile Radio Service is a major modification of license that requires prior Commission approval. In March 2001, the Wireless Telecommunications Bureau conditionally waived § 1.929(c)(1) to

permit expansion of paging CICs over water on a secondary basis.

76. We amend § 1.929(c)(1) and treat expansions of the CIC of a site-based licensee in the Paging and Radiotelephone Service, Rural Radiotelephone Service, or 800 MHz Specialized Mobile Radio Service over water, on a secondary, non-interference basis to any geographic area licensee in the same area, as a minor, not major, modification of license. We also define the term "over water" as "over bodies of water that extend beyond county boundaries including, but not limited to, oceans, the Gulf of Mexico, and the Great Lakes." As a result, such expansions of the CIC are permissive and no notification to the Commission is required. The classification of these modifications as major can hamper a carrier's ability to respond to unexpected disruptions or to meet changes in consumer demand. Licensees providing service in coastal areas often need to relocate or adjust transmitting facilities in order to maintain and improve coverage. Moreover, CIC expansions that take place solely over water should pose no risk of interference to other systems on land, and Commission records indicate that we have not received any interference complaints arising from our current temporary policy of conditionally waiving § 1.929(c)(1). We also note the benefits to both licensees and the Bureau derived from the removal of these particular regulatory filing requirements. We believe that our action here will facilitate the provision of PMS services to the public.

b. Nationwide Network Paging Channels

77. Section 22.531(b) provides that frequencies 931.8875, 931.9125, and 931.9375 MHz may only be used for nationwide network paging service. Section 22.551 specifies the application process for such channels in the event one should become available for licensing, and provides additional rules for nationwide network paging service.

78. We believe that allowing licensees on these channels to provide services other than nationwide network paging is in line with our policy to facilitate flexible service offerings, our attempts to achieve regulatory parity among competing wireless services, and the highly competitive state of the paging industry. Similarly, we will apply our general paging licensing rules, including competitive bidding procedures, to license these channels in the event that one becomes available for licensing. Therefore, we delete §§ 22.313(a)(5), 22.531(b) and 22.551 from our rules.

c. Additional Channel Policies

79. Sections 22.539 and 22.569 govern the processing of applications for additional paging and mobile channels, respectively. In particular, these rules implement the Commission's general policy to assign only one paging or two mobile channels in an area to a carrier per application cycle. Carriers that seek to add channels to their systems in the same geographic service area may thus do so one at a time (two for mobile channels). Before applying for another channel, carriers must certify that service has commenced on the previously-granted channel(s).

80. We delete §§ 22.539 and 22.569 from our rules. Today, the part 22 paging channels set forth in these rule sections are licensed on a geographic area basis rather than assigned on a site-by-site basis. We no longer place a blanket restriction on the amount of spectrum that a single entity may hold in one area (although we review competitive issues involving paging licensees on a case-by-case basis). Incumbents operating on a site-by-site basis may expand their systems by assignment or transfer of a license or by participating in a spectrum auction. In addition, under our current licensing scheme for paging channels, we place no blanket restrictions on the number of overlapping part 22 paging channels that a particular entity may hold in one area. Consequently, we believe that maintaining these rules is unnecessary.

d. Provision of Rural Radiotelephone Service on Paging Channels

81. Section 22.563 requires stations in the Paging and Radiotelephone Service that provide two-way public mobile service on certain channels to also provide Rural Radiotelephone Service (RRS) upon request from a subscriber. These channels are now predominantly assigned for use by one-way paging systems that are technically incapable of providing RRS. We believe that § 22.563 is no longer needed. Not only are most of these channels assigned for one-way paging use, there are now a number of wireless telephone service alternatives to RRS (*e.g.*, cellular, PCS, and some SMR). Moreover, consumers in many areas—including rural areas—have begun to substitute cellular, PCS, and some SMR service for landline service. This nascent trend is driven in part by wireless service plans that include the price of long distance service that may reduce a consumer's aggregate charges for local and toll service. In light of these circumstances and the fact that rural subscribers may readily obtain fixed basic telephone services from a variety of sources, we delete § 22.563 from our rules.

e. Transmission Power Limits

82. Section 22.565(g) limits the effective radiated power (ERP) of dispatch and auxiliary test transmitters to 100 watts. We delete § 22.565(g) so that test transmitters may operate, pursuant to § 22.565(a), at a limit of 150 watts. We note that because we have decided to permit auxiliary test transmitters to operate on both base and mobile frequencies, licensees can now choose to operate on either the base or the mobile side of the frequency subject to the 150-watt limit under § 22.565(a).

f. Dispatch Service

83. Section 22.577 governs the provision of dispatch service. We believe that the deletion of § 22.577 of our rules is warranted. We find that the rule is outdated and no longer necessary. Moreover, "limits on output power and the functionality of the dispatch transmitter" are out of line with the Commission's emphasis on "flexible spectrum use." In addition, part 90 dispatch operations are not subject to such restrictions, and that the removal of § 22.577 will "expand the choices to wireless end users." We therefore delete § 22.577.

g. Channels for Point-to-Point Operation—Microwave Channels

84. Section 22.591 also includes a table of 2110–2130 and 2160–2180 MHz microwave channels. In 1992, the Commission allocated these bands for use by emerging technologies (ET) services and no new systems may be authorized on these channels under part 22. Recently, the Commission allocated, *inter alia*, the 2110–2130 MHz band for Advanced Wireless Services (AWS). At present, both the 2110–2130 and 2160–2180 MHz bands are widely used for common carrier fixed microwave service.

85. In addition, § 22.601 specifies rules for modification of previously authorized part 22 stations on the 2110–2130 and 2160–2180 MHz channels. Section 22.602 sets forth rules governing a transition period for Paging and Radiotelephone Service licensees on the microwave channels listed in § 22.591 to relocate to other frequencies. We delete the microwave channels from the § 22.591 table and delete § 22.591(b) regarding the assignment of such channels. We will allow the licenses to expire at the end of their current authorizations, and we will not renew them for another license term. These microwave incumbents will, in the meantime, continue to be subject to

§§ 22.601 and 22.602 (although once their license terms end, these sections will become superfluous). We will delete the cross-reference to § 22.591 in §§ 22.601 and 22.602 and, instead, reference the 2110–2130 and 2160–2180 MHz channels.

h. Effective Radiated Power Limits

86. Section 22.593 specifies power limits for the channels enumerated in § 22.591. Although we are deleting the microwave channels listed in § 22.591, these microwave licensees are still subject to § 22.593, which specifies the EIRP of the microwave channels listed in § 22.591. Consequently, we will not amend this rule until after the subject licenses have expired.

i. Channel Usage Reports

87. Section 22.655 requires a subcategory of paging licensees—470–512 MHz band licensees—to submit defined channel usage reports every three months. Only two carriers must still file these reports; they have maintained mobile usage of the channels for some time, and loading reporting requirements for other paging operators have been eliminated.

88. We eliminate § 22.655 so that we no longer require licensees engaged in trunked mobile operations to measure and report channel usage. The continuation of this reporting requirement is burdensome and no longer necessary. Moreover, there are only two licensees that currently remain subject to this requirement, while the majority of CMRS licensees using the 470–512 MHz band do not have to submit these quarterly reports. Given these circumstances, we do not believe that the continued channel usage reporting requirements are warranted.

6. Rural Radiotelephone Service Rules-Channels for Basic Exchange Telephone Radio Systems

89. Section 22.757 specifies channels (in addition to those listed in § 22.725) in the frequency ranges 816.0125–820.2375 MHz and 861.0125–865.2375 MHz that are allocated for paired assignment to basic exchange telephone radio systems (BETRS). The Commission auctioned these channels on a geographic area basis in Auction 16, and that they are no longer available for assignment to BETRS. We therefore eliminate § 22.757 and amend the first sentence of § 22.725 to provide that the channels listed therein are available for paired assignment to BETRS.

7. Offshore Radiotelephone Service Rules

90. Subpart I of part 22—which includes §§ 22.1001, 22.1003, 22.1005, 22.1007, 22.1009, 22.1011, 22.1013, 22.1015, 22.1025, 22.1031, 22.1035, and 22.1037—governs the licensing and operation of Offshore Radiotelephone Service (ORS) stations. These stations provide telephone service to subscribers located on oil exploration and production platforms in the Gulf of Mexico. At this time, we take no action on the majority of the rules in this Subpart, and we will revisit the ORS rules at another time. We also revise § 22.1003, to revise the eligibility requirements to eliminate references to "common carriers" and instead to rely on language similar to that used in parts 24 and 27 ("[a]ny entity, other than those precluded by section 310 of the Communications Act of 1934, as amended, 47 U.S.C. 310, * * * is eligible to hold a license under this part").

Procedural Matters

Final Regulatory Flexibility Analysis

91. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*Notice*) in this proceeding, WT Docket No. 03–103. The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

D. Need for, and Objectives of, the Report and Order

92. The *Report and Order* addresses revision of the rules and spectrum band plan for the 800 MHz commercial Air-Ground Radiotelephone Service spectrum. A total of four megahertz of spectrum is currently allocated for this service. Although the Commission originally licensed six operators to provide service in this band on a shared basis using narrowband channels, only one licensee (Verizon Airfone) continues to operate in the band. Its operations are subject to a number of specific technical requirements designed to facilitate sharing among licensees. Given the constraints on current operations in this band and the changing demands of the public with respect to wireless telecommunications services, the *Notice* requested comment on how best to reconfigure this band and revise the related service rules in order to meet consumer needs and promote flexible, competitive use of this spectrum.

93. The *Report and Order* makes available new nationwide air-ground licenses in three band configurations: (1) Band plan 1, comprised of two overlapping, shared, cross-polarized 3 MHz licenses (licenses A and B, respectively), (2) band plan 2, comprised of an exclusive 3 MHz license and an exclusive 1 MHz license (licenses C and D, respectively), and (3) band plan 3, comprised of an exclusive 1 MHz license and an exclusive 3 MHz license (licenses E and F, respectively), with the blocks at opposite ends of the band from the second configuration. Licenses will have a 10-year term. Licenses will be awarded to winning bidders for the licenses comprising the configuration that receives the highest aggregate gross bid, subject to long-form license application review.

94. The *Report and Order* also takes action on a range of proposals for updating the Commission's part 1, 22, and 90 rules. Some of these steps are taken pursuant to the Commission's biennial review obligations as well as to implement the results of staff review of the part 22 non-cellular rules. The *Report and Order* revises and eliminates many rule sections in light of technological change, increased competition in Commercial Mobile Radio Services, supervening changes to the Commission's rules, or a combination of factors. These rule changes also include actions to harmonize the treatment of various wireless services.

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

95. We received no comments in response to the IRFA. As described in section E below, we have nonetheless considered potential significant economic impacts of our actions on small entities.

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

96. 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).

97. *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.

98. *Cellular Licensees.* As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census category "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 Cellular and Other Wireless Telecommunications firms, 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 category and size standard, the great majority of firms can be considered small. According to the most recent Trends in Telephone Service data, 719 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data. We have estimated that 294 of these are small, under the SBA small business size standard.

99. *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.

100. In the *Paging Second Report and Order*, 62 FR 11616, March 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, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 589 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.

101. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are currently 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.

102. *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 Basic Exchange Telephone Radio System (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 proposed herein.

103. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service. Again, we note that SBA has a 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. (See also the *Notice* and associated IRFA in this proceeding, which describe two proposed small business size standards for the commercial Air-Ground Radiotelephone Service.)

104. *Wireless Communications Equipment Manufacturers.* Some of the actions in the *Report and Order* could also benefit equipment manufacturers. The SBA has established a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. Examples of products in this category include "transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment" and may include other devices that transmit and receive IP-enabled services, such as personal digital assistants (PDAs). Under the SBA size standard, firms are considered small if they have 750 or fewer

employees. According to Census Bureau data for 1997, there were 1,215 establishments in this category that operated for the entire year. Of those, there were 1,150 that had employment of under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category was approximately 61.35%, so we estimate that the number of wireless equipment manufacturers with employment of under 500 was actually closer to 706, with and additional 23 establishments having employment of between 500 and 999. Consequently, we estimate that the majority of wireless communications equipment manufacturers are small entities that may be affected by our action.

G. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

105. In this *Report and Order*, we are not adopting any new rules that would add reporting, recordkeeping, or other compliance requirements. We only modify or eliminate certain rules, thereby eliminating economic burdens for small and other sized entities. For example, we amend § 1.929(c)(1) of our rules to specify that expansion of a composite interference contour (CIC) of a site-based licensee in the Paging and Radiotelephone Service—as well as the Rural Radiotelephone Service and 800 MHz Specialized Mobile Radio Service—over water on a secondary, non-interference basis should be classified as a minor (rather than major) modification of license. Such reclassification should substantially reduce the filing requirements associated with these license modifications.

H. Steps Taken To Minimize Significant Economic Impact on Small Entities, And Significant Alternatives Considered

106. 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."

107. We do not anticipate any adverse impact on small entities resulting from either reconfiguration of the 800 MHz Air-Ground Radiotelephone Service band plan or revision of the related service rules. Currently, there is only one licensee in this band and demand for its service has markedly declined. The flexible approach to reconfiguration of the 800 MHz air-ground band adopted in the *Report and Order* will promote our goal of facilitating the highest valued use of this spectrum, resulting in the provision of wireless communications services that better meet the needs of the traveling public onboard aircraft.

108. In order to promote competition in the 800 MHz air-ground band, the *Report and Order* prohibits any party from obtaining a controlling interest, either at auction or by a post-auction transaction, in more than three megahertz of spectrum (either shared or exclusive) in the band. No single entity, therefore, may hold more than one license in any of the available band configurations. The *Report and Order* adopts limited technical constraints in order to provide the eventual licensees with significant operational flexibility to provide broadband telecommunications services to commercial airline passengers and others while onboard aircraft. We note that the technical rules will, among other things, ensure that operations in this band do not cause harmful interference to adjacent bands, including cellular, SMR, and public safety. The *Report and Order* provides that future licensees in the 800 MHz air-ground band, as well as other interested parties, will have the opportunity to engage in spectrum leasing under the Commission's rules. Future licensees will also be permitted to engage in partitioning and/or disaggregation of their licenses. These regulatory opportunities are intended to provide the air-ground marketplace greater flexibility to respond to consumer demand. The regulatory approach adopted in the *Report and Order* will benefit both small and large entities.

109. Regarding the modification or elimination of rules stemming from our Biennial Regulatory Review responsibilities, we do not anticipate any adverse impact on small entities. To the contrary, to the extent that there is any direct impact at all, streamlining and harmonizing technical and operational rules should result in decreasing regulatory burdens that benefit both small and large entities.

I. Report to Congress

110. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA.

Ordering Clauses

111. Pursuant to the authority contained in sections 1, 4(i), 11, 303(r) and (y), 308, 309, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 161, 303(r), 303(y), 308, 309, and 332, this *Report and Order* is hereby adopted, and parts 1, 22, and 90 of the Commission's rules are amended accordingly.

112. Pursuant to sections 4(i), 301, and 307 of the Communications Act, as amended, 47 U.S.C. 154(i), 301, and 307, a new license for Station KNKG804, is granted to Verizon Airfone Inc. for a five-year non-renewable term in accordance with the terms and conditions set forth above (file no. 0001716212).

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Radio, Reporting and Recordkeeping requirements, Telecommunications.

47 CFR Part 22

Communications common carriers, Radio.

47 CFR Part 90

Business and Industry, Common carriers, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 1, 22, and 90 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, and 303(r).

■ 2. In § 1.903, revise paragraph (c) to read as follows:

§ 1.903 Authorization required.

* * * * *

(c) *Subscribers.* Authority for subscribers to operate mobile or fixed stations in the Wireless Radio Services,

except for certain stations in the Rural Radiotelephone Service, is included in the authorization held by the licensee providing service to them. Subscribers are not required to apply for, and the Commission does not accept, applications from subscribers for individual mobile or fixed station authorizations in the Wireless Radio Services. Individual authorizations are required to operate rural subscriber stations in the Rural Radiotelephone Service, except as provided in § 22.703 of this chapter. Individual authorizations are required for end users of certain Specialized Mobile Radio Systems as provided in § 90.655 of this chapter. In addition, certain ships and aircraft are required to be individually licensed under parts 80 and 87 of this chapter. See §§ 80.13, 87.18 of this chapter.

■ 3. In § 1.929, revise paragraph (c)(1) to read as follows:

§ 1.929 Classification of filings as major or minor.

* * * * *

(c) * * *

(1) In the Paging and Radiotelephone Service, Rural Radiotelephone Service and 800 MHz Specialized Mobile Radio Service (SMR), any change that would increase or expand the applicant's existing composite interference contour, except extensions of a composite interference contour over bodies of water that extend beyond county boundaries (*i.e.*, including but not limited to oceans, the Gulf of Mexico, and the Great Lakes) on a secondary basis.

* * * * *

■ 4. Add § 1.958 to read as follows:

§ 1.958 Distance computation.

The method given in this section must be used to compute the distance between any two locations, except that, for computation of distance involving stations in Canada and Mexico, methods for distance computation specified in the applicable international agreement, if any, must be used instead. The result of a distance calculation under parts 21 and 101 of this chapter must be rounded to the nearest tenth of a kilometer. The method set forth in this paragraph is considered to be sufficiently accurate for distances not exceeding 475 km (295 miles).

(a) Convert the latitudes and longitudes of each reference point from degree-minute-second format to degree-decimal format by dividing minutes by 60 and seconds by 3600, then adding the results to degrees.

$$LATX_{dd} = DD + \frac{MM}{60} + \frac{SS}{3600}$$

$$LONX_{dd} = DDD + \frac{MM}{60} + \frac{SS}{3600}$$

(b) Calculate the mean geodetic latitude between the two reference points by averaging the two latitudes:

$$ML = \frac{LAT1_{dd} + LAT2_{dd}}{2}$$

(c) Calculate the number of kilometers per degree latitude difference for the mean geodetic latitude calculated in paragraph (b) of this section as follows:

$KPD_{lat} = 111.13209 - 0.56605 \cos 2ML + 0.00120 \cos 4ML$

(d) Calculate the number of kilometers per degree of longitude difference for the mean geodetic latitude calculated in paragraph (b) of this section as follows:

$KPD_{lon} = 111.41513 \cos 5ML - 0.09455 \cos 3ML + 0.00012 \cos 5ML$

(e) Calculate the North-South distance in kilometers as follows:

$NS = KPD_{lat} \times (LAT1_{dd} - LAT2_{dd})$

(f) Calculate the East-West distance in kilometers as follows:

$EW = KPD_{lon} \times (LON1_{dd} - LON2_{dd})$

(g) Calculate the distance between the locations by taking the square root of the sum of the squares of the East-West and North-South distances:

$$DIST = \sqrt{NS^2 + EW^2}$$

(h) Terms used in this section are defined as follows:

(1) $LAT1_{dd}$ and $LON1_{dd}$ are the coordinates of the first location in degree-decimal format.

(2) $LAT2_{dd}$ and $LON2_{dd}$ are the coordinates of the second location in degree-decimal format.

(3) ML is the mean geodetic latitude in degree-decimal format.

(4) KPD_{lat} is the number of kilometers per degree of latitude at a given mean geodetic latitude.

(5) KPD_{lon} is the number of kilometers per degree of longitude at a given mean geodetic latitude.

(6) NS is the North-South distance in kilometers.

(7) EW is the East-West distance in kilometers.

(8) DIST is the distance between the two locations, in kilometers.

■ 5. Add § 1.959 to read as follows:

§ 1.959 Computation of average terrain elevation.

Except as otherwise specified in § 90.309(a)(4) of this chapter, average terrain elevation must be calculated by computer using elevations from a 30 second point or better topographic data file. The file must be identified. If a 30 second point data file is used, the elevation data must be processed for intermediate points using interpolation techniques; otherwise, the nearest point may be used. In cases of dispute, average terrain elevation determinations can also be done manually, if the results differ significantly from the computer derived averages.

(a) Radial average terrain elevation is calculated as the average of the elevation along a straight line path from 3 to 16 kilometers (2 and 10 miles) extending radially from the antenna site. If a portion of the radial path extends over foreign territory or water, such portion must not be included in the computation of average elevation unless the radial path again passes over United States land between 16 and 134 kilometers (10 and 83 miles) away from the station. At least 50 evenly spaced data points for each radial should be used in the computation.

(b) Average terrain elevation is the average of the eight radial average terrain elevations (for the eight cardinal radials).

(c) For locations in Dade and Broward Counties, Florida, the method prescribed above may be used or average terrain elevation may be assumed to be 3 meters (10 feet).

§ 1.1102 [Amended]

■ 6. In the table in § 1.1102, revise page 19 of the table by removing row entry 16.h. "Air Ground Individual". The revised page 19 is set forth below.

17. Cellular a. New; Major Mod; Additional Facility; Major Renewal/Mod (Per Call Sign) (Electronic Filing Required)	601 & 159	$340.00	CMC	Federal Communications Commission Wireless Bureau Applications (ELT) P.O. Box 358994 Pittsburgh, PA 15251-5994
b. Minor Modification; Minor Renewal/Mod (Per Call Sign (Electronic Filing Required)	601 & 159	$90.00	CDC	Federal Communications Commission Wireless Bureau Applications (ELT) P.O. Box 358994 Pittsburgh, PA 15251-5994
c. Assignment of License; Transfer of Control (Full or Partial) (Per Call Sign) Spectrum Leasing (Electronic Filing Required)	603 & 159 603-T & 159	$340.00	CMC	Federal Communications Commission Wireless Bureau Applications (ELT) P.O. Box 358994 Pittsburgh, PA 15251-5994
d. Notice of Extension of Time to Complete Construction; (Per Request) Renewal (Per Call Sign) (Electronic Filing Required)	601 & 159	$55.00	CAC	Federal Communications Commission Wireless Bureau Applications (ELT) P.O. Box 358994 Pittsburgh, PA 15251-5994
e. Special Temporary Authority (Per Request)	601 & 159	$295.00	CLC	Federal Communications Commission Wireless Bureau Applications P.O. Box 358130 Pittsburgh, PA 15251-5130
f. Special Temporary Authority (Per Request) (Electronic Filing)	601 & 159	$295.00	CLC	Federal Communications Commission Wireless Bureau Applications (ELT) P.O. Box 358994 Pittsburgh, PA 15251-5994
g. Combining Cellular Geographic Areas (Per Area) (Electronic Filing Required)	601 & 159	$75.00	CBC	Federal Communications Commission Wireless Bureau Applications (ELT) P.O. Box 358994 Pittsburgh, PA 15251-5994

§ 1.2003 [Amended]

■ 7. In § 1.2003, remove the entry for "FCC 409 Airborne Mobile Radio Telephone License Application;".

PART 22—PUBLIC MOBILE SERVICES

■ 8. The authority citation for part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 222, 303, 309 and 332.

■ 9. In § 22.1, revise paragraph (b) to read as follows:

§ 22.1 Basis and purpose.

* * * * *

(b) *Purpose.* The purpose of these rules is to establish the requirements and conditions under which radio stations may be licensed and used in the Public Mobile Services.

■ 10. In § 22.3, revise paragraph (b) to read as follows:

§ 22.3 Authorization required.

* * * * *

(b) Authority for subscribers to operate mobile or fixed stations in the Public Mobile Services, except for certain stations in the Rural Radiotelephone Service, is included in the authorization held by the licensee providing service to them. Subscribers are not required to apply for, and the FCC does not accept applications from subscribers for, individual mobile or fixed station authorizations in the Public Mobile Services, except that individual authorizations are required to operate rural subscriber stations in the Rural Radiotelephone Service under certain circumstances. See § 22.703.

■ 11. Revise § 22.7 to read as follows:

§ 22.7 General eligibility.

Any entity, other than those precluded by section 310 of the Communications Act of 1934, as amended, 47 U.S.C. 310, is eligible to hold a license under this part. Applications are granted only if the applicant is legally, financially, technically and otherwise qualified to render the proposed service.

■ 12. Amend in § 22.99, by revising the definitions for "Air-Ground Radiotelephone Service", "Cellular Radiotelephone Service", "Channel", "Communications channel", "Control

channel", "Ground station", "Offshore Radiotelephone Service", "Public Mobile Services", and "Rural Radiotelephone Service", and by removing the terms "Meteor burst propagation mode", "Radio Common Carrier", and "Wireline Common Carrier" to read as follows:

§ 22.99 Definitions.

Air-Ground Radiotelephone Service. A radio service in which licensees are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.

* * * * *

Cellular Radiotelephone Service. A radio service in which licensees are authorized to offer and provide cellular service for hire to the general public. This service was formerly titled Domestic Public Cellular Radio Telecommunications Service.

* * * * *

Channel. The portion of the electromagnetic spectrum assigned by the FCC for one emission. In certain circumstances, however, more than one emission may be transmitted on a channel.

* * * * *

Communications channel. In the Cellular Radiotelephone and Air-Ground Radiotelephone Services, a channel used to carry subscriber communications.

* * * * *

Control channel. In the Cellular Radiotelephone Service and the Air-Ground Radiotelephone Service, a channel used to transmit information necessary to establish or maintain communications. In the other Public Mobile Services, a channel that may be assigned to a control transmitter.

* * * * *

Ground station. In the Air-Ground Radiotelephone Service, a stationary transmitter that provides service to airborne mobile stations.

* * * * *

Offshore Radiotelephone Service. A radio service in which licensees are authorized to offer and provide radio telecommunication services for hire to subscribers on structures in the offshore coastal waters of the Gulf of Mexico.

* * * * *

Public Mobile Services. Radio services in which licensees are authorized to offer and provide mobile and related fixed radio telecommunication services for hire to the public.

* * * * *

Rural Radiotelephone Service. A radio service in which licensees are authorized to offer and provide radio telecommunication services for hire to subscribers in areas where it is not feasible to provide communication services by wire or other means.

* * * * *

■ 13. Revise paragraph (d)(4) of § 22.143 to read as follows:

§ 22.143 Construction prior to grant of application.

* * * * *

(d) * * *

(4) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460–1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC at WTB, Spectrum Management Resources and Technologies Division, 1270 Fairfield Road, Gettysburg, PA 17325, or electronically via the FCC Antenna Structure Registration home page, *wireless.fcc.gov/antenna/*.

* * * * *

§ 22.157 [Removed]

■ 14. Remove § 22.157.

§ 22.159 [Removed]

■ 15. Remove § 22.159.

§ 22.161 [Removed]

■ 16. Remove § 22.161.

§ 22.313 [Amended]

■ 17. Remove and reserve paragraphs (a)(3) and (a)(5) of § 22.313.

■ 18. Revise § 22.351 to read as follows:

§ 22.351 Channel assignment policy.

The channels allocated for use in the Public Mobile Services are listed in the applicable subparts of this part. Channels and channel blocks are assigned in such a manner as to facilitate the rendition of service on an interference-free basis in each service area. Except as otherwise provided in this part, each channel or channel block is assigned exclusively to one licensee in each service area. All applicants for, and licensees of, stations in the Public Mobile Services shall cooperate in the selection and use of channels in order to minimize interference and obtain the most efficient use of the allocated spectrum.

■ 19. In § 22.352, revise the first sentence of the introductory text, to read as follows:

§ 22.352 Protection from interference.

Public Mobile Service stations operating in accordance with applicable FCC rules and the terms and conditions of their authorizations are normally considered to be non-interfering. * * *

* * * * *

■ 20. Revise § 22.357 to read as follows:

§ 22.357 Emission types.

Any authorized station in the Public Mobile Services may transmit emissions of any type(s) that comply with the applicable emission rule, *i.e.* § 22.359, § 22.861 or § 22.917.

■ 21. Revise § 22.359 to read as follows:

§ 22.359 Emission limitations.

The rules in this section govern the spectral characteristics of emissions in the Public Mobile Services, except for the Air-Ground Radiotelephone Service (see § 22.861, instead) and the Cellular Radiotelephone Service (see § 22.917, instead).

(a) *Out of band emissions.* The power of any emission outside of the authorized operating frequency ranges must be attenuated below the transmitting power (P) by a factor of at least 43 + 10 log (P) dB.

(b) *Measurement procedure.* Compliance with these rules is based on the use of measurement instrumentation employing a resolution bandwidth of 30 kHz or more. In the 60 kHz bands immediately outside and adjacent to the authorized frequency range or channel, a resolution bandwidth of at least one percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. A narrower resolution bandwidth is permitted in all cases to improve measurement accuracy provided the measured power is integrated over the full required measurement bandwidth (i.e., 30 kHz or 1 percent of emission bandwidth, as specified). The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power.

(c) *Alternative out of band emission limit.* Licensees in the Public Mobile Services may establish an alternative out of band emission limit to be used at specified frequencies (band edges) in specified geographical areas, in lieu of that set forth in this section, pursuant to a private contractual arrangement of all affected licensees and applicants. In this event, each party to such contract shall maintain a copy of the contract in their station files and disclose it to prospective assignees or transferees and, upon request, to the FCC.

(d) *Interference caused by out of band emissions.* If any emission from a

transmitter operating in any of the Public Mobile Services results in interference to users of another radio service, the FCC may require a greater attenuation of that emission than specified in this section.

§ 22.361 [Removed]

■ 22. Remove § 22.361.

§ 22.363 [Removed]

■ 23. Remove § 22.363.

§ 22.367 [Removed]

■ 24. Remove § 22.367.

§ 22.373 [Removed]

■ 25. Remove § 22.373.

§ 22.379 [Removed]

■ 26. Remove § 22.379.

§ 22.381 [Removed]

■ 27. Remove § 22.381.

■ 28. In § 22.401, the first sentence of the introductory text is revised to read as follows:

§ 22.401 Description and purposes of developmental authorizations.

Eligible entities (*see* § 22.7) may apply for, and the FCC may grant, authority to construct and operate one or more transmitters subject to the rules in this subpart and other limitations, waivers and/or conditions that may be prescribed. * * *

* * * * *

§ 22.411 [Removed]

■ 29. Remove § 22.411.

§ 22.415 [Removed]

■ 30. Remove § 22.415.

§ 22.417 [Removed]

■ 31. Remove § 22.417.

§ 22.531 [Amended]

■ 32. Remove and reserve paragraphs (a) and (b) of § 22.531.

§ 22.539 [Removed]

■ 33. Remove § 22.539.

§ 22.551 [Removed]

■ 34. Remove § 22.551.

§ 22.563 [Removed]

■ 35. Remove § 22.563.

§ 22.565 [Amended]

■ 36. Remove paragraph (g) of § 22.565.

§ 22.569 [Removed]

■ 37. Remove § 22.569.

§ 22.577 [Removed]

■ 38. Remove § 22.577.

§ 22.591 [Amended]

■ 39. In § 22.591, in the introductory text, remove the table entitled "Microwave channels", and remove and reserve paragraph (b).

■ 40. Revise § 22.593 to read as follows:

§ 22.593 Effective radiated power limits.

The effective radiated power of fixed stations operating on the channels listed in § 22.591 must not exceed 150 Watts. The equivalent isotropically radiated power of existing fixed microwave stations (2110–2130 and 2160–2180 MHz) licensed under this part (pursuant to former rules) must not exceed the applicable limits set forth in § 101.113 of this chapter.

■ 41. Revise the section heading and introductory text of § 22.601 to read as follows:

§ 22.601 Existing microwave stations licensed under this part.

Existing microwave stations (2110–2130 and 2160–2180 MHz) licensed under this part (pursuant to former rules) are subject to the transition rules in § 22.602. No new microwave systems will be authorized under this part.

* * * * *

■ 42. Revise the introductory paragraph of § 22.602 to read as follows:

§ 22.602 Transition of the 2110–2130 and 2160–2180 MHz channels to emerging technologies.

The 2110–2130 and 2160–2180 MHz microwave channels formerly listed in § 22.591 have been re-allocated for use by emerging technologies (ET) services. No new systems will be authorized under this part. The rules in this section provide for a transition period during which existing Paging and Radiotelephone Service (PARS) licensees using these channels may relocate operations to other media or to other fixed channels, including those in other microwave bands. For PARS licensees relocating operations to other microwave bands, authorization must be obtained under part 101 of this chapter.

* * * * *

■ 43. Revise paragraph (a) of § 22.625 to read as follows:

§ 22.625 Transmitter locations.

* * * * *

(a) *928–960 MHz.* In this frequency range, the required minimum distance separation between co-channel fixed transmitters is 113 kilometers (70 miles).

* * * * *

§ 22.655 [Removed]

■ 44. Remove § 22.655.

■ 45. In § 22.725, revise section heading, the first sentence of the introductory text, and by removing paragraph (c) to read as follows:

§ 22.725 Channels for conventional rural radiotelephone stations and basic exchange telephone radio systems.

The following channels are allocated for paired assignment to transmitters that provide conventional rural radiotelephone service and to transmitters in basic exchange telephone radio systems. * * *

* * * * *

§ 22.727 [Amended]

■ 46. Remove paragraph (f) of § 22.727.

§ 22.729 [Removed]

■ 47. Remove § 22.729.

■ 48. Revise § 22.757 to read as follows:

§ 22.757 Channels for basic exchange telephone radio systems.

The channels listed in § 22.725 are also allocated for paired assignment to transmitters in basic exchange telephone radio systems.

■ 49. Revise § 22.801 to read as follows:

§ 22.801 Scope.

The rules in this subpart govern the licensing and operation of air-ground stations and systems. The licensing and operation of these stations and systems is also subject to rules elsewhere in this part and in part 1 of this chapter that generally apply to the Public Mobile Services. In case of conflict, however, the rules in this subpart govern.

■ 50. Section 22.803 is amended as follows:

■ a. Redesignate § 22.803 as § 22.807.

■ b. Revise the newly designated section heading.

■ c. Revise the introductory text.

■ d. Revise paragraphs (b)(1) and (b)(2).

■ e. Remove paragraph (c).

The revisions read as follows:

§ 22.807 General aviation air-ground station application requirements.

In addition to the information required by subparts B and D of this part, FCC Form 601 applications for authorization to operate a general aviation air-ground station must contain the applicable supplementary information described in this section.

* * * * *

(b) *Technical information.* The following information is required by FCC Form 601.

(1) Location description, city, county, state, geographic coordinates (NAD83) correct to ±1 second, site elevation above mean sea level, proximity to adjacent market boundaries and international borders;

(2) Antenna height to tip above ground level, antenna gain in the maximum lobe, the electric field polarization of the wave emitted by the antenna when installed as proposed;

* * * * *

§ 22.811 [Removed]

■ 51. Remove § 22.811.

■ 52. Revise § 22.815 to read as follows:

§ 22.815 Construction period for general aviation ground stations.

The construction period (see § 1.946 of this chapter) for general aviation ground stations is 12 months.

§ 22.819 [Removed]

■ 53. Remove § 22.819.

■ 54. Add § 22.853 to read as follows:

§ 22.853 Eligibility to hold interest in licenses limited to 3 MHz of spectrum.

No individual or entity may hold, directly or indirectly, a controlling interest in licenses authorizing the use of more than three megahertz of spectrum (either shared or exclusive) in the 800 MHz commercial aviation Air-Ground Radiotelephone Service frequency bands (see § 22.857). Individuals and entities with either *de jure* or *de facto* control of a licensee in these bands will be considered to have a controlling interest in its license(s). For purposes of this rule, the definitions of "controlling interests" and "affiliate" set forth in paragraphs (c)(2) and (c)(5) of § 1.2110 of this chapter shall apply.

■ 55. Revise § 22.857 introductory text to read as follows:

§ 22.857 Frequency bands.

The 849–851 MHz and 894–896 MHz frequency bands are designated for paired nationwide exclusive assignment to the licensee or licensees of systems providing radio telecommunications service, including voice and/or data service, to persons on board aircraft. Air-ground systems operating in these frequency bands are referred to in this part as "commercial aviation" systems.

* * * * *

■ 56. Revise § 22.859 to read as follows:

§ 22.859 Incumbent commercial aviation air-ground systems.

This section contains rules concerning continued operation of commercial aviation air-ground systems that were originally authorized prior to January 1, 2004 to provide radiotelephone service using narrowband (6 kHz) channels, and that have been providing service continuously since the original commencement of service (hereinafter "incumbent systems").

(a) An incumbent system may continue to operate under its authorization, for the remaining term of such authorization, subject to the terms and conditions attached thereto. Wherever such technical and operational conditions differ from technical and operational rules in this subpart, those conditions shall govern its operations.

(b) Notwithstanding any other provision in this chapter, the licensee of an incumbent system shall not be entitled to an expectation of renewal of said authorization.

(c) During the period that an incumbent system continues to operate and provide service pursuant to paragraph (a) of this section, air-ground systems of licensees holding a new authorization for the spectrum within which the incumbent system operates must not cause interference to the incumbent system. Protection from interference requires that the signals of the new systems must not exceed a ground station received power of −130 dBm within a 6 kHz receive bandwidth, calculated assuming a 0 dBi vertically polarized receive antenna.

■ 57. Revise § 22.861 to read as follows:

§ 22.861 Emission limitations.

The rules in this section govern the spectral characteristics of emissions for commercial aviation systems in the Air-Ground Radiotelephone Service. Commercial aviation air-ground systems may use any type of emission or technology that complies with the technical rules in this subpart.

(a) *Out of band emissions.* The power of any emission outside of the authorized operating frequency ranges must be attenuated below the transmitting power (P) by a factor of at least 43 + 10 log (P) dB.

(b) *Measurement procedure.* Compliance with these rules is based on the use of measurement instrumentation employing a resolution bandwidth of 100 kHz or greater. In the 1 MHz bands immediately outside and adjacent to the frequency block a resolution bandwidth of at least one percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. A narrower resolution bandwidth is permitted in all cases to improve measurement accuracy provided the measured power is integrated over the full required measurement bandwidth (*i.e.*, 100 kHz or 1 percent of emission bandwidth, as specified). The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power.

(c) *Alternative out of band emission limit.* The licensee(s) of commercial aviation air-ground systems, together with affected licensees of Cellular Radiotelephone Service systems operating in the spectrum immediately below and adjacent to the commercial aviation air-ground bands, may establish an alternative out of band emission limit to be used at the 849 MHz and 894 MHz band edge(s) in specified geographical areas, in lieu of that set forth in this section, pursuant to a private contractual arrangement of all affected licensees and applicants. In this event, each party to such contract shall maintain a copy of the contract in their station files and disclose it to prospective assignees or transferees and, upon request, to the FCC.

(d) *Interference caused by out of band emissions.* If any emission from a transmitter operating in this service results in interference to users of another radio service, the FCC may require a greater attenuation of that emission than specified in this section.

■ 58. Revise § 22.863 to read as follows:

§ 22.863 Frequency stability.

The frequency stability of equipment used under this subpart shall be sufficient to ensure that, after accounting for Doppler frequency shifts, the occupied bandwidth of the fundamental emissions remains within the authorized frequency bands of operation.

§ 22.865 [Removed]

■ 59. Remove § 22.865.

■ 60. Revise § 22.867 to read as follows:

§ 22.867 Effective radiated power limits.

The effective radiated power (ERP) of ground and airborne stations operating on the frequency ranges listed in § 22.857 must not exceed the limits in this section.

(a) The peak ERP of airborne mobile station transmitters must not exceed 12 Watts.

(b) The peak ERP of ground station transmitters must not exceed 500 Watts.

§ 22.869 [Removed]

■ 61. Remove § 22.869.

§ 22.871 [Removed]

■ 62. Remove § 22.871.

■ 63. Revise § 22.873 to read as follows:

§ 22.873 Construction requirements for commercial aviation air-ground systems.

Licensees authorized to use more than one megahertz (1 MHz) of the 800 MHz commercial aviation air-ground

spectrum allocation (see § 22.857) must make a showing of "substantial service'" as set forth in this section. Failure by any such licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it. Licensees authorized to use one megahertz or less of the 800 MHz commercial aviation air-ground spectrum allocation are not subject to the requirements in this section.

(a) "Substantial service" is defined as service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.

(b) Each commercial aviation air-ground system subject to the requirements of this section must demonstrate substantial service within 5 years after grant of the authorization. Substantial service may be demonstrated by, but is not limited to, either of the following "safe harbor" provisions:

(1) Construction and operation of 20 ground stations, with at least one ground station located in each of the 10 Federal Aviation Administration regions; or,

(2) Provision of service to the airspace of 25 of the 50 busiest airports (as measured by annual passenger boardings).

§ 22.875 [Removed]

■ 64. Remove § 22.875.

■ 65. Add § 22.877 to read as follows:

§ 22.877 Unacceptable Interference to Part 90 non-cellular 800 MHz licensees from commercial aviation air-ground systems.

The definition of unacceptable interference to non-cellular part 90 licensees in the 800 MHz band from commercial aviation air-ground systems is the same as the definition set forth in § 22.970 which is applicable to Cellular Radiotelephone Service systems.

■ 66. Add § 22.878 to read as follows:

§ 22.878 Obligation to abate unacceptable interference.

This section applies only to commercial aviation ground stations transmitting in the 849–851 MHz band, other than commercial aviation ground stations operating under the authority of a license originally granted prior to January 1, 2004.

(a) *Strict responsibility.* Any licensee who, knowingly or unknowingly, directly or indirectly, causes or contributes to causing unacceptable interference to a non-cellular part 90 licensee in the 800 MHz band, as defined in § 22.877, shall be strictly accountable to abate the interference, with full cooperation and utmost diligence, in the shortest time practicable. Interfering licensees shall consider all feasible interference abatement measures, including, but not limited to, the remedies specified in the interference resolution procedures set forth in § 22.879. This strict responsibility obligation applies to all forms of interference, including out-of-band emissions and intermodulation.

(b) *Joint and Several responsibility.* If two or more licensees, whether in the commercial aviation air-ground radiotelephone service or in the Cellular Radiotelephone Service (see § 22.971), knowingly or unknowingly, directly or indirectly, cause or contribute to causing unacceptable interference to a non-cellular part 90 licensee in the 800 MHz band, as defined in § 22.877, such licensees shall be jointly and severally responsible for abating interference, with full cooperation and utmost diligence, in the shortest practicable time.

(1) This joint and several responsibility rule requires interfering licensees to consider all feasible interference abatement measures, including, but not limited to, the remedies specified in the interference resolution procedures set forth in § 22.879(c). This joint and several responsibility rule applies to all forms of interference, including out-of-band emissions and intermodulation.

(2) Any licensee that can show that its signal does not directly or indirectly cause or contribute to causing unacceptable interference to a non-cellular part 90 licensee in the 800 MHz band, as defined in § 22.877, shall not be held responsible for resolving unacceptable interference. Notwithstanding, any licensee that receives an interference complaint from a public safety/CII licensee shall respond to such complaint consistent with the interference resolution procedures set forth in § 22.879.

■ 67. Add § 22.879 to read as follows:

§ 22.879 Interference resolution procedures.

This section applies only to commercial aviation ground stations transmitting in the 849–851 MHz band, other than commercial aviation ground stations operating under the authority of a license originally granted prior to January 1, 2004.

(a) *Initial notification.* Commercial aviation air-ground system licensees may receive initial notification of interference from non-cellular part 90 licensees in the 800 MHz band pursuant to § 90.674(a) of this chapter.

(1) Commercial aviation air-ground system licensees shall join with part 90 ESMR licensees and Cellular Radiotelephone Service licensees in utilizing an electronic means of receiving the initial notification described in § 90.674(a) of this chapter. See § 22.972.

(2) Commercial aviation air-ground system licensees must respond to the initial notification described in § 90.674(a) of this chapter as soon as possible and no later than 24 hours after receipt of notification from a part 90 public safety/CII licensee. This response time may be extended to 48 hours after receipt from other part 90 non-cellular licensees provided affected communications on these systems are not safety related.

(b) *Interference analysis.* Commercial aviation air-ground system licensees—who receive an initial notification described in § 90.674(a) of this chapter—shall perform a timely analysis of the interference to identify the possible source. Immediate on-site visits may be conducted when necessary to complete timely analysis. Interference analysis must be completed and corrective action initiated within 48 hours of the initial complaint from a part 90 public safety/CII licensee. This response time may be extended to 96 hours after the initial complaint from other part 90 non-cellular licensees provided affected communications on these systems are not safety related. Corrective action may be delayed if the affected licensee agrees in writing (which may be, but is not required to be, recorded via e-mail or other electronic means) to a longer period.

(c) *Mitigation steps.* Any commercial aviation air-ground system that is responsible for causing unacceptable interference to non-cellular part 90 licensees in the 800 MHz band shall take affirmative measures to resolve such interference.

(1) Commercial aviation air-ground system licensees found to contribute to unacceptable interference, as defined in § 22.877, shall resolve such interference in the shortest time practicable. Commercial aviation air-ground system licensees must provide all necessary test apparatus and technical personnel skilled in the operation of such equipment as may be necessary to determine the most appropriate means of timely eliminating the interference. However, the means whereby interference is abated or the technical parameters that may need to be adjusted is left to the discretion of the commercial aviation air-ground system licensee, whose affirmative measures

may include, but not be limited to, the following techniques:

(i) Increasing the desired power of the public safety/CII signal;

(ii) Decreasing the power of the commercial aviation air-ground system signal;

(iii) Modifying the commercial aviation air-ground system antenna height;

(iv) Modifying the commercial aviation air-ground system antenna characteristics;

(v) Incorporating filters into the commercial aviation air-ground system transmission equipment;

(vi) Changing commercial aviation air-ground system frequencies; and

(vii) Supplying interference-resistant receivers to the affected public safety/CII licensee(s). If this technique is used, in all circumstances, commercial aviation air-ground system licensees shall be responsible for all costs thereof.

(2) Whenever short-term interference abatement measures prove inadequate, the affected part 90 non-cellular licensee shall, consistent with but not compromising safety, make all necessary concessions to accepting interference until a longer-term remedy can be implemented.

(3) When a part 90 public safety licensee determines that a continuing presence of interference constitutes a clear and imminent danger to life or property, the licensee causing the interference must discontinue the associated operation immediately, until a remedy can be identified and applied. The determination that a continuing presence exists that constitutes a clear and imminent danger to life or property, must be made by written statement that:

(i) Is in the form of a declaration, notarized affidavit, or statement under penalty or perjury, from an officer or executive of the affected public safety licensee;

(ii) Thoroughly describes the basis of the claim of clear and imminent danger;

(iii) Was formulated on the basis of either personal knowledge or belief after due diligence;

(iv) Is not proffered by a contractor or other third party; and,

(v) Has been approved by the Chief of the Wireless Telecommunication Bureau or other designated Commission official. Prior to the authorized official making a determination that a clear and imminent danger exists, the associated written statement must be served by hand-delivery or receipted fax on the applicable offending licensee, with a copy transmitted by the fastest available means to the Washington, DC office of the Commission's Wireless Telecommunications Bureau.

■ 68. Add § 22.880 to read as follows:

§ 22.880 Information exchange.

(a) *Prior notification.* Public safety/CII licensees may notify a commercial aviation air-ground system licensee that they wish to receive prior notification of the activation or modification of a commercial aviation air-ground system ground station site in their area. Thereafter, the commercial aviation air-ground system licensee must provide the following information to the public safety/CII licensee at least 10 business days before a new ground station is activated or an existing ground station is modified:

(1) Location;

(2) Effective radiated power;

(3) Antenna manufacturer, model number, height above ground level and up tilt angle, as installed;

(4) Channels available for use.

(b) *Purpose of prior notification.* The prior notification of ground station activation or modification is for informational purposes only: public safety/CII licensees are not afforded the right to accept or reject the activation of a proposed ground station or to unilaterally require changes in its operating parameters. The principal purposes of prior notification are to:

(1) Allow a public safety licensee to advise the commercial aviation air-ground system licensee whether it believes a proposed ground station will generate unacceptable interference;

(2) Permit commercial aviation air-ground system licensee(s) to make voluntary changes in ground station parameters when a public safety licensee alerts them to possible interference; and

(3) Rapidly identify the source if interference is encountered when the ground station is activated.

■ 69. Revise § 22.1003 to read as follows:

§ 22.1003 Eligibility.

Any eligible entity (see § 22.7) may apply for central station license(s) and/or offshore subscriber licenses under this subpart.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 70. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

■ 71. Revise § 90.309(a)(1) to read as follows:

§ 90.309 Tables and figures.

(a) * * *

(1) Using the method specified in § 1.958 of this chapter, determine the distances between the proposed land mobile base station and the protected co-channel television station and between the proposed land mobile base station and the protected adjacent channel television station. If the exact mileage does not appear in table A for protected co-channel television stations (or table B for channel 15 in New York and Cleveland and channel 16 in Detroit) or table E for protected adjacent channel television stations, the next lower mileage separation figure is to be used.

* * * * *

[FR Doc. 05–6948 Filed 4–12–05; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 11

[EB Docket No. 04–51; FCC 05–21]

Emergency Alert System

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts revisions to the Federal Communication Commission's (Commission's) rules governing the Emergency Alert System (EAS) that will allow wireless cable television systems to provide EAS alerts to their subscribers in a more efficient and less burdensome manner. Specifically, wireless cable system operators will now be able to install equipment that provides a means to switch all programmed channels to a predesignated channel that carries an EAS alert in lieu of installing an EAS decoder for each and every system channel. Accordingly, upon receipt of an EAS alert, subscribers' equipment will automatically be tuned to the channel carrying the EAS message.

DATES: Effective May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Shannon Lipp, Enforcement Bureau, Office of Homeland Security, at (202) 418–1199, or via the Internet at *shannon.lipp@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, in EB Docket No. 04–51, FCC 05–21, adopted January 28, 2005 and released February 7, 2005. The complete text of this *Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Room CY–A527,

Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via Web site at *http://www.bcpiweb.com*. It is also available on the Commission's Web site at *http://www.fcc.gov*.

Synopsis of the Report and Order

1. In this *Report and Order*, the Commission adopts revisions to part 11 of the Commission's rules governing the Emergency Alert System (EAS) that will allow wireless cable television systems to provide EAS alerts to their subscribers in a more efficient and less burdensome manner. Specifically, wireless cable system operators will now be able to install equipment that provides a means to switch all programmed channels to a predesignated channel that carries an EAS alert in lieu of installing an EAS decoder for each and every system channel. Accordingly, upon receipt of an EAS alert, subscribers' equipment will automatically be tuned to the channel carrying the EAS message.

2. The Commission released a *Notice of Proposed Rulemaking* (*NPRM*), 69 FR 18857, March 12, 2004, seeking comment on revisions to part 11 of the Commission's rules. Comments and replies were due May 10, 2004 and May 24, 2004, respectively. WCA and W.A.T.C.H. TV both submitted comments in support of the proposed modifications. W.A.T.C.H. TV, in its comments recommended a permanent rule change. No comments opposed the suggested rule revision, and no replies were submitted.

3. The Commission's EAS rules are designed to ensure that individual TV viewers, including viewers of wireless cable TV systems, receive all national level EAS alerts, no matter what channel the viewer may be watching. As these rules are currently written, wireless cable providers serving more than 5,000 subscribers are required to install special equipment sufficient to display the audio and video EAS message on every channel in their systems. Systems serving fewer than 5,000 subscribers are required to display the audio and video EAS message only on one channel, but must provide a video interrupt and an audio alert on every channel.

4. The Commission's EAS rules were neither intended to require a particular technical solution nor to impose an unnecessary financial burden on participating cable providers. The Commission agrees that a good technical alternative exists to minimize that burden without harm to the public. As a result of these modifications, a wireless cable operator would be able to install EAS equipment for one channel only at the headend of each of its systems, and in the event of an EAS alert, automatically force each subscriber's equipment to tune to the channel carrying the EAS alert. This would allow wireless cable providers to deliver EAS alerts to all viewers in a more technologically and economically efficient manner. The Commission believes these revisions would satisfy the Communications Act's intent to provide national alert and warning to the public, while reducing the regulatory burden on wireless cable systems. The Commission also notes that W.A.T.C.H. TV, a wireless cable system, has successfully deployed force tuning in its system, and that no comments were filed opposing this approach. Accordingly, the Commission modifies its EAS rules to allow wireless cable TV systems to supply an EAS alert to their viewers by force tuning their systems. Also, because the revisions the Commission adopts today do not affect wireless cable systems' EAS equipment, the Commission adopts its tentative conclusion that no new authorization standards for such equipment are required.

5. The Commission recently released a *Notice of Proposed Rulemaking* (*NPRM*), 69 FR 52843 (August 30, 2004), in which it sought comment on whether EAS as currently constituted is the most effective and efficient public warning system available to the American public. One of the primary objectives of the August 2004 *NPRM* is to determine whether there are any specific steps the Commission may take to enhance the effectiveness of EAS, particularly as regards digital, wireless, and other emerging communications technologies. Accordingly, regardless of the modifications made in the *Report and Order*, wireless cable operators are still subject to any future rulemaking proceedings. The *Report and Order* does not affect the Commission's ability to adjust any of the wireless cable requirements or impose other obligations on wireless cable operators through general rulemaking proceedings.

6. Because the modifications to the Commission's EAS rules will contribute to an economically efficient and technologically current public alert and warning system, in the *Report and Order*, the Commission adopts the proposed revisions to the EAS rules for wireless cable operators.

Final Regulatory Flexibility Analysis

7. As required by the Regulatory Flexibility Act, 5 U.S.C. 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) for the *Report and Order*. The Commission will send a copy of the *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

8. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM*. The Commission sought comment on the proposals in the *NPRM*, including comment on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Rules

9. In the *Report and Order*, the Commission adopts revisions to part 11 of the Commission's rules governing the Emergency Alert System (EAS). The revisions will reduce burdens on wireless cable television systems and improve the overall performance of the EAS.

Summary of Significant Issues Raised By Public Comments in Response to the IRFA

10. 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. As a result of these modifications, a wireless cable operator will now be able to install EAS equipment for one channel only at the headend of the system. In the event of an EAS alert, the system will automatically force each subscriber set-top box to tune to the channel carrying the EAS alert. This will allow wireless cable providers to deliver EAS alerts to all viewers in a more technologically and economically efficient manner. While this rule revision provides the greatest economic benefit to systems with over 5,000 subscribers by obviating the need for special signal conversion for all channels, it also provides a benefit to those systems with fewer than 5,000 subscribers.

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

11. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. 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). A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." The arts, entertainment, and recreations sector had 96,497 small firms.

12. *Broadband Radio Services.* The adopted rules would apply to Broadband Radio Services (BRS) operated as part of a wireless cable system. The Commission has defined "small entity" for purposes of the auction of BRS frequencies 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. This definition of small entity in the context of BRS auctions has been approved by the SBA. The Commission completed its BRS auction in March 1996 for authorizations in 493 basic trading areas. Of 67 winning bidders, 61 qualified as small entities. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees.

13. BRS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, Cable and Other Subscription Programming, which includes all such companies generating $12.5 million or less in annual receipts. This definition includes BRS and thus applies to BRS licensees that did not participate in the BRS auction. Information available to us indicates that there are approximately 392 incumbent BRS licensees that do not generate revenue in excess of $11 million annually. Therefore, we find that there are approximately 440 (392 pre-auction plus 48 auction licensees) small BRS providers as defined by the SBA and the Commission's auction rules which may be affected by the rules adopted herein.

14. *Educational Broadband Services.* The adopted rules would also apply to Educational Broadband Services (EBS). The SBA definition of small entities for pay television services also appears to apply to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business. However, we do not collect annual revenue data for EBS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we conclude that at least 1,932 EBS are small businesses and may be affected by the adopted rules.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

15. There are no reporting or recordkeeping requirements adopted in the *Report and Order*. The revisions adopted in the *Report and Order* are, for the most part, intended to enhance the performance of the EAS while reducing the burden on digital wireless cable systems. We emphasize that participation in state and local EAS activities remains voluntary and that we do not impose additional costs or burdens on entities that choose not to participate in state and local area EAS plans. The *Report and Order* adopts rules that permit new equipment capabilities and new policies with regard to method of delivery of EAS messages to viewers for all EAS alerts: National, state and local. These modifications will lessen cost and operational burdens on digital wireless cable system EAS participants.

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

16. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives: (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 or reporting requirements under the rule for 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 small entities.

17. In the *NPRM*, we sought comment on the impact of our proposals on small entities and on any possible alternatives that would minimize the impact on small entities. In adopting the modifications contained in the *Report and Order*, we have attempted to minimize the burdens on all entities.

Report to Congress

18. The Commission will send a copy of the *Report and Order*, including the FRFA, in a report to be sent to Congress 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 *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Paperwork Reduction Act of 1995 Analysis

19. This document does not contain new or modified information collection requirements 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(4).

Ordering Clauses

20. Accordingly, *it is ordered* that pursuant to the authority contained in sections 1, 4(i), 4(j), and 4(o), 303(r), 624(g) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and 154(o), 303(r), 544(g) and 606, this *Report and Order* is adopted.

21. *It is further ordered* that part 11 of the Commission's rules, 47 CFR part 11, is amended as set forth, effective May 13, 2005.

22. *It is further ordered* that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to Congress pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

23. *It is further ordered* that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act.

List of Subjects in 47 CFR Part 11

Television, Wireless cable, Emergency alert system, EAS, Force tune.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rule

■ For the reasons discussed in the preamble, the Federal Communications

Commission amends 47 CFR part 11 as follows:

PART 11—EMERGENCY ALERT SYSTEM (EAS)

■ 1. The authority for part 11 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i) and (o), 303(r), 544(g) and 606.

■ 2. Section 11.11 is amended by revising the table entitled "WIRELESS CABLE SYSTEMS (MDS/MMS/ITFS STATIONS)" in paragraph (a) to read as follows:

§ 11.11 The Emergency Alert System (EAS).

(a) * * *

WIRELESS CABLE SYSTEMS (BRS/EBS STATIONS)

[A. Wireless cable systems serving fewer than 5,000 subscribers from a single transmission site must either provide the National level EAS message on all programmed channels—including the required testing—by October 1, 2002, or comply with the following EAS requirements. All other wireless cable systems must comply with B.]

B. EAS equipment requirement	System size and effective dates	
	≥ 5,000 subscribers	< 5,000 subscribers
EAS decoder	Y 10/1/02	Y 10/1/02
EAS encoder [1] [2]	Y 10/1/02	Y 10/1/02
Audio and Video EAS Message on all channels [3]	Y 10/1/02	N
Video interrupt and audio alert message on all channels; [4] Audio and Video EAS message on at least one channel.	N	Y 10/1/02

[1] The two-tone signal is used only to provide an audio alert to an audience prior to an EAS emergency message or to the Required Monthly Test (RMT) under § 11.61(a)(1). The two-tone signal must be 8–25 seconds in duration.

[2] Wireless cable systems serving < 5,000 subscribers are permitted to operate without an EAS encoder if they install an FCC-certified decoder.

[3] All wireless cable systems may comply with this requirement by providing a means to switch all programmed channels to a predesignated channel that carries the required audio and video EAS messages.

[4] The Video interrupt must cause all channels that carry programming to flash for the duration of the EAS emergency message. The audio alert must give the channel where the EAS messages are carried and be repeated for the duration of the EAS message.

Note: Programmed channels do not include channels used for the transmission of data services such as Internet.

* * * * *

■ 3. Section 11.51 is amended by adding paragraphs (g)(5) and (h)(5) to read as follows:

§ 11.51 EAS code and Attention Signal Transmission requirements.

(g) * * *

(5) Wireless cable systems with a requirement to carry the audio and video EAS message on at least one channel and a requirement to provide video interrupt and an audio alert message on all other channels stating which channel is carrying the audio and video EAS message, may comply by using a means on all programmed channels that automatically tunes the subscriber's set-top box to a pre-designated channel which carries the required audio and video EAS messages.

(h) * * *

(5) Wireless cable systems with a requirement to carry the audio and video EAS message on all downstream channels may comply by using a means on all programmed channels that automatically tunes the subscriber's set-top box to a pre-designated channel which carries the required audio and video EAS messages.

* * * * *

[FR Doc. 05–7412 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22, 80, 87, 90 and 101

[WT Docket Nos. 98–20 and 96–188; RM–8677 and RM–9107; FCC 98–234 and FCC 99–139]

Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services

AGENCY: Federal Communications Commission.

ACTION: Final rule, announcement of effective date.

SUMMARY: The Wireless Telecommunications Bureau (Bureau) of the Federal Communications Commission (Commission) announces that certain rules adopted in the Universal Licensing System proceeding (WT Docket Nos. 98–20 and 96–188, FCC 98–234) in 1998, to the extent they contained information collection requirements that required approval by the Office of Management and Budget (OMB), became effective on January 21, 1999.

The Bureau also announces that certain rules adopted in the Universal Licensing System proceeding (WT Docket Nos. 98–20, and 96–188, FCC 99–139) in 1999, to the extent they contained information collection requirements that required approval by OMB, became effective on October 1, 1999.

DATES: Sections 22.105, 22.709(b)(2), 22.803(b)(2), 22.875(d)(5), 22.929(b)(2), 80.21, 80.33, 80.53, 80.469, 80.511, 80.513, 80.553, 80.605, 87.215, 87.347, 90.625, 90.683, 90.763, 101.61, and 101.701, published at 63 FR 68904 (Dec. 14, 1998), contained information collection requirements and became effective on January 21, 1999. Sections 22.529(c), 22.709(f), 22.803(c), and 22.929(d), published at 64 FR 53231 (Oct. 1, 1999), contained information collection requirements and became effective on October 1, 1999.

FOR FURTHER INFORMATION CONTACT: Richard Arsenault, Wireless Telecommunications Bureau, at (202) 418–0920, or via the Internet at *Richard.Arsenault@fcc.gov*. For additional information concerning the information collections contained in this document, contact Judith-B. Herman at (202) 418–0214, or via the Internet at *Judith-B.Herman@fcc.gov*.

Announcement of Effective Date of Certain Commission Rules

1. On December 14, 1998, the Commission published a notice in the **Federal Register**, 63 FR 68904, of its Report and Order (*Report and Order*) in the Universal Licensing System proceeding (WT Docket Nos. 98–20 and 96–188; RM-8677; FCC 98–234). In that Notice, the Commission stated that it would publish a document in the **Federal Register** announcing the effective date of certain rules adopted in the *Report and Order*—specifically §§ 22.105, 22.709(b)(2), 22.803(b)(2),

22.875(d)(5), 22.929(b)(2), 80.21, 80.33, 80.53, 80.469, 80.511, 80.513, 80.553, 80.605, 87.215, 87.347, 90.625, 90.683, 90.763, 101.61, and 101.701, to the extent that these rules contained information collection requirements that required approval by OMB. On January 21, 1999, OMB approved the public information collection associated with these rules via OMB Control No. 3060–0865. The Commission published a Notice in the **Federal Register** at 64 FR 9510, (Feb. 26, 1999), announcing OMB's approval. OMB Control No. 3060–0865 subsequently was modified and extended until March 31, 2007.

2. The Commission published a Notice in the **Federal Register** at 64 FR 68904, (Oct. 1, 1999), of its Memorandum Opinion and Order and Order on Reconsideration (*Memorandum Opinion and Order and Order on Reconsideration*) in the Universal Licensing System proceeding (WT Docket Nos. 98–20 and 96–188, RM–8677 and RM–9107; FCC 99–139), wherein the Commission modified certain rules. In that Notice, the Commission stated that it would publish a document in the **Federal Register** announcing the effective date of certain rules adopted in the *Memorandum Opinion and Order and Order on Reconsideration*—specifically §§ 22.529(c), 22.709(f), 22.803(c), and 22.929(d), to the extent that these rules contained information collection requirements that required approval by OMB. On September 30, 1999, OMB approved the public information collection associated with these rules via OMB Control No. 3060–0865. OMB Control No. 3060–0865 subsequently was modified and extended until March 31, 2007.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–6949 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 01–185, FCC 05–30]

Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document is a summary of the *Memorandum Opinion and Order and Second Order on Reconsideration* adopted by the Commission in this proceeding. The Commission reaffirmed its decision to allow satellite operators to integrate Ancillary Terrestrial Components (ATC) to existing Mobile Satellite Service (MSS) systems and amended the service rules governing ATC to provide greater flexibility for MSS operators to design and deploy ATC, while protecting other users in the bands. The new rules will further the Commission's goals of development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, and efficient and intensive use of the electromagnetic spectrum.

DATES: Effective May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Sean O'More, Howard Griboff, or Paul Locke, Policy Division, International Bureau, (202) 418–1460.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order and Second Order on Reconsideration* in IB Docket No. 01–185, FCC No. 05–30, adopted February 10, 2005 and released on February 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257). The document is also available for download over the Internet at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–05–30A1.doc*. The complete text may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) located in Room CY-B402, 445 12th Street, SW., Washington, DC 20554. Customers may contact BCPI at their web site: *http://www.bcpiweb.com* or call 1–800–378–3160.

Summary of Memorandum Opinion and Order and Second Order on Reconsideration

On February 10, 2003, the Commission released a Report and Order (*MSS Flexibility R&O*) in this proceeding (68 FR 33640, June 5, 2003). The *MSS Flexibility R&O* permitted MSS operators to provide integrated ATC within their assigned MSS spectrum, and adopted rules pertaining to the licensing and operation of ATC systems. The Commission established a set of prerequisites, known as "gating criteria," that MSS operators would have to satisfy in order to add ATC to their systems. The Commission also established technical rules to ensure that ATC did not interfere with other MSS operators' systems or with other services. Finally, the Commission concluded that ATC authority would be granted by modifying MSS operators' current licenses, and that ATC authority would not be granted by competitive bidding. On July 3, 2003, the Commission released an *Order on Reconsideration* (*Sua Sponte Order*) (68 FR 47856, August 12, 2003), which clarified certain aspects of the *MSS Flexibility R&O*.

On February 10, 2005, the Commission adopted the *Memorandum Opinion and Order and Second Order on Reconsideration* in this proceeding. The *Memorandum Opinion and Order and Second Order on Reconsideration* amends the licensing and service rules for ATC in the 2000–2020 and 2180–2200 MHz bands (the 2 GHz MSS band), the 1525–1559 MHz and 1626.5–1660.5 MHz bands (the L-band), and the 1610–1626.5 MHz and 2483.5–2500 MHz bands (the Big LEO band). MSS can provide mobile communications at any location in the United States, including rural and remote areas and offshore maritime areas where communications by terrestrial mobile systems are often unavailable. In some areas, however, particularly urban areas, the communications signal from the MSS satellite can be blocked by tall buildings. For this reason, there are areas where MSS communications are not available. ATC will provide integrated communications coverage in these areas, allowing MSS/ATC to offer ubiquitous service to consumers.

The *Memorandum Opinion and Order and Second Order on Reconsideration* responded to petitions for reconsideration of the *MSS Flexibility R&O* and *Sua Sponte Order* in four major areas: (1) Gating criteria, (2) uplink interference, (3) downlink interference, and (4) licensing rules.

Gating Criteria. The *Memorandum Opinion and Order and Second Order on Reconsideration* considered requests to change the gating criteria which MSS operators must meet in order to provide ATC. The Commission declined to require that a percentage of MSS/ATC system capacity must be reserved for MSS operations. The Commission also declined to require MSS/ATC user terminals, such as handsets, to attempt to contact the satellite before communicating through the ATC. The Commission also clarified the meaning of the term "dual-mode device," the prohibition on offering ATC-only service, and the requirement that an MSS operator must satisfy the gating criteria in each band in which it seeks to offer ATC.

Uplink Interference. The *Memorandum Opinion and Order and Second Order on Reconsideration*

changes the basis of the uplink interference rules in the L-band. Previously, the technical rules designed to limit uplink interference to the MSS/ATC operator's own satellite and the satellites of other MSS operators were a detailed set of restrictions on ATC base stations and handsets. The Commission reconsidered these rules, and replaced them with limits on the overall amount of interference an MSS/ATC system, as a whole, may cause to other MSS systems in the L-band.

Downlink Interference. The *Memorandum Opinion and Order and Second Order on Reconsideration* increased the maximum power of ATC base stations in the L-band. The power limits on ATC base stations in the *MSS Flexibility R&O* were based on an assumed MSS user terminal receiver tolerance level for interference of -60 dBm. The Commission staff tested representative MSS user terminals and determined that the correct tolerance level for interference of these terminals is -52 dBm. This justifies an 8 dB increase in the maximum power of ATC base stations, and in the power flux density (PFD) that ATC base stations may produce near airports and waterways. In order to provide extra interference protection for the 1544–1545 MHz sub-band, which is used for distress and safety communications, the Commission retained the former ATC base station power limits in the 1541.5–1547.5 MHz sub-band, based on measurements that demonstrate lower MSS terminal tolerance for interference from interfering signals close to the desired signal. The Commission also required MSS/ATC operators to coordinate with other MSS operators when there was a likelihood that third-order intermodulation from ATC base stations could cause harmful interference to MSS terminals. In addition, the Commission noted that grant of future ATC applications will be coordinated with the National Telecommunications and Information Administration, pursuant to the general notification process, to assure adequate protection of the Radionavigation Satellite Service (RNSS) signals in the 1559–1610 MHz band.

Licensing Rules. The *Memorandum Opinion and Order and Second Order on Reconsideration* reconsidered the licensing rules for ATC, and amended the rules to allow non-operational MSS operators to demonstrate that they would soon meet the gating criteria. Upon a substantial showing, the Commission will grant ATC authorization to these non-operations MSS operators so they may begin ATC operations at the same time they begin MSS operations. The Commission also reconsidered and reaffirmed its decision that ATC authority is not eligible for assignment by competitive bidding.

Procedural Matters

Paperwork Reduction Act Analysis

The *Memorandum Opinion and Order and Second Order on Reconsideration* does not contain information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104–13. It also, therefore, 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 No. 107–198, *see* 44 U.S.C. 3506(c)(4).

Final Regulatory Flexibility Act Certification

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." (*See* 5 U.S.C. 601–612; the RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996)). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. (*See* 5 U.S.C. 601(3), incorporating by reference the definition of "small-business concern" in the Small Business Act, (15 U.S.C. 632)). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

As required by the RFA, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *MSS Flexibility Notice*, (68 FR 33666, June 5, 2003) and no parties responded to the IRFA. After a review of the policies and rules adopted in the *MSS Flexibility R&O*, the Commission determined that there would be no significant impact on a substantial number of small entities. Thus, a Final Regulatory Flexibility Certification was included in the *MSS Flexibility R&O*.

In addressing the issues raised by the parties seeking reconsideration of the *MSS Flexibility R&O*, no parties commented on the regulatory flexibility certification. We certify that the policies and rules adopted in the *Memorandum Opinion and Order and Second Order on Reconsideration* will not have a significant impact on a substantial number of small entities.

We are incorporating the Final Regulatory Analysis Certification contained in the *MSS Flexibility R&O* into this proceeding. In our reconsideration of the petitions in this proceeding, we modify our rules that permit the addition of ATC to MSS systems. We change certain technical standards for ATC in the L-band, in order to permit MSS/ATC licenses flexibility in designing and operating their ATC while at the same time preventing harmful interference from ATC to co-primary MSS licensees in the L-band. In addition, we will allow certain increases in ATC base station power. We also modify the rules for authorizing MSS operators to add ATC to their networks. We expect that these changes will facilitate the development of MSS/ATC. We believe that all entities, both large and small, will have the flexibility to design their systems to meet their customers' needs. The policies and rules adopted in this proceeding are essentially technical changes that will provide equal opportunity for operational and non-operational MSS systems to add ATC without undue delay.

We believe that the policies and rules adopted in this proceeding—which bring additional flexibility to existing MSS licensees—will not affect a substantial number of small entities. There are currently five 2 GHz MSS licensees, two Big LEO MSS licensees and three L-band MSS licensees authorized to provide service in the United States. Although at least one of the 2 GHz MSS system licensees and one of the Big LEO licensees are small businesses, small businesses often do not have the financial ability to become MSS system operators because of the high implementation costs associated with satellite systems and services. We expect that, by the time of MSS ATC system implementation, these current

small businesses will no longer be considered small due to the capital requirements for launching and operating a proposed system.

Therefore, we certify that the requirements of the *Memorandum Opinion and Order and Second Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities.

The Commission will send a copy of the *Memorandum Opinion and Order and Second Order on Reconsideration*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act (*see* 5 U.S.C. 801(a)(1)(A)).

Ordering Clauses

Pursuant to sections 4(i), 7, 302, 303(c), 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended, *47 U.S.C. 154(i), 157, 302, 303(c), 303(e), 303(f) and 303(r)*, this *Memorandum Opinion and Order and Second Order on Reconsideration* is adopted and that part 25 of the Commission's rules is amended, as specified in the Final rule, effective May 13, 2005.

The Petitions for Reconsideration of the *MSS Flexibility R&O* filed by Cingular Wireless LLC, the Society of Broadcast Engineers, Inc., and Cellular Telecommunications & Internet Association are granted in part and denied in part.

The Petitions for Reconsideration of the *MSS Flexibility R&O* filed by Mobile Satellite Ventures Subsidiary LLC and Inmarsat Ventures PLC are granted in part, dismissed as moot in parte, and denied in part.

The Petition for Reconsideration of the *MSS Flexibility R&O* filed by the Boeing Co. is granted in part and denied in part.

The Petition for Reconsideration of the *Sua Sponte Order* filed by the Boeing Co. is granted in part and denied in part.

The Final Regulatory Flexibility Certification, as required by section 604 of the Regulatory Flexibility Act, is adopted.

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

List of Subjects in 47 CFR Part 25

Radio, Satellites, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rule

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

PART 25—SATELLITE COMMUNICATIONS

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

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

■ 2. Section 25.149 is amended by adding a note to paragraph (a)(1) and by revising paragraph (b)(1)(i) to read as follows:

§ 25.149 Application requirements for ancillary terrestrial components in the mobile-satellite service networks operating in the 1.5/1.6 GHz, 1.6/2.4 GHz and 2 GHz mobile-satellite service.

(a) * * *

(1) * * *

Note to paragraph (a)(1): An L-band MSS licensee is permitted to apply for ATC authorization based on a non-forward-band mode of operation provided it is able to demonstrate that the use of a non-forward-band mode of operation would produce no greater potential interference than that produced as a result of implementing the rules of this section.

* * * * *

(b) * * *

(1) * * *

(i) For the 2 GHz MSS band, an applicant must demonstrate that it can provide space-segment service covering all 50 states, Puerto Rico, and the U.S. Virgin Islands one-hundred percent of the time, unless it is not technically possible, consistent with the coverage requirements for 2 GHz MSS GSO operators.

* * * * *

■ 3. Section 25.201 is amended by revising the definition of "Ancillary terrestrial component" to read as follows:

§ 25.201 Definitions.

* * * * *

Ancillary terrestrial component. The term "ancillary terrestrial component" means a terrestrial communications network used in conjunction with a qualifying satellite network system authorized pursuant to these rules and the conditions established in the Orders issued in IB Docket No. 01–185, *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band.*

* * * * *

■ 4. Section 25.216 is amended by revising paragraph (i) to read as follows:

§ 25.216 Limits on emissions from mobile earth stations for protection of aeronautical radionavigation-satellite service.

* * * * *

(i) The e.i.r.p density of carrier-off state emissions from mobile earth stations manufactured more than six months after **Federal Register** publication of the rule changes adopted in FCC 03–283 with assigned uplink frequencies between 1 and 3 GHz shall not exceed -80 dBW/MHz in the 1559–1610 MHz band averaged over any two millisecond interval.

* * * * *

■ 5. Section 25.252 is amended by revising paragraphs (a)(7) and (b)(3) to read as follows:

§ 25.252 Special requirements for ancillary terrestrial components operating in the 2000–2020 MHz/2180–2200 MHz bands.

(a) * * *

(7) Generate EIRP density, averaged over any two millisecond active transmission interval, greater than -70 dBW/MHz in the 1559–1610 MHz band. The EIRP, measured over any two millisecond active transmission interval, of discrete out-of-band emissions of less than 700 Hz bandwidth from such base stations, shall not exceed -80 dBW in the 1559–1610 MHz band. A root-mean-square detector function with a resolution bandwidth of one megahertz or equivalent and no less video bandwidth shall be used to measure wideband EIRP density for purposes of this rule, and narrowband EIRP shall be measured with a root-mean-square detector function with a resolution bandwidth of one kilohertz or equivalent.

* * * * *

(b) * * *

(3) Not generate EIRP density, averaged over any two-millisecond active transmission interval, greater than -70 dBW/MHz in the 1559–1610 MHz band. The EIRP, measured over any two-millisecond active transmission interval, of discrete out-of-band emissions of less than 700 Hz bandwidth from such mobile terminals shall not exceed -80 dBW in the 1559–1610 MHz band. The EIRP density of carrier-off-state emissions from such mobile terminals shall not exceed -80 dBW/MHz in the 1559–1610 MHz band, averaged over a two-millisecond interval. A root-mean-square detector

function with a resolution bandwidth of one megahertz or equivalent and no less video bandwidth shall be used to measure wideband EIRP density for purposes of this rule, and narrowband EIRP shall be measured with a root-mean-square detector function with a resolution bandwidth of one kilohertz or equivalent.

* * * * *

■ 6. Section 25.253 is revised to read as follows:

§ 25.253 Special requirements for ancillary terrestrial components operating in the 1626.5–1660.5 MHz/1525–1559 MHz bands.

(a) An ancillary terrestrial component in these bands shall:

(1) In any band segment coordinated for the exclusive use of an MSS applicant within the land area of the U.S., where there is no other L-Band MSS satellite making use of that band segment within the visible portion of the geostationary arc as seen from the ATC coverage area, the ATC system will be limited by the in-band and out-of-band emission limitations contained in this section and the requirement to maintain a substantial MSS service.

(2) In any band segment that is coordinated for the shared use of the applicant's MSS system and another MSS operator, where the coordination agreement existed prior to February 10, 2005 and permits a level of interference to the other MSS system of less than 6% ΔT/T, the applicant's combined ATC and MSS operations shall increase the system noise level of the other MSS to no more then 6% ΔT/T. Any future coordination agreement between the parties governing ATC operation will supersede this paragraph.

(3) In any band segment that is coordinated for the shared use of the applicant's MSS system and another MSS operator, where a coordination agreement existed prior to February 10, 2005 and permits a level of interference to the other MSS system of 6% ΔT/T or greater, the applicant's ATC operations may increase the system noise level of the other MSS system by no more than an additional 1% ΔT/T. Any future coordination agreement between the parties governing ATC operations will supersede this paragraph.

(4) In a band segment in which the applicant has no rights under a coordination agreement, the applicant may not implement ATC in that band.

(b) ATC base stations shall not exceed an out-of-channel emissions measurement of -57.9 dBW/MHz at the edge of a MSS licensee's authorized and internationally coordinated MSS frequency assignment.

(c) An applicant for an ancillary terrestrial component in these bands shall:

(1) Demonstrate, at the time of application, how its ATC network will comply with the requirements of footnotes US308 and US315 to the table of frequency allocations contained in § 2.106 of this chapter regarding priority and preemptive access to the L-band MSS spectrum by the aeronautical mobile-satellite en-route service (AMS(R)S) and the global maritime distress and safety system (GMDSS).

(2) Coordinate with the terrestrial CMRS operators prior to initiating ATC transmissions when co-locating ATC base stations with terrestrial commercial mobile radio service (CMRS) base stations that make use of Global Positioning System (GPS) time-based receivers.

(3) Provide, at the time of application, calculations that demonstrate the ATC system conforms to the ΔT/T requirements in paragraphs (a)(2) and (a)(3) of this section, if a coordination agreement that incorporates the ATC operations does not exist with other MSS operators.

(d) Applicants for an ancillary terrestrial component in these bands must demonstrate that ATC base stations shall not:

(1) Exceed a peak EIRP of 31.9–10*log (number of carriers) dBW/200kHz, per sector, for each carrier in the 1525–1541.5 MHz and 1547.5–1559 MHz frequency bands;

(2) Exceed an EIRP in any direction toward the physical horizon (not to include man-made structures) of 26.9–10*log (number of carriers) dBW/200 kHz, per sector, for each carrier in the 1525–1541.5 MHz and 1547.5–1559 MHz frequency bands;

(3) Exceed a peak EIRP of 23.9 −10*log(number of carriers) dBW/200 kHz, per sector, for each carrier in the 1541.5–1547.5 MHz frequency band;

(4) Exceed an EIRP toward the physical horizon (not to include man-made structures) of 18.9—10*log(number of carriers) dBW/200 kHz, per sector, for each carrier in the 1541.5–1547.5 MHz frequency band;

(5) Exceed a total power flux density level of −56.8 dBW/m²/200 kHz at the edge of all airport runways and aircraft stand areas, including takeoff and landing paths from all carriers operating in the 1525–1559 MHz frequency bands. The total power flux density here is the sum of all power flux density values associated with all carriers in a sector in the 1525–1559 MHz frequency band, expressed in dB(Watts/m²/200 kHz). Free-space loss must be assumed if this requirement is demonstrated via calculation;

(6) Exceed a total power flux density level of −56.6 dBW/ m²/200 kHz at the water's edge of any navigable waterway from all carriers operating in the 1525–1541.5 MHz and 1547.5–1559 MHz frequency bands. The total power flux density here is the sum of all power flux density values associated with all carriers in a sector in the 1525–1541.5 MHz and 1547.5–1559 MHz frequency bands, expressed in dB(Watts/m²/200 kHz). Free-space loss must be assumed if this requirement is demonstrated via calculation;

(7) Exceed a total power flux density level of −64.6 dBW/ m²/200 kHz at the water's edge of any navigable waterway from all carriers operating in the 1541.5–1547.5 MHz frequency band. The total power flux density here is the sum of all power flux density values associated with all carriers in a sector in the 1541.5–1547.5 MHz frequency band, expressed in dB(Watts/m²/200 kHz). Free-space loss must be assumed if this requirement is demonstrated via calculation;

(8) Exceed a peak antenna gain of 16 dBi;

(9) Generate EIRP density, averaged over any two-millisecond active transmission interval, greater than −70 dBW/MHz in the 1559–1605 MHz band or greater than a level determined by linear interpolation in the 1605–1610 MHz band, from −70 dBW/MHz at 1605 MHz to −46 dBW/MHz at 1610 MHz. The EIRP, averaged over any two-millisecond active transmission interval, of discrete out-of-band emissions of less than 700 Hz bandwidth from such base stations shall not exceed −80 dBW in the 1559–1605 MHz band or exceed a level determined by linear interpolation in the 1605–1610 MHz band, from −80 dBW at 1605 MHz to −56 dBW at 1610 MHz. A root-mean-square detector function with a resolution bandwidth of one megahertz or equivalent and no less video bandwidth shall be used to measure wideband EIRP density for purposes of this rule, and narrowband EIRP shall be measured with a root-mean-square detector function with a resolution bandwidth of one kilohertz or equivalent.

(e) Applicants for an ancillary terrestrial component in these bands must demonstrate, at the time of the application, that ATC base stations shall use left-hand-circular polarization antennas with a maximum gain of 16 dBi and overhead gain suppression according to the following:

Angle from direction of maximum gain, in vertical plane, above antenna (degrees)	Antenna discrimination pattern (dB)
0	Gmax
5	Not to Exceed Gmax −5
10	Not to Exceed Gmax −19
15 to 55	Not to Exceed Gmax −27
55 to 145	Not to Exceed Gmax −30
145 to 180	Not to Exceed Gmax −26

Where: Gmax is the maximum gain of the base station antenna in dBi.

(f) Prior to operation, ancillary terrestrial component licensees shall:

(1) Provide the Commission with sufficient information to complete coordination of ATC base stations with Search-and-Rescue Satellite-Aided Tracking (SARSAT) earth stations operating in the 1544–1545 MHz band for any ATC base station located either within 27 km of a SARSAT station, or within radio horizon of the SARSAT station, whichever is less.

(2) Take all practicable steps to avoid locating ATC base stations within radio line of sight of Mobile Aeronautical Telemetry (MAT) receive sites in order to protect U.S. MAT systems consistent with ITU–R Recommendation ITU–R M.1459. MSS ATC base stations located within radio line of sight of a MAT receiver must be coordinated with the Aerospace and Flight Test Radio Coordinating Council (AFTRCC) for non-Government MAT receivers on a case-by-case basis prior to operation. For government MAT receivers, the MSS licensee shall supply sufficient information to the Commission to allow coordination to take place. A listing of current and planned MAT receiver sites can be obtained from AFTRCC for non-Government sites and through the FCC's IRAC Liaison for Government MAT receiver sites.

(g) ATC mobile terminals shall:

(1) Be limited to a peak EIRP level of 0 dBW and an out-of-channel emissions of −67 dBW/4 kHz at the edge of an MSS licensee's authorized and internationally coordinated MSS frequency assignment.

(2) Be operated in a fashion that takes all practicable steps to avoid causing interference to U.S. radio astronomy service (RAS) observations in the 1660–1660.5 MHz band.

(3) Not generate EIRP density, averaged over any two-millisecond active transmission interval, greater than −70 dBW/MHz in the 1559–1605 MHz band or greater than a level determined by linear interpolation in the 1605–1610 MHz band, from −70 dBW/MHz at 1605 MHz to −46 dBW/MHz at 1610 MHz. The EIRP, averaged over any two-millisecond active transmission interval, of discrete out-of-band emissions of less than 700 Hz bandwidth from such mobile terminals shall not exceed −80 dBW in the 1559–1605 MHz band or exceed a level determined by linear interpolation in the 1605–1610 MHz band, from −80 dBW at 1605 MHz to −56 dBW at 1610 MHz. The EIRP density of carrier-off-state emissions from such mobile terminals shall not exceed −80 dBW/MHz in the 1559–1610 MHz band, averaged over a two-millisecond interval. A root-mean-square detector function with a resolution bandwidth of one megahertz or equivalent and no less video bandwidth shall be used to measure wideband EIRP density for purposes of this rule, and narrowband EIRP shall be measured with a root-mean-square detector function with a resolution bandwidth of one kilohertz or equivalent.

(h) When implementing multiple base stations and/or base stations using multiple carriers, where any third-order intermodulation product of these base stations falls on an L-band MSS band coordinated for use by another MSS operator with rights to the coordinated band, the MSS ATC licensee must notify the MSS operator. The MSS operator may request coordination to modify the base station carrier frequencies, or to reduce the maximum base station EIRP on the frequencies contributing to the third-order intermodulation products. The threshold for this notification and coordination is when the sum of the calculated signal levels received by an MSS receiver exceeds −70 dBm. The MSS receiver used in these calculations can be assumed to have an antenna with 0 dBi gain. Free-space propagation between the base station antennas and the MSS terminals can be assumed and actual signal polarizations for the ATC signals and the MSS system may be used.

■ 7. Section 25.254 is amended by revising paragraphs (a)(4) and (b)(4) as follows:

§ 25.254 Special requirements for ancillary terrestrial components operating in the 1610–1626.5 MHz/2483.5–2500 MHz bands.

(a) * * *

(4) Base stations operating in frequencies above 2483.5 MHz shall not generate EIRP density, averaged over any two-millisecond active transmission interval, greater than −70 dBW/MHz in the 1559–1610 MHz band. The EIRP, averaged over any two-millisecond active transmission interval, of discrete out-of-band emissions of less than 700 Hz bandwidth from such base stations shall not exceed −80 dBW in the 1559–1610 MHz band. A root-mean-square detector function with a resolution bandwidth of one megahertz or equivalent and no less video bandwidth shall be used to measure wideband EIRP density for purposes of this rule, and narrowband EIRP shall be measured with a root-mean-square detector function with a resolution bandwidth of one kilohertz or equivalent.

* * * * *

(b) * * *

(4) ATC mobile terminals operating in assigned frequencies in the 1610–1626.5 MHz band shall not generate EIRP density, averaged over any two-millisecond active transmission interval, greater than -70 dBW/MHz in the 1559–1605 MHz band or greater than a level determined by linear interpolation in the 1605–1610 MHz band, from −70 dBW/MHz at 1605 MHz to −10 dBW/MHz at 1610 MHz. The EIRP, averaged over any two-millisecond active transmission interval, of discrete out-of-band emissions of less than 700 Hz bandwidth from such mobile terminals shall not exceed −80 dBW in the 1559–1605 MHz band or exceed a level determined by linear interpolation in the 1605–1610 MHz band, from −80 dBW at 1605 MHz to −20 dBW at 1610 MHz. The EIRP density of carrier-off-state emissions from such mobile terminals shall not exceed −80 dBW/MHz in the 1559–1610 MHz band, averaged over a two-millisecond interval. A root-mean-square detector function with a resolution bandwidth of one megahertz or equivalent and no less video bandwidth shall be used to measure wideband EIRP density for purposes of this rule, and narrowband EIRP shall be measured with a root-mean-square detector function with a

resolution bandwidth of one kilohertz or equivalent.

* * * * *

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 52

[CC Docket No. 92–105; FCC 05–59]

The Use of N11 Codes and Other Abbreviated Dialing Arrangements

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission designates 811 as the national abbreviated dialing code to be used by state One Call notification systems for providing advanced notice of excavation activities to underground facility operators in compliance with the Pipeline Safety Improvement Act of 2002 (the Pipeline Safety Act). This Order implements the Pipeline Safety Act, which provides for the establishment of a nationwide toll-free abbreviated dialing arrangement to be used by state One Call notification systems.

DATES: Effective May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Regina Brown, Attorney, Wireline Competition Bureau, Telecommunications Access Policy Division, (202) 418–7400, TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Sixth Report and Order*, in CC Docket No. 92–105, FCC 05–59, released March 14, 2005. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

I. Introduction

1. In this *Sixth Report and Order* (6th R&O), released on March 14, 2005, we designate 811 as the national abbreviated dialing code to be used by state One Call notification systems for providing advanced notice of excavation activities to underground facility operators in compliance with the Pipeline Safety Act. This Order implements the Pipeline Safety Act, which provides for the establishment of a nationwide toll-free abbreviated dialing arrangement to be used by state One Call notification systems. A One Call notification system is a communication system established by operators of underground facilities and/or state governments in order to provide a means for excavators and the general public to notify facility operators in advance of their intent to engage in excavation activities. We also address various implementation issues in this Order. Specifically, we:

- Require One Call Centers to notify carriers of the toll-free or local number the One Call Center uses in order to ensure that callers do not incur toll charges, as mandated by the statute;
- Allow carriers to use either the Numbering Plan Area (NPA)-NXX or the originating switch to determine the appropriate One Call Center to which a call should be routed;
- Require the use of 811 as the national abbreviated dialing code for providing advanced notice of excavation activities to underground facility operators within two years after publication of this Order in the **Federal Register**; and
- Delegate authority to the states, pursuant to section 251(e), to address the technical and operational issues associated with the implementation of the 811 code.

2. The 811 abbreviated dialing code shall be deployed ubiquitously by carriers throughout the United States for use by all telecommunications carriers, including wireline, wireless, and payphone service providers that provide access to state One Call Centers. This designation shall be effective May 13, 2005.

II. Discussion

A. Abbreviated Dialing Arrangements

1. Designation of 811 as a National Abbreviated Dialing Code

3. *Background.* In the *Notice of Proposed Rulemaking*, (NPRM), 69 FR 31930, June 8, 2004, we sought comment on whether to use an N11 code for access to One Call Centers. Specifically, we sought comment on the North American Numbering Council's (NANC) recommendation to assign 811 for this purpose. We also asked commenters to address whether we should incorporate the One Call access service into an existing N11 code, such as 311 or 511, to preserve the remaining unassigned N11 codes. The NANC expressed concern that shared use could cause caller confusion, misrouted calls; and deployment delay. We requested commenters that advocated shared use of an existing N11 code to propose solutions to mitigate the concerns expressed by the NANC.

4. *Discussion.* In this Order, we conclude that an N11 code is the best solution, within the framework of the statute, for access to One Call Centers. Thus, consistent with the statutory mandate, we designate 811 as the national abbreviated dialing code to be used by state One Call notification systems for providing advanced notice of excavation activities to underground facility operators in compliance with the Pipeline Safety Improvement Act. In so doing, we reject the other options considered by the NANC and posed in the *NPRM*. We agree with commenters that other alternatives—codes using a leading star or number sign, *e.g.* *344 or #344 and an Easily Recognizable Code (ERC), such as 344—are impractical, costly to implement, and could delay the availability of a national One Call number for years. Moreover, dialing arrangements in the format of *XXX or #XXX, in as much as these codes include three digits following the leading star or number sign, do not comply with the statute's requirement to utilize a nationwide "three-digit number" to access One Call Centers. We believe that 811 will have less impact on customer dialing patterns and can be implemented without the substantial cost and delay of switch development required with the other proposed alternatives. We also agree with the U.S. Department of Transportation (DOT) that the special nature of an N11 code makes the 811 code amenable to a public education campaign linking it to One Call Centers. We reject APCC's request to exempt payphone service providers from this requirement. In contrast to the Act's clear mandate of a *nationwide* toll-free three-digit code for access to One Call Centers, APCC provides no credible argument for an exemption. The Act does not provide any exemptions from this requirement, and we decline to do so here.

5. Although we recognize that using 811 depletes the quantity of remaining N11 codes assignable for other purposes, using an N11 code to access One Call Centers will consume fewer numbering resources than certain other alternative abbreviated dialing arrangements. Additionally, the use of an N11 code to access One Call services follows the existing conventions for abbreviated dialing already familiar to customers. The N11 architecture is an established abbreviated dialing plan that is recognized by switch manufacturers and the public at large. Most significantly, using an N11 code such as 811 satisfies the legislative mandate for a three-digit nationwide number.

6. We share the concerns of commenters regarding the shared use of an existing N11 code, such as 511 (which is currently used for travel and

information services) or 311 (which is currently used for non-emergency police and other governmental services). In this instance, due to the volume of calls received by state One Call Centers, shared use of an existing N11 code could result in customer confusion and misrouting when dialing a shared N11 code. Thus, excavators could be deterred from using the notification system, thereby reducing the effectiveness of the One Call Centers. The Common Ground Alliance (CGA) estimates that the One Call Centers currently receive approximately 15 million calls annually. It also estimates that 40 percent of the incidents where underground facilities are damaged were caused by those who did not call before digging. CGA contends that the incoming call volume to One Call Centers over the next few years may well exceed 20 million calls. Thus, integration of state One Call Centers with existing N11 systems may also increase implementation costs while adding unnecessary complexity to the One Call notification program. Further, shared use of an existing N11 code for access to state One Call Centers could also delay deployment due to the need to reach agreement with the existing users of the N11 code to be integrated and national advertising efforts to educate users on the shared use of the N11 code. For these reasons, we reject the use of an existing N11 code as opposed to the approach adopted in this Order.

2. Other Abbreviated Dialing Arrangements Considered in the Notice

a. Rejection of 344 as the Abbreviated Dialing Code for One Call Notification

7. *Background.* In the NPRM, we sought comment on DOT's initial proposal to establish the digits "344" or any other mnemonic three-digit dialing arrangement for access to One Call Centers. We tentatively concluded that because 344 corresponds to an ERC, an abbreviated dialing code in the format of an Easily Recognizable Code (ERC) or other area code would be inconsistent with our numbering resource optimization policies by potentially rendering eight million North American Numbering Plan (NANP) telephone numbers unusable. We specifically sought comment on the technical and operational issues raised by the NANC and whether there are existing measures that can address these issues. We also sought comment as to the extent switch development or replacement may be needed and the impact this will have on nationwide implementation.

8. *Discussion.* We conclude that an abbreviated dialing code in the format of an ERC or other area code would be inconsistent with our numbering resource optimization policies by rendering approximately eight million NANP telephone numbers unusable. We agree with commenters that the selection of an ERC for this purpose would not be in the public interest because it would accelerate NANP exhaust. Further, the establishment of 344 as an abbreviated dialing code may cause customer confusion and frustration for customers by misrouting callers to the One Call Center where 344 is a working NXX code. Additionally, from a technical perspective, some switches would require either replacement or development work that could delay the capability of using the 344 code as a three-digit number for a number of years. For example, Verizon comments that vendor development for the affected switches would require new technical specifications, code preparation, installation, testing, and release of generic software release prior to distribution. In light of these technical and practical challenges, we do not establish 344 as the One Call abbreviated dialing code.

b. Rejection of Codes Using a Leading Star or Number Sign for One Call Notification

9. *Background.* In the NPRM, we sought comment on whether a code with a leading star or number sign, in the format of either *XXX or #XXX, should be used to access One Call Centers. We sought comment on the extent to which using a code with a leading star or number sign will either promote or discourage exhaust of the NANP numbers. We asked parties to discuss any existing measures that can mitigate or alleviate the limitations with using a leading star or number sign. We also sought comment on whether calls from wireless customers to One Call Centers should continue to be permitted because of the effort that has gone into wireless implementation of #344 (#DIG).

10. *Discussion.* We agree with commenters that the use of a code with a leading star or number sign, in the format of either *XXX or #XXX, for access to One Call Centers would be too difficult and costly to implement. Most significantly, as indicated above, such a dialing arrangement does not comply with the statute's requirement to utilize a nationwide "three-digit number" to access One Call Centers. Moreover, this abbreviated dialing arrangement would not achieve the uniformity mandated by the Pipeline Safety Act since all users would not be dialing the same sequence if the code selected includes a star or number sign. A single nationwide abbreviated dialing code for access to One Call Centers will provide the certainty and reliability required for maximum usage and benefits of One Call services. Additionally, many telephone systems use the star and number signs for feature access. Thus, reprogramming these systems may not always be feasible and will involve considerable customer expense. Further, some switching systems may not be capable of processing access codes using a leading star or number sign in the dialing sequences; and the necessary switch development would delay the full implementation of the One Call functionality. Based on the record before us, we conclude that *XXX and #XXX are impractical for use as the national One Call access code and we will not assign a code using a leading star or number sign for access to One Call Centers.

11. Although we recognize the efforts undertaken in the implementation of #344 by some wireless carriers, we disagree with those commenters who advocate the continued and indefinite use of #344 for access to One Call Centers. We agree with DOT that a single nationwide abbreviated dialing code for access to One Call Centers will provide the certainty and reliability required for maximum usage and benefits of One Call services as intended by Congress. The #344 abbreviated dialing arrangement does not comply with the statute's requirement to utilize a nationwide "three-digit number" to access One Call Centers and the statutory mandate that dialing be uniform across the nation. The use of different abbreviated dialing codes for access to state One Call Centers, even if such codes are made available in addition to 811, likely will result in customer confusion as the public use both wireless and wireline telephones. Wireless carriers that currently use #344 shall transition to 811 pursuant to the implementation requirements.

B. Implementation Issues

1. Integration of Existing One Call Center Numbers

12. *Background.* The Pipeline Safety Act expressly mandates use of a three-digit *toll-free* number to access State One Call Centers. In the NPRM, we sought comment on methods to ensure that calls to One Call Centers are toll-free. We specifically sought comment on the NANC's recommendation that each One Call Center provide a toll-free number, which can be an 8YY number or any number that is not an IntraLATA

toll call from the area to be served, so that callers do not incur toll charges. We also sought comment on whether the dialing sequence should be the same for all providers or whether existing abbreviated dialing sequences should be allowed to continue.

13. *Discussion.* To ensure that calls to One Call Centers are toll-free, we conclude that One Call Centers shall provide to carriers its toll-free number, which can be an 8YY number, or any number that is not an IntraLATA toll call, from the area to be served for use in implementing 811. Thus, when a caller dials 811, the carriers will translate 811 into the appropriate number to reach the One Call Center. This requirement will both simplify call routing and ensure that callers do not incur toll charges, as mandated by the statute. As discussed above, other existing abbreviated dialing sequences shall be discontinued, because the use of other existing abbreviated dialing sequences in addition to 811 does not comply with the statutory mandate that dialing be uniform across the nation.

2. Originating Switch Location

14. *Background.* In establishing a framework for its evaluation of various abbreviated dialing arrangements to implement the Pipeline Safety Act, the NANC proposed that for wireline-originated calls, the originating NPA–NXX would determine the One Call Center to which the call is sent. For wireless-originated calls, the NANC proposed that the originating Mobile Switch Center would determine the One Call Center to which the call is sent. In the NPRM, we sought comment on these proposals.

15. *Discussion.* We direct carriers to use either the NPA–NXX or the originating switch to determine the appropriate One Call Center to which a call should be routed. For wireline-originated calls, the originating switch location or the NPA–NXX will determine the One Call Center to which the call is sent. For wireless-originated calls, the originating Mobile Switch Center will determine the One Call Center to which the call is sent. This approach allows all carriers the flexibility to utilize the most efficient and cost-effective method for routing calls to appropriate state One Call Center and is competitively neutral.

3. Implementation Period

16. *Background.* In the NPRM, we sought comment on several issues relating to how much time carriers should be given to implement a new national abbreviated dialing code. Specifically, we sought comment on how long the implementation period for each proposed abbreviated dialing arrangement should be. We asked parties to comment on all of the steps that carriers must undertake to prepare the network for use of the three abbreviated dialing arrangements proposed in the NPRM to route properly such calls to the One Call Centers. We also sought comment on what time limit should be given to carriers to vacate any existing uses, if an unassigned N11 code, such as 811, were selected to access One Call Centers. Further, we specifically sought comment on the technical and operational issues that should be considered when determining the time period for implementation that would allow carriers to prepare for use of the proposed abbreviated dialing arrangement that was adopted. We also sought comment on the NANC's recommendation that we allow carriers one to two years to prepare the network to support One Call notification to existing One Call Centers. Additionally, we sought comment on whether the period for implementation should be uniform or variable and based on local conditions and whether, pursuant to section 251(e), we should delegate authority to the states to establish the timeframe for implementation and how best to engage states in the implementation process.

17. *Discussion.* With regard to how much time carriers will need to implement 811, we find that, based on the record before us, two years from publication of this Order in the **Federal Register** is a reasonable time period for implementing 811. Most commenters generally agree that two years is a sufficient period for implementing an N11 code, specifically 811, for access to One Call Centers. Thus, we conclude that calls to One Call Centers using an abbreviated dialing code must use 811 as the national abbreviated dialing code for providing advanced notice of excavation activities to underground facility operators on or before two years from publication of this Order in the **Federal Register**. We defer to the expertise of the carriers, in cooperation with the individual states, to develop and determine the most appropriate technological means of implementing 811 access to One Call services, as dictated by their particular network architectures.

18. Although the Commission has allowed the local use of unassigned N11 codes, it has recognized that this use must be discontinued on short notice. The record indicates that the 811 code, while not formally allocated by a Commission order, is being used in several jurisdictions for other purposes. For example, 811 is used in some areas to allow customers to make free repair calls and as a 911 test code. Specifically, in some of its states, SBC Communications (SBC) uses 811 as a test code for 911 prior to "turning up" new 911 trunk groups. SBC asserts therefore that designing a new code for testing will take some time because SBC must be able to test new 911 trunk groups to ensure they operate correctly. SBC also currently uses 811 in Connecticut for its business offices. Thus, in certain states, implementing the 811 solution will require time and effort.

19. American Public Communications Council (APCC) also notes that many independent payphone service providers currently use 811 to allow the general public to make free repair calls from payphones. APCC argues that it would be costly to implement 811 because it would require payphones to be reprogrammed and a change of signage informing payphone users of the new repair code. We agree with SBC that where 811 have been used by customers for other purposes, changing the use of that number will require more robust customer education. Additionally, changes to phone books, methods and procedures, and systems will require significantly more time where 811 was previously used for other purposes. For the foregoing reasons, we believe two years provides a reasonable transition period to clear the 811 abbreviated dialing code of any other existing uses, provide customer education, and ensure that there is no unreasonably abrupt disruption of the existing uses.

20. We recognize that states have unique knowledge that will assist in implementing the transition to the One Call Center access set forth in this Order. We therefore delegate authority to the state commissions, pursuant to section 251(e), to address the technical and operational issues associated with the implementation of 811. In delegating authority to the state commissions to address the technical and operational issues, state commissions should also consider whether a carrier may need additional time to implement 811 due to such technical and/or operational difficulties. We agree with Michigan Public Service Commission (MPSC) that state commissions are in the best position to address issues associated with implementing the abbreviated dialing arrangement because many of the One Call Centers were developed by, or under the auspices of, the state commissions. For example, Qwest suggests that states be involved in mediating issues associated with

customer contention in areas where multiple call centers request service in the same geographical area and be delegated authority to assess the qualifications of One Call Centers. We agree. We defer to the expertise of the states to address and resolve such issues. However, we decline to delegate authority to the state commissions, as suggested by California Public Utilities Commission and the People of the State of California (CPUC), to establish the implementation period. We agree with SBC that the statute calls for a nationwide solution and that allowing states to establish the implementation period would not meet this mandate. Therefore, as discussed above, we have established a two year period for implementing 811 as the national abbreviated dialing code for access to state One Call Centers.

III. Procedural Matters

A. Regulatory Flexibility Analysis

21. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) for this *Order*, set forth at Appendix B.

B. Paperwork Reduction Act Analysis

22. This *Order* does not contain new or modified information collection requirements 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 businesses 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).

C. Further Information

23. Alternative formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 voice, (202) 418–7365 TTY, or *bmillin@fcc.gov*. This Order can also be downloaded in Microsoft Word and ASCII formats at *http://www.fcc.gov/ccb/universalservice/highcost*.

Final Regulatory Flexibility Analysis (Report and Order)

24. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (NPRM). The Commission sought public comments on the proposals in the NPRM, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

D. Need for, and Objectives of, the Proposed Rules

25. In this *Order*, we designate 811 as the national abbreviated dialing code to be used by state One Call notification systems for providing advanced notice of excavation activities to underground facility operators in compliance with the Pipeline Safety Improvement Act of 2002 (the "Pipeline Safety Act"). This Order implements the Pipeline Safety Act, which provides for the establishment of a nationwide toll-free abbreviated dialing arrangement to be used by state One Call notification systems.

26. A One Call notification system is a communication system established by operators of underground facilities and/or state governments in order to provide a means for excavators and the general public to notify facility operators in advance of their intent to engage in excavation activities. We also address various implementation issues. Specifically, we require One Call Centers to notify carriers of the toll-free or local number the One Call Center uses in order to ensure that callers do not incur toll charges, as mandated by the statute. We also allow carriers to use either the Numbering Plan Area (NPA) NXX or the originating switch to determine the appropriate One Call Center to which a call should be routed. Further, we require the use of 811 as the national abbreviated dialing code for providing advanced notice of excavation activities to underground facility operators within two years after publication of this *Order* in the **Federal Register**. We also delegate authority to the states, pursuant to section 251(e), to address the technical and operational issues associated with the implementation of the 811 code.

27. The 811 abbreviated dialing code shall be deployed ubiquitously by carriers throughout the United States for use by all telecommunications carriers, including wireline, wireless, and payphone service providers that provide access to state One Call Centers. The designation of 811 for access to state One Call Centers shall be effective thirty days after publication of this *Order* in the **Federal Register**.

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

28. In the IRFA, we indicated that we would consider any proposals made to minimize any significant economic impact on small entities. We received no comments directly in response to the IRFA. However, the National Telecommunications Cooperative Association (NTCA) and THG Consultants LLP (THG) filed general comments regarding the possible impact of the implementation of an N11 code on small business entities. Specifically, NTCA asserted that, although implementing 811 as the abbreviated dialing code for accessing the state One Call notification system will not cause its member companies any technical hardships; it will involve some costs and difficulties due to the need to modify switches. While NTCA did not provide detailed information on implementation costs, NTCA contended that the burdens associated with implementation of the 811 code would have a greater impact on smaller companies with limited staffing and a smaller subscriber base. THG argued that if an unassigned N11 code is selected to access One Call Centers, then existing commercial uses of this code should continue for commercial purposes until a qualified entity applies for develops the capability to put the code into use for One Call access. THG is concerned that, where an unassigned N11 code is selected for One Call access, small businesses engaged in commercial activities may be adversely affected and the public deprived of an existing service. The steps taken to minimize economic impact on small entities are discussed below.

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

29. 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. 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).

a. Telecommunications Service Entities

(i) Wireline Carriers and Service Providers

30. 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.

31. *Incumbent Local Exchange Carriers.* 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, 1,337 carriers have reported that they are engaged in the provision of incumbent 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 our action.

32. *Competitive Local Exchange Carriers, Competitive Access Providers, "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, 609 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 carriers, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 35 carriers have reported that they are "Other Local Service Providers." Of the 35, 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, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action.

33. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 133 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 127 have 1,500 or fewer employees and six have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our action.

34. *Toll Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 625 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 590 have 1,500 or fewer employees and 35 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our action.

35. *Payphone Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services 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, 761 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 757 have 1,500 or fewer employees and four 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 our action.

36. *Interexchange Carriers.* 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, 261 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

37. *Operator Service Providers.* 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 action.

38. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 37 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our action.

(ii) Wireless Telecommunications Service Providers

39. *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 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 majority of firms can, again, be considered small.

40. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category "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 Cellular and Other Wireless Telecommunications firms, 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 category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service, or Specialized Mobile Radio Telephony services, which are placed together in the data. We have estimated that 294 of these are small, under the SBA small business size standard.

41. *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. In the Paging *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 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. The SBA has approved these small business size standards. 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. According to the most recent *Trends in Telephone Service*, 433 carriers reported that they were engaged in the provision of paging and messaging services. Of those, we estimate that 423 are small, under the SBA approved small business size standard.

42. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the wireless communications services. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity.

43. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted earlier, the SBA has developed a 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. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of wireless telephony. We have estimated that 294 of these are small under the SBA small business size standard.

44. *Broadband Personal Communications Service.* The broadband Personal Communications Service (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 35, 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.

45. *Narrowband Personal Communications Services.* To date, two auctions of narrowband PCS licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure

meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*, 65 FR 35875, June 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. In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

46. *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 small business size standard for 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 12 wireless firms out of a total of 1,238 such firms that operated for the entire year, 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 size standard.

47. *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, April 3, 1997, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business size 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 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 business 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 Licenses, and 875 Economic Area Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

48. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very 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, or that had revenues of no more than $3 million in each of the previous calendar years, respectively. These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities. Consequently, the Commission estimates that there are 301 or fewer small entity SMR licensees in the 800 MHz and 900 MHz bands that may be affected by the rules and policies adopted herein.

49. *700 MHz Guard Band Licensees.* In the *700 MHz Guard Band Order*, 65 FR 17594, April 4, 2000, we adopted 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" as 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 52 Major Economic Area 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.

50. *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 Basic Exchange Telephone Radio System. 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.

51. *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.

52. *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 adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

53. *Offshore Radiotelephone Service.* This service operates on several 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.

54. *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 adopted herein.

55. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.* Multichannel Multipoint Distribution Service 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 established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas. Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. 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 rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

56. *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 1,030 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 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

57. *218–219 MHz Service.* The first auction of 218–219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was 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*, 64 FR 59656, November 3, 1999, we established a small business size standard for 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 to exceed $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 holds interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3

million for the preceding three years. We cannot estimate, however, 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.

58. *24 GHz—Incumbent 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.

59. *24 GHz—Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million. "Very small business" in the 24 GHz band is 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 small business size standards. These size standards will apply to the future auction, if held.

G. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

60. In the IRFA, we invited comment on any possible costs associated with the abbreviated dialing arrangement ultimately chosen to comply with the Pipeline Safety Act. We received five general, non-IRFA comments in response to this issue. Commenters support the North American numbering Council's (NANC) recommendation that the cost of implementing a One Call service should not be an unfunded mandate. Qwest asserts that, although past N11 deployments have not typically involved federal cost recovery, state regulatory commissions are not uniform in the way in which they resolve cost recovery matters associated with N11 deployments. Specifically, the American Public Communications Council (APCC) contends that if payphone service providers are not excluded from the statutory mandate, then they should also be compensated for such calls.

61. While we recognize that there may be some costs associated with implementation of the 811 code, we have not specified parameters for cost recovery in this Order. The Pipeline Safety Act did not provide for federal financial support as part of the mandate for a nationwide abbreviated dialing arrangement for access to One Call Centers. Therefore, we find that the Congressional mandate and benefits of a national N11 code assignment, specifically 811, outweigh any concerns regarding cost recovery on the federal level. These issues are most appropriately addressed by the state and local governments. As indicated above, we believe that state commissions are in the best position to address issues associated with implementing 811 because many of the One Call Centers were developed by, or under the auspices of, the state commissions.

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

62. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed 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 or reporting requirements under the rule for 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 small entities.

63. In adopting 811 as the national abbreviated dialing code for access to One Call Centers, we have taken steps to minimize the impact on small entities. The overall objective of this proceeding was to assess possible abbreviated dialing arrangements to use to access state One Call Centers as mandated by the Pipeline Safety Act, while at the same time, seeking to minimize any adverse impact on numbering resources. We, therefore, sought comment on various abbreviated dialing arrangements, including those considered and recommended by the NANC, that could be used by state One Call notification systems in compliance with the Pipeline Safety Act while at the same time minimizing, to the extent possible, any adverse impact on numbering resources, including any impact on small entities.

64. After reviewing the comments and considering the possible abbreviated dialing arrangements that could be used by state One Call notification systems in compliance with the Pipeline Safety Act, we conclude that an N11 code is the best solution, within the framework of the statute, for access to One Call Centers. Thus, consistent with the statutory mandate, we designate 811 as the national abbreviated dialing code to be used by state One Call notification systems for providing advanced notice of excavation activities to underground facility operators in compliance with the Pipeline Safety Act. We agree with commenters that the other proposed alternatives—codes using a leading star or number sign, *e.g.* *344 or #344, and the establishment of an Easily Recognizable Code (ERC), such as 344, as an abbreviated dialing code are impractical, costly to implement, and could delay the availability of a national One Call number for years. Moreover, this abbreviated dialing arrangement would not achieve the uniformity mandated by the Pipeline Safety Act since all users would not be dialing the same sequence if the code selected includes a star or number sign. We believe that 811 will have less impact on customer dialing patterns and can be implemented without the substantial cost and delay of switch development required with other proposed alternatives.

65. Although we recognize that using 811 depletes the quantity of remaining N11 codes assignable for other purposes, using an N11 code to access One Call Centers will consume fewer numbering resources than certain other alternative abbreviated dialing arrangements. Additionally, the use of an N11 code to access One Call services follows the existing conventions for abbreviated dialing already familiar to customers. The N11 architecture is an established abbreviated dialing plan that is recognized by switch manufacturers and the public at large. Most significantly, using an N11 code such as 811 satisfies the legislative mandate for a three-digit nationwide number.

66. Further, although the Commission has allowed the local use of unassigned N11 codes, it has recognized that this

use must be discontinued on short notice. In order to minimize the impact of our action, including the impact on small business entities, we provide a two year period, from publication of this *Order* in the **Federal Register**, for implementing the 811 code. Based on the record before us, we believe two years from publication of this *Order* in the **Federal Register** is a reasonable time period for implementation of 811. The alternative of not providing for a transition period was considered but rejected because we believe a transition period is necessary to provide all telecommunications carriers, including wireline, wireless, and payphone service providers, sufficient time to make the necessary network modifications or upgrades, as well as integrate existing One Call notification systems, thus minimizing any adverse or unfair impact on smaller entities. In addition, this transition period will give carriers time to clear this number of any other existing uses, provide customer education, and ensure that there is no unreasonably abrupt disruption of the existing uses.

I. Publication of FRFA

67. The Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

IV. Ordering Clauses

68. 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 *Sixth Report and Order* is adopted.

69. Pursuant to section 251(e)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 251(e)(3), 811 is assigned as the national abbreviated dialing code to be used exclusively for access to Once Call Centers, effective May 13, 2005.

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

71. 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), because no rules were adopted or changed.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7179 Filed 4–12–05; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; FCC 05–28]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration; clarification.

SUMMARY: This document addresses certain issues raised in petitions for reconsideration of regarding the national do-not-call registry and the Commission's other telemarketing rules implementing the Telephone Consumer Protection Act (TCPA).

DATES: Effective May 13, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Erica McMahon, Consumer & Governmental Affairs Bureau, (202) 418–2512.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Order on Reconsideration*, CG Docket No. 02–278, FCC 05–28, adopted February 10, 2005, and released February 18, 2005 (*Order*). The *Order* addresses issues arising from *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, (*2003 TCPA Order*), CG Docket No. 02–278, FCC 03–153, released July 3, 2003; published at 68 FR 44144, July 25, 2003. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, it does not contain 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). Copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, Room CY–A257, 445 12th Street, SW., Washington, DC 20054. The complete text of this decision may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at its Web site: *http://www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). The *Order* can also be downloaded in Word and Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy*.

Synopsis

In the *2003 TCPA Order*, the Commission adopted a national do-not-call registry, in conjunction with the FTC, to provide residential consumers with a one-step option to prohibit unwanted telephone solicitations. Telemarketers are prohibited from contacting those consumers that register their telephone numbers on the national list, unless the call falls within a recognized exemption. We explained that calls that do not fall within the definition of "telephone solicitation" as defined in section 227(a)(3) are not restricted by the national do-not-call list. These may include surveys, market research, political and religious speech calls. The national do-not-call rules also do not prohibit calls by or on behalf of tax-exempt nonprofit organizations, calls to persons with whom the seller or telemarketer has an established business relationship, calls to businesses, and calls to persons with whom the marketer has a "personal relationship."

A number of petitioners raise questions related to the administration and operation of the national do-not-call registry. The DMA requests that the Commission review the national do-not-call registry set up by the FTC and reconsider our rules to impose more reasonable security procedures for the registry. In addition, the DMA asks the FCC to require the DNC list administrator to provide a mechanism by which callers can download the national list without wireless numbers. Several other petitioners request that the Commission reconsider the extent to which states may apply their do-not-call requirements to interstate telemarketers. We note that, since the close of the filing period for petitions for reconsideration, the Commission has received several petitions for declaratory ruling seeking preemption of state telemarketing laws. The

Commission intends to address the issue of preemption separately in the future.

The Commission also received petitions asking whether certain entities or certain types of calls are subject to the national do-not-call rules. The National Association of Realtors (NAR) asks us to clarify that the do-not-call rules do not apply to certain practices that are "unique to the real estate industry." Specifically, NAR argues that calls from real estate agents to individuals who have advertised their properties as "For Sale By Owner" fall outside the scope of the do-not-call rules. In addition, NAR requests that the Commission clarify that the rules permit real estate professionals to call individuals whose listing with another agent has lapsed. Independent Insurance Agents ask the Commission to reconsider our determinations that insurance agents are subject to the TCPA and that there should be no exemption for calls made based on referrals. The State and Regional Newspaper Association asks the Commission to reconsider its treatment of newspapers under the do-not-call rules in view of the constitutional protection newspapers are accorded.

As discussed below, we dismiss the foregoing petitions to the extent they seek reconsideration of the rules establishing the national do-not-call registry. Many of the same issues regarding the do-not-call registry were raised during the original proceeding and were addressed in the *2003 TCPA Order*. In conjunction with the FTC, we will continue to monitor closely the operation of the list to ensure its continued effectiveness. We are not persuaded by the State & Regional Newspaper Association that we need to revisit our rules. The State and Regional Newspaper Associations argue that the Commission cannot justify application of the new telemarketing rules under the "limited constitutional analysis" offered in the 2003 TCPA Order. They argue instead that, pursuant to a line of judicial decisions involving licensing schemes for the distribution of newspapers, the Commission's rules must be justified under the standards "applicable to fully protected speech."

In February 2004, the United States Court of Appeals for the 10th Circuit held that the Commission's "opt-in telemarketing regulation[s] that provide a mechanism for consumers to restrict commercial sales calls but do not provide a similar mechanism to limit charitable or political calls" are "consistent with First Amendment requirements." Thus, our do-not-call rules are constitutional.

We recognize, however, that no party to that case specifically raised the issue of the standard of First Amendment protection afforded the distribution of newspapers before the court. After careful review of the State Newspaper Association's argument, however, we conclude that it is incorrect. To be sure, the right to distribute newspapers is afforded First Amendment protection. But a call from a telemarketer to an unwilling listener in their home for the purpose of selling a newspaper subscription remains speech which does "no more than propose a commercial transaction."

Although the State Newspaper Association cites to a number of decisions noting that newspapers have been afforded First Amendment protection in the distribution of their newspapers, these cases typically deal with licensing cases that vest "unbridled discretion" in a government official over whether to permit or deny distribution of the publication at all. By contrast, our rules simply permit a private individual, not a government official, to decide whether or not to entertain a subscription request in their home. Indeed, the Supreme Court upheld a statute that directed the Postmaster General to send an order directing a mail sender to delete the name of an addressee if that addressee requests the removal of his name from the sender's mailing list: The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer * * * In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence.

The do not call rules directly advance the government's substantial interests in guarding against fraudulent and abusive solicitations and facilitating the protection of consumer privacy in the home even when the product sought to be sold is a newspaper. We therefore reject the State Newspaper Association's constitutional arguments.

In addition, we disagree with the DMA that the rules should be revised to expressly exempt calls to business numbers. The *2003 TCPA Order* provided that the national do-not-call registry applies to calls to "residential subscribers" and does not preclude calls to businesses. To the extent that some business numbers have been inadvertently registered on the national registry, calls made to such numbers will not be considered violations of our rules. We also decline to exempt from the do-not-call rules those calls made to "home-based businesses'; rather, we will review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber.

We also find no basis to further exempt certain entities or calls from the national do-not-call rules. The TCPA defines a telephone solicitation as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person but does not include a call or message to any person with that person's prior express invitation or permission; to any person with whom the caller has an established business relationship; or by a tax-exempt nonprofit organization." As with any entity making calls that constitute "telephone solicitations," a real estate agent, insurance agent, or newspaper is precluded from calling consumers registered on the national do-not-call list, unless the calls would fall within one of the specific exemptions provided in the statute and rules. Therefore, we clarify that a telephone solicitation would include calls by real estate agents to property owners for the purpose of offering their services to the owner, whether the property listing has lapsed or not. In addition, a person who, after seeing an advertisement in a newspaper, calls the advertiser to offer advertising space in the same or different publication, is making a telephone solicitation to that advertiser. We find, however, that calls by real estate agents who represent only the potential buyer to someone who has advertised their property for sale, do not constitute telephone solicitations, so long as the purpose of the call is to discuss a potential sale of the property to the represented buyer. The callers, in such circumstances, are not encouraging the called party to purchase, rent or invest in property, as contemplated by the definition of "telephone solicitation." They are instead calling in response to an offer to purchase something from the called party. Similarly, a recruiter calling to discuss potential employment or service in the military with a consumer is not making a "telephone solicitation" to the extent the called party will not be asked during or after the call to purchase, rent or invest in property, goods or services. A caller responding to a classified ad would not be making a telephone solicitation, provided the purpose of the

call was to inquire about or offer to purchase the product or service advertised, rather than to encourage the advertiser to purchase, rent or invest in property, goods or services. In addition, as explained in the *2003 TCPA Order*, calls constituting telephone solicitations to persons based on referrals are nevertheless subject to the do-not-call rules, if not otherwise exempted.

Finally, we deny Insurance Agents' petition to the extent it requests that we amend our safe harbor provision to account for "good faith calls" that violate the rules and to accommodate call back technologies that have the potential to run afoul of the rules. We believe the existing safe harbor provision sufficiently addresses calls made in error by telemarketers that have made a good faith effort to comply with the rules. Consistent with the FTC, we concluded that a seller or telemarketer will not be liable for violating the national do-not-call rules if it can demonstrate that it has met certain standards, including using a process to prevent telemarketing to any telephone number on the national do-not-call registry using a version of the registry obtained from the registry administrator no more than 31 days prior to the date any call is made.

Common Carrier Notifications

The Commission's rules require that, beginning January 1, 2004, common carriers shall "when providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the Federal government and the methods by which such rights may be exercised by the subscriber." This notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database. Verizon asks the Commission to reconsider this requirement, arguing that an annual notice is expensive and unnecessary. Alternatively, Verizon asks the Commission to clarify that other forms of notification, such as messages on telephone bills or in telephone directories, satisfy the TCPA requirement and at a much lower cost than bill inserts.

The TCPA provides that if the Commission adopts a national do-not-call database, such regulations shall "require each common carrier providing telephone exchange service * * * to inform subscribers for telephone exchange service of the opportunity to provide notification * * * that such subscriber objects to receiving telephone solicitations." In implementing this provision, the Commission adopted a rule requiring such notice to be made on an annual basis. While many residential subscribers have already placed their numbers on the national do-not-call registry, others may wish to do so in the future or may need to place a different number on the registry because of a move or change in service. Still others may decide subsequently to remove their numbers from the registry. Therefore, we disagree with Verizon that such annual notification, which includes the registry's toll-free telephone number and Internet address established by the FTC, is unnecessary.

Upon further consideration, we will allow common carriers to provide the notice required by 47 U.S.C. 227(c)(3)(B) through either a bill insert or a separate message on the bill itself. Such notice may also appear on an Internet bill that the subscriber has opted to receive. We believe that bill messages may be a less expensive and an efficient alternative to a separate page in the bill for some carriers, and will nevertheless comply with the TCPA. We emphasize, however, that the notice, whether appearing on the actual bill or on a separate page in the bill, must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on or remove their numbers from the national database.

Company-Specific Do-Not-Call Lists

In the *2003 TCPA Order*, the Commission determined that company-specific do-not-call lists should be retained in order to provide consumers with an additional option for managing telemarketing calls. In addition, we concluded that the retention period for records of those consumers requesting not to be called should be reduced from ten years to five years. Petitioner Biggerstaff seeks clarification on how the five-year retention requirement applies to do-not-call requests made prior to the effective date of the amended rule. He argues that in fairness to consumers, any do-not-call request made prior to the effective date of the new rule must be honored by the telemarketer or seller for the original ten-year period. SBC and MCI disagree and urge the Commission to clarify that telemarketers are required to honor company-specific do-not-call requests for five years from the date any request is made, including those requests made prior to the Commission's ruling. Petitioner Brown asks the Commission to reduce the period of time by which a telemarketer must honor company-specific do-not-call requests from 30 days to 24 hours. We conclude that any do-not-call request made of a particular company must be honored for a period of five years from the date the request is made, whether the request was made prior to the effective date of the amended rule or after the rule went into effect. Telemarketers may remove those numbers from their company-specific do-not-call lists that have been on their lists for a period of five years or longer. As explained in the *2003 TCPA Order*, we believe a five-year retention period reasonably balances any administrative burden on consumers in requesting not to be called with the interests of telemarketers in contacting consumers. The shorter retention period increases the accuracy of companies' do-not-call databases while the national do-not-call registry option mitigates the burden on those consumers who may find company-specific do-not-call requests overly burdensome. We also believe that having two different retention periods—one for requests made prior to the effective date of the amended rule and one for requests made after—will lead to confusion among consumers and increase administrative burdens on telemarketers.

In addition, we decline to amend the timeframe by which telemarketers must honor do-not-call requests. In concluding that telemarketers must honor such requests within 30 days, we considered both the large databases of such requests maintained by some entities and the limitations on certain small businesses. We also determined that telemarketers with the capability to honor company-specific do-not-call requests in less than thirty days must do so. We continue to believe that this requirement adequately balances the privacy interests of those consumers that have requested not to be called with the interests of the telemarketing industry. We also decline to amend our determination regarding the hours a telemarketer must be available to record do-not-call requests from consumers making inbound calls to that telemarketer. In the *2003 TCPA Order*, we concluded that the number supplied by the telemarketer must permit an individual to make a do-not-call request during the hours of 9 a.m. and 5 p.m. Monday through Friday. Telemarketers are already required to record do-not-call requests at the time the request is made, such as during a live solicitation call. Thus, we believe that in those instances where the consumer must

instead contact the telemarketer at the telemarketer's number, it is reasonable to do so during "normal" business hours when most consumers are likely to call.

Finally, the rules as adopted in July of 2003 contain a minor error in wording which is being corrected by this *Order*. In § 64.1200(d)(6), the word "caller's" should be replaced with the word "consumer's." We correct the sentence to read: "A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls."

Established Business Relationship Exemption

The TCPA expressly exempts calls to persons with whom the caller has an "established business relationship" (EBR) from the restrictions on telephone solicitations. Congress determined that such an exemption was necessary to allow companies to communicate by telephone with their existing customers. Consistent with the FTC, we modified the definition of established business relationship so that the relationship, once begun, exists for 18 months in the case of purchases or transactions and three months in the case of inquiries or applications, unless the consumer "terminates" it by, for example, making a company-specific do-not-call request. ACLI asks the Commission to clarify that an "established business relationship" exists: (1) Between a person and his or her insurer as long as there is an insurance policy or annuity in force between the company and the person; and (2) between the person and his or her insurance agent, as long as there is an insurance policy or annuity in force that was placed by that insurance agent. ACLI indicates that the definition of "established business relationship" is vague as applied to the life insurance industry and does not take into account the unique aspects of the relationship between policyholders, insurers, their agents and licensed insurance professionals. ACLI maintains that insurance policies and annuities purchased by consumers represent long-term obligations of the companies that provide those policies. ACLI indicates that an insurance policy or annuity remains in force between the parties beyond the initial policy placement or renewal. Thus, ACLI contends that an EBR exists during the life of the policy even without an additional purchase, transaction or inquiry by the policyholder.

Petitioner Dowler similarly requests that the Commission clarify that an EBR exists between a mortgage broker and a consumer throughout the term of any loan that originates with the broker. Without clarification from the Commission, Dowler contends that the mortgage broker's EBR with the consumer would end 18 months after the original transaction with the broker, even though the broker established the initial relationship with the consumer. Dowler recommends that the Commission expand the rules so that an EBR exists between the broker and borrower during the length of the originating loan transaction and extends 18 months beyond the conclusion of the loan contract.

Although petitions from ACLI and Dowler were filed late, we take this opportunity to clarify application of the EBR time limitations. We agree with petitioners that a unique relationship exists between consumers and entities that enter into financial contracts or agreements. Financial "contracts" often remain in force even if the consumer is not required to make regular payments or transactions. In passing the recent Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Congress provided that a "pre-existing business relationship" includes a "financial contract between a person and a consumer which is in force" or a "financial transaction (including holding an active account or a policy in force or having another continuing relationship)." We similarly clarify that the existence of financial agreements, including bank accounts, credit cards, loans, insurance policies and mortgages, constitute ongoing relationships that should permit a company to contact the consumer to, for example, notify them of changes in terms of a contract or offer new products and services that may benefit them. Consumers should not be surprised to receive a call from a bank at which they have an account, even if they have not transacted any business on that account for over 18 months. They also are likely to expect to receive calls from insurance companies with whom they hold an insurance policy or from lenders with whom they secured a mortgage. Similarly, a publication that a consumer agrees to subscribe to for a specified period of time, has an EBR with the consumer for the duration of the subscription. Thus, during the time a financial contract remains in force between a company and a consumer, there exists an established business relationship, which will permit that company to call the consumer during the period of the "contract." Once any account is closed or any "contract" has terminated, the bank, lender, or other entity will have an additional 18 months from the last transaction to contact the consumer before the EBR is terminated for purposes of telemarketing calls. However, we emphasize that a consumer may terminate the EBR for purposes of telemarketing calls at any time by making a do-not-call request. Once the consumer makes a company-specific do-not-call request, the company may not call the consumer again to make a telephone solicitation regardless of whether the consumer continues to do business with the company.

In addition, we clarify that intermediaries, such as insurance agents and mortgage brokers, may call those consumers with whom they have arranged an insurance policy or mortgage for a period of 18 months from the time the transaction is completed, *i.e.*, the broker/agent arranged the mortgage or insurance deal. We agree that brokers and agents often play an important role in these types of financial transactions and that, in many circumstances, the consumer would expect to receive a call from them within a reasonable period of time of the transaction. However, we believe that to allow a broker to make a telephone solicitation to a consumer for the duration of the loan or term of the policy would conflict with the do-not-call rules' purpose in protecting consumer privacy rights. In addition, a broker or agent may obtain the consumer's express written permission to call beyond the 18-month period at the time of the transaction.

Tax-Exempt Nonprofit Organization Exemption

The term "telephone solicitation," as defined in the TCPA, does not include a call or message "by a tax-exempt nonprofit organization." The Commission concluded, as part of its *1995 TCPA Reconsideration Order*, published at 60 FR 42068, August 15, 1995, that calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call. In the *2003 TCPA Order*, the Commission reaffirmed this conclusion, finding that charitable and other nonprofit entities with limited expertise, resources and infrastructure, might find it advantageous to contract out its fundraising efforts. We determined that a tax-exempt nonprofit organization that conducts its own fundraising campaign or hires a professional fundraiser to do it, will not be subject to the restrictions on telephone solicitations. We also determined, however, that when a for-profit organization is delivering its own commercial message as part of a telemarketing campaign, even if

accompanied by a donation to a charitable organization or referral to a tax-exempt nonprofit organization, that call is not by or on behalf of a tax-exempt nonprofit organization and is therefore subject to the "telephone solicitation" rules.

Several petitioners ask the Commission to reconsider the rules regarding calls by and on behalf of tax-exempt nonprofit organizations. DialAmerica requests that we clarify that its "Sponsor Program" is exempt from the national do-not-call registry because the calls it makes are on behalf of a tax-exempt nonprofit entity, and not on behalf of a for-profit seller. Petitioner Biggerstaff, on the other hand, asks us to reconsider our determination regarding calls made *by or on behalf of* tax-exempt nonprofit organizations, arguing that exempting calls from the definition of "telephone solicitation," when they are made by a for-profit telemarketer on behalf of the nonprofit, violates Congressional intent and the plain language of the statute. We now reaffirm our determination regarding for-profit companies that call to encourage the purchase of goods or services, yet donate some of the proceeds to a nonprofit organization. In circumstances where telephone calls are initiated by a for-profit entity to offer its own, or another for-profit entity's products for sale—even if a tax-exempt nonprofit will receive a portion of the sale's proceeds—such calls are telephone solicitations as defined by the TCPA. We distinguish these types of calls from those initiated, directed and controlled by a tax-exempt nonprofit for its own fundraising purposes. We believe that to exempt for-profit organizations merely because a tax-exempt nonprofit organization is involved in the telemarketing program would undermine the purpose of the do-not-call registry. Thus, we decline to exempt DialAmerica's Sponsor Program from the national do-not-call registry.

We emphasize that a tax-exempt nonprofit organization that simply contracts out its fundraising efforts will not be subject to the restrictions on telephone solicitations. Although Petitioner Biggerstaff describes certain entities that purport to be calling on behalf of tax-exempt nonprofits to evade the rules, the record does not warrant reversing this determination. Instead, we will address such potential violations on a case-by-case basis through the Commission's enforcement process.

Predictive Dialers and Abandoned Calls

Under the Commission's rules, telemarketers must ensure that any technology used to dial telephone numbers abandons no more than three percent of calls answered by a person, measured over a 30-day period. A call will be considered abandoned if it is not transferred to a live sales agent within two seconds of the recipient's completed greeting. When a call is abandoned within the three percent maximum allowed, a telemarketer must deliver a prerecorded identification message containing only the telemarketer's name, telephone number, and notification that the call is for "telemarketing purposes." Several petitioners and commenters raise issues related to the use of predictive dialers and the Commission's call abandonment rules. InfoCision requests that the Commission reconsider the call abandonment rate of three percent and instead adopt a five percent abandonment rate. Petitioner Brown asks us to revise the rules to prohibit the abandonment of any call which is answered by a person. Beautyrock urges the Commission to act to ensure that the FTC's rules on abandoned calls are consistent with the FCC's.

We conclude that petitioners raise no new facts suggesting the call abandonment rules should be amended or that the identification message requirement should be eliminated. We therefore dismiss such petitions to the extent they seek such action. In addition, while we do not have the authority to change the FTC's rules, we have forwarded a report to Congress which outlines the inconsistencies between the agencies' sets of rules.

The record before us revealed that consumers often face "dead air" calls and repeated hang-ups resulting from the use of predictive dialers. In addition to requiring that telemarketers limit the number of such abandoned calls to three percent of calls answered by a person, the Commission required that telemarketers deliver a prerecorded message when abandoning a call so that consumers will know who is calling them. We emphasized that the message must be limited to name and telephone number, along with a notice that the call is for "telemarketing purposes." We cautioned that the message may not be used to deliver an unsolicited advertisement, and that additional information in the prerecorded message constituting an unsolicited advertisement would be a violation of our rules. We agree with the DMA that words other than "telemarketing purposes" may convey the purpose of the call. However, we disagree that language such as "Hi, this is Company A, calling today to sell you our services" does not constitute an unsolicited advertisement and conclude that such statement would run afoul of the rules. Therefore, we strongly encourage telemarketers to use the words "telemarketing purposes" when delivering a prerecorded identification message for an abandoned call in order to avoid delivering an unsolicited advertisement in the message.

Artificial or Prerecorded Voice Messages

The TCPA prohibits telephone calls to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is specifically exempted under Commission rules. The TCPA permits the Commission to exempt calls that are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party and which do not transmit an unsolicited advertisement. Since 1992, the Commission's rules have exempted from the prohibition "a call or message * * * that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement." The Commission made clear in the *2003 TCPA Order* that offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services are subject to the restrictions on unsolicited advertisements. We also determined that if the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement.

Debt Collection Calls

The Commission's rules require that all prerecorded messages identify the name of the business, individual or other entity that is responsible for initiating the call, along with the telephone number of such business, other entity, or individual. The prerecorded message must contain, at a minimum, the legal name under which the business, individual or entity calling is registered to operate. The rule also requires that the telephone number stated in the message be one that a consumer can use during normal business hours to ask not to be called again. ACA International (ACA) requests clarification that the amended identification requirements for prerecorded messages do not apply to calls made for debt collection purposes. ACA states that the Commission's identification requirement as applied to debt collection calls directly conflicts

with section 805(b) of the Fair Debt Collection Practices Act (FDCPA), which prohibits the disclosure of the existence of a debt to persons other than the debtor. ACA maintains that the FDCPA expressly prohibits debt collectors from communicating any information to third parties, even inadvertently, with respect to the existence of a debt. ACA states that the requirement that a debt collector transmit its registered name at the beginning of the prerecorded message potentially would trigger liability under the third party disclosure prohibition of the FDCPA. In the alternative, ACA requests that the Commission clarify that debt collectors are not required to identify their state-registered name in prerecorded messages if such identification conflicts with Federal or State laws.

In the *1995 TCPA Reconsideration Order*, the Commission concluded that the rules did not require that debt collection employees give the names of their employers in a prerecorded message, which disclosure might otherwise reveal the purpose of the call to persons other than the debtor. Although we believe that it is generally in the best interest of residential subscribers that full identification of the caller be provided during any prerecorded message call, the FDCPA clearly prohibits the disclosure by debt collectors of any information regarding the existence of a debt. It requires a collector initiating a call answered by a third party to identify himself by name but not to disclose the name of his employer unless asked. We therefore clarify that as long as the call is made for the purpose of debt collection and is not "for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services * * *," the debt collector is not required to identify its state-registered name in prerecorded messages if such identification conflicts with Federal or State laws. In such circumstances where a conflict would exist, we find that the caller may instead identify himself by individual name. We continue to require any debt collector to state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual.

"Information-Only" Calls

The American Resort Development Association (ARDA) asks the Commission to permit entities to make prerecorded, "information-only" calls to numbers that are not on the national do-not-call list or a company-specific do-not-call list. ARDA explains that timeshare providers use such messages to describe promotional opportunities, but that consumers are not encouraged to purchase anything on the phone. If the consumer returns the call to learn more, the operator informs the consumer about promotional activities at a nearby resort. ARDA contends that prohibiting such prerecorded message calls is not necessary to safeguard consumers' privacy or prevent unscrupulous conduct. ARDA further argues that the Commission's determination regarding such messages violates the First Amendment rights of consumers who wish to receive such calls. Shields opposes ARDA's petition, maintaining that a prerecorded call, the ultimate purpose of which is to further a commercial enterprise, is a telemarketing call.

We decline to grant ARDA's petition to exempt prerecorded messages regarding timeshare opportunities. The messages ARDA describes that purport to deliver "information only" are clearly part of a marketing campaign to encourage consumers to invest in a commercial product. As we stated in the *2003 TCPA Order*, the fact that a sale is not completed during the call or message does not mean the message does not constitute a telephone solicitation or unsolicited advertisement. Messages that describe a new product, a vacation destination, or a company that will be in "your area" to perform home repairs nevertheless are part of an effort to sell goods and services, even if a sale is not made during the call. In addition, as discussed above, messages that promote goods or services at no cost are nevertheless unsolicited advertisements because they describe the "quality of any property, goods or services." ARDA points out that consumers who receive prerecorded messages must return the calls if they wish to learn more, to complete the sale, or simply to ask to be placed on a do-not-call list. As noted in the *2003 TCPA Order*, such messages were determined by Congress to be more intrusive to consumer privacy than live solicitation calls. The record before us shows that consumers are, in fact, often more frustrated by prerecorded messages. The DMA indicates that they should be used only in limited circumstances, as consumers are often offended by such messages. Thus, we reiterate that prerecorded messages that contain either a telephone solicitation or introduce an unsolicited advertisement are prohibited without the prior express consent of the called party.

We disagree with Petitioner Strang that entities sending lawful prerecorded messages must obtain the "prior express consent" of the called party in writing. Unlike the national do-not-call registry, through which consumers have indicated that they do not wish to receive telemarketing calls (by registering on the list), we find no evidence in the record suggesting that consent should be in writing when sending prerecorded messages to consumers not registered on the national do-not-call list. In the case of the national do-not-call registry, we concluded that sellers may contact those consumers on the list if they have obtained the prior express permission of the consumers. Such express permission must be evidenced only by a signed, written agreement between the consumer and the seller. Absent a consumer's listing on the do-not-call registry, such prior express consent to deliver a lawful prerecorded message may be obtained orally. As with the sending of unsolicited facsimile advertisements, telemarketers delivering prerecorded messages must be prepared to provide clear and convincing evidence that they received prior express consent from the called party.

We also decline to reconsider the requirement for businesses to use their legal name to identify themselves when they use prerecorded messages. We believe that the use of "d/b/a" ("doing business as") alone in many instances may make it difficult to identify the company calling. However, as we stated in the *2003 TCPA Order*, the rule does not prohibit the use of "d/b/a" information, provided that the legal name of the business is also provided.

Radio Station and Television Broadcaster Messages

In the *2003 TCPA Order*, we addressed prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or similar opportunity. We concluded that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast; such message is permitted under the rules as a commercial call that "does not include or introduce an unsolicited advertisement or constitute a telephone solicitation." We also noted, however, that if the message encourages consumers to listen to or watch programming that is retransmitted broadcast programming for which consumers must pay (*e.g.*, cable, digital satellite, etc.), such messages would be considered "unsolicited advertisements" for purposes of our rules. Such messages would be part of an overall marketing campaign to encourage the purchase of goods or

services or that describe the commercial availability or quality of any goods or services and would be considered "unsolicited advertisements" as defined by the TCPA.

Petitioner Biggerstaff requests that the Commission reconsider its determination that certain radio and television broadcast messages are not considered "unsolicited advertisements" under the restrictions on prerecorded messages. Biggerstaff contends specifically that radio and television broadcasts are entertainment and news "services," as well as "advertisement delivery services." Biggerstaff further maintains that there is no basis for treating such broadcasters differently from others providing similar services, such as cable networks, Web sites, newspapers or publishers.

We decline to reverse our conclusion regarding radio station and television broadcaster messages. As explained in the *2003 TCPA Order*, if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as "a commercial call that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation."

Wireless Telephone Numbers

In the *2003 TCPA Order*, we affirmed that it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. We stated that both the statute and our rules prohibit these calls, with limited exceptions, "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged." In addition, we determined not to prohibit all live solicitations to wireless numbers, but noted that the TCPA already prohibits such calls to wireless numbers using an autodialer.

As noted above, section 227(b)(1)(A)(iii) of the TCPA refers to calls made to any telephone number "assigned to" cellular telephone service or any service for which the called party is charged for the call. Verizon Wireless explains that according to numbering guidelines and the Commission's rules, numbers ported to another carrier are treated as "assigned numbers" that are then reported to the Commission for utilization purposes by the donating carrier, not by the receiving carrier. According to Verizon Wireless, a number that is ported to another carrier is still assigned to the original carrier for purposes of numbering and local number portability. Verizon Wireless asks us to clarify that, under the TCPA, the number is "assigned to" a wireless service based on the identity of a customer's new service, rather than the identity of the original carrier.

We agree with those petitioners who point out that permitting autodialed and prerecorded voice messages to wireless telephone numbers that have been ported from wireline carriers would defeat the underlying purpose of the prohibition—to protect wireless subscribers from the cost and interference associated with such calls. To apply the Commission's definition of "assigned numbers" for number utilization purposes to the TCPA's rules on calls to wireless numbers would lead to an unintended result. Telemarketers would be prohibited from placing autodialed and prerecorded message calls to wireless numbers generally, but permitted to place such calls to certain subscribers simply because they have ported their numbers from wireline service to wireless service. In addition, we believe we made clear in the *2003 TCPA Order* that, even with the advent of local number portability, we expect telemarketers to make use of the tools available in the marketplace to avoid making autodialed and prerecorded message calls to wireless numbers. Thus, we affirm that a telephone number is assigned to a cellular telephone service, for purposes of the TCPA, if the number is currently being used in connection with that service.

We also agree with the DMA that a call placed to a wireline number that is then forwarded, at the subscriber's sole discretion and request, to a wireless number or service, does not violate the ban on autodialed and prerecorded message calls to wireless numbers. Action on the part of any residential subscriber to forward certain calls from their wireline device to their wireless telephones does not subject telemarketers to liability under the TCPA.

Caller Identification Rules

The DMA asks the Commission to further examine and perhaps revise our caller identification (caller ID) requirements, indicating that it is not clear that Automatic Number Identification (ANI) will pass to ordinary residential subscriber lines. Brown petitions the Commission to require telemarketers, when transmitting caller ID, to provide a telephone number, which the consumer may call at no toll charge.

We decline to reconsider the caller ID requirements and dismiss both the DMA's and Brown's petitions. We continue to believe that the caller ID rules allow consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again. In addition, as discussed in the *2003 TCPA Order*, we believe that telemarketers can comply with the requirements. Under the rules, telemarketers are required to transmit caller ID information, which must include either ANI or Calling Party Number (CPN). We explained that CPN can include any number associated with the telemarketer or party on whose behalf the call is made, that allows the consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, the number for the party on whose behalf the telemarketer is making the call, or the seller's customer service number. Any number supplied must permit an individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

Private Right of Action

The TCPA provides consumers with a private right of action in State court for any violation of the TCPA's prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements. Several petitioners request that the Commission clarify the parameters of the private right of action.

The Commission declines to make any determination about the specific contours of the TCPA's private right of action: Congress provided consumers with a private right of action, "if otherwise permitted by the laws or rules of court of a State." As we stated in the *2003 TCPA Order*, this language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate State courts, subject to those State courts' rules. We continue to believe that it is for Congress, not the Commission, either to clarify or limit this right of action.

Regulatory Flexibility Act Analysis

We note that no FRFA is necessary for the *Second Order on Reconsideration*. In this *Order*, we are not making any changes to the Commission's rules; rather, we are clarifying the existing rules. In addition, there were no objections to the FRFA regarding the Commission's telemarketing rules.

Congressional Review Act

The Commission will send a copy of this *Second Order on Reconsideration* 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).

Ordering Clauses

Pursuant to sections 1–4, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 227, and 303(r); and § 1.429 of the Commission's Rules, 47 CFR 1.429, this *Second Order on Reconsideration* in CG Docket No. 02–278 is adopted as set forth herein, and part 64 of the Commission's rules, 47 CFR 64.1200 is amended as set forth in the Rule Changes.

This *Second Order on Reconsideration* shall become effective May 13, 2005.

The petitions for reconsideration and/or clarification of the telemarketing rules in CG Docket No. 02–278 are denied in part and granted in part, as set forth herein. As noted above, the Commission intends to address the issue of preemption separately in the future. MedStaffing Inc.'s *Petition for Declaratory Ruling* is granted to the extent stated herein. Petitions not filed within 30 days of the Report and Order's publication by American Council of Life Insurers, Consumer Bankers Association, Clifford Dowler, and RDI Marketing are dismissed.

List of Subjects in 47 CFR Part 64

Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For reasons discussed in the preamble, the Commission amends part 64 of the Code of Federal Regulations as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

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

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

■ 2. Section 64.1200 is amended by revising paragraph (d)(6) to read as follows:

§ 64.1200 Delivery restrictions.

* * * * *

(d) * * *

(6) *Maintenance of do-not-call lists.* A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

* * * * *

[FR Doc. 05–7346 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–764, MB Docket No. 02–266, RM–10557]

Radio Broadcasting Services; Chillicothe, Dublin, Hillsboro, and Marion, OH

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a rulemaking petition to reallot, downgrade, and change the community of license for Station WMRN–FM from Channel 295B at Marion, OH, to Channel 294B1 at Dublin, OH, as a first local service. To accommodate this action, the document also reallots, downgrades, and changes the community of license for Station WSRW–FM from Channel 294B at Hillsboro, OH, to Channel 293A at Chillicothe, OH. Finally, the document denies objections raised by Infinity Broadcasting Operations, the Committee for Competitive Columbus Radio, and Sandyworld, Inc. *See* 67 F.R. 57780, September 12, 2002. *See also* **SUPPLEMENTARY INFORMATION.**

DATES: Effective May 9, 2005.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket 02–266, adopted March 23, 2005, and released March 25, 2005. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. 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 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of the *Report and Order* in this proceeding in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

The reference coordinates for Channel 294B1 at Dublin, OH are 40–09–20 and 82–54–12. The reference coordinates for Channel 293A at Chillicothe, OH are 39–17–31 and 82–51–38.

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 Ohio, is amended by adding Channel 293A at Chillicothe, adding Dublin, Channel 294B1, removing Channel 294B at Hillsboro, and removing Channel 295B at Marion.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7071 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–763; MB Docket No. 04–219; RM–10986]

Radio Broadcasting Services; Evergreen, AL, and Shalimar, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 227C2 for Channel 227C1 at Evergreen, Alabama, reallots Channel 227C2 to Shalimar, Florida, and modifies the Station WPGG license to specify operation on Channel 227C2 at Shalimar. The reference coordinates for the Channel 227C2 allotment at Shalimar, Florida, are 30–23–36 and 86–29–45. *See* 69 FR 35562, June 25, 2004. With this action, the proceeding is terminated.

DATES: Effective May 9, 2005.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Report and Order in MB Docket No. 04–219 adopted March 23, 2005, and released March 25, 2005. The

full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, 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 Congress and the Government Accountability 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 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 Alabama, is amended by removing Evergreen, Channel 227C1.

■ 3. Section 73.202(b), the Table of FM Allotments, under Florida, is amended by adding Shalimar, Channel 227C2.

Federal Communications Commission.

John A. Karousos.

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7072 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126333–5040–02; I.D. 040805C]

Fisheries of the Economic Exclusive Zone Off Alaska; Deep-Water Species Fishery by Vessels Using Trawl Gear in the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for species that comprise the deep-water species fishery by vessels using trawl gear in the Gulf of Alaska (GOA). This action is necessary because the second seasonal apportionment of the 2005 Pacific halibut bycatch allowance specified for the deep-water species fishery in the GOA has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), April 8, 2005, through 1200 hrs, A.l.t., July 5, 2005.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The second seasonal apportionment of the 2005 Pacific halibut bycatch allowance specified for the deep-water species fishery in the GOA is 300 metric tons as established by the 2005 and 2006 harvest specifications for groundfish of the GOA (70 FR 8958, February 24, 2005), for the period 1200 hrs, A.l.t., April 1, 2005, through 1200 hrs, A.l.t., July 5, 2005.

In accordance with § 679.21(d)(7)(i), the Administrator, Alaska Region, NMFS, has determined that the second seasonal apportionment of the 2005 Pacific halibut bycatch allowance specified for the trawl deep-water species fishery in the GOA has been reached. Consequently, NMFS is prohibiting directed fishing for the deep-water species fishery by vessels using trawl gear in the GOA. The species and species groups that comprise the deep-water species fishery are all rockfish of the genera *Sebastes* and *Sebastolobus*, deep-water flatfish, rex sole, arrowtooth flounder, and sablefish.

After the effective date of this closure the maximum retainable amounts at §§ 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of the deep-water species fishery by vessels using trawl gear in the GOA.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 8, 2005.

Emily Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–7447 Filed 4–8–05; 2:57 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126332–5039–02; I.D. 040805B]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher/Processor Vessels Using Pot Gear in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher/processor vessels using pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2005 first seasonal allowance of the Pacific cod total allowable catch (TAC) specified for catcher/processor vessels using pot gear in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), April 9, 2005, through 1200 hrs, A.l.t., September 1, 2005.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the

Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2005 first seasonal allowance of the Pacific cod TAC specified for catcher/processor vessels using pot gear in the BSAI as a directed fishing allowance is 1,914 metric tons (mt) as established by the 2005 and 2006 final harvest specifications for groundfish in the BSAI (70 FR 8979, February 24, 2005), for the period 1200 hrs, A.l.t., January 1, 2005, through 1200 hrs, A.l.t., June 10, 2005. See §§ 679.20(a)(7)(i)(A), (a)(7)(i)(C)(*1*)(*iii*), (c)(3)(iii), and (c)(5)

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS, has determined that the 2005 first seasonal allowance of the Pacific cod total allowable catch specified for catcher/processor vessels using pot gear in the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,900 mt, and is setting aside the remaining 14 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher/processor vessels using pot gear in the BSAI.

After the effective date of this closure the maximum retainable amounts at §§ 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher/processor vessels using pot gear in the BSAI.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 8, 2005.

Emily Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–7446 Filed 4–8–05; 2:57 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 70
Wednesday, April 13, 2005

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–2005–20589; Directorate Identifier 2005–CE–12–AD]

RIN 2120–AA64

Airworthiness Directives; GROB-WERKE Model G120A 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 all GROB-WERKE (GROB) Model G120A airplanes. This proposed AD would require you to repetitively inspect the nose landing gear (NLG) assembly, paying special attention to the NLG swivel tube and the engine truss in the area of the NLG attachment, for cracks and damaged (defective) welding seams. If you find cracks or defects during any inspection, this proposed AD would require you to replace the cracked or defective part. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. We are issuing this proposed AD to detect and correct cracks and defects in the NLG assembly, which could result in failure of the NLG. This failure could lead to a hard landing and/or loss of control of the airplane during landing operations.

DATES: We must receive any comments on this proposed AD by May 13, 2005.

ADDRESSES: Use one of the following 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 20590–0001.
- *Fax:* 1–202–493–2251.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

To get the service information identified in this proposed AD, contact GROB Luft-und Raumfahrt, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Federal Republic of Germany; telephone: 011 49 8268 998139; facsimile: 011 49 8268 998200.

To view the comments to this proposed AD, go to *http://dms.dot.gov.* This is docket number FAA–2005–20589; Directorate Identifier 2005–CE–12–AD.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on this proposed AD? We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include the docket number, "FAA–2005–20589; Directorate Identifier 2005–CE–12–AD" at the beginning of your comments. We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed rulemaking. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). This is docket number FAA–2005–20589; Directorate Identifier 2005–CE–12–AD. You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov.*

Are there any specific portions of this proposed AD I should pay attention to? We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. If you contact us through a nonwritten communication and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend this proposed AD in light of those comments and contacts.

Docket Information

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

Discussion

What events have caused this proposed AD? The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, recently notified FAA that an unsafe condition may exist on all GROB Model G120A airplanes. The LBA reports cracks found on the nose landing gear (NLG) swivel tube on one of the affected airplanes during routine maintenance.

What is the potential impact if FAA took no action? If not detected and corrected, cracks and defects in the nose landing gear assembly could cause the nose landing gear to fail. This failure could lead to a hard landing and/or loss of control of the airplane during landing operations.

Is there service information that applies to this subject? GROB has issued Service Bulletin No. MSB1121–055, dated November 26, 2004.

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

—Inspecting the nose landing gear (NLG) assembly, paying special attention to the NLG swivel tube and the engine truss in the area of the NLG attachment, for cracks and damaged (defective) welding seams; and

—Replacing any cracked or defective part.

What action did the LBA take? The LBA classified this service bulletin as mandatory and issued German AD Number D–2004–514, effective date: December 9, 2004, to ensure the continued airworthiness of these airplanes in Germany.

Did the LBA inform the United States under the bilateral airworthiness agreement? These GROB Model G120A airplanes are manufactured in Germany and are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Under this bilateral airworthiness agreement, the LBA has kept us informed of the situation described above.

FAA's Determination and Requirements of This Proposed AD

What has FAA decided? We have examined the LBA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since the unsafe condition described previously is likely to exist or develop on other GROB Model G120A airplanes of the same type design that are registered in the United States, we are proposing AD action to detect and correct cracks and defects in the nose landing gear assembly, which could result in failure of the nose landing gear. This failure could lead to a hard landing and/or loss of control of the airplane during landing operations.

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

Is there a modification I can incorporate instead of repetitively inspecting the nose landing gear assembly? The FAA has determined that long-term continued operational safety would be better assured by design changes that remove the source of the problem rather than by repetitive inspections or other special procedures. With this in mind, FAA will continue to work with GROB to collect information and perform fatigue analysis in determining whether a future design change is feasible.

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

Costs of Compliance

How many airplanes would this proposed AD impact? We estimate that this proposed AD affects 6 airplanes in the U.S. registry.

What would be the cost impact of this proposed AD on owners/operators of the affected airplanes? We estimate the following costs to do the proposed inspections:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work hour × $65 = $65	Not applicable	$65	$65 × 6 = $390

The cost for replacing any cracked or defective part based on the results of the proposed inspections will be covered under warranty by the manufacturer.

Authority for This Rulemaking

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

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

Regulatory Findings

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

Would this proposed AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this proposed AD:

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

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

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

We prepared a summary of the costs to comply with this proposed AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket FAA–2005–20589; Directorate Identifier 2005–CE–12–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

GROB-WERKE: Docket No. FAA–2005–20589; Directorate Identifier 2005–CE–12–AD.

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

(a) We must receive comments on this proposed airworthiness directive (AD) by May 13, 2005.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects Model G120A airplanes, all serial numbers, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. We are issuing this AD to detect and correct cracks and damage in the nose landing gear (NLG) assembly, which could result in failure of the NLG. This failure could lead to a hard landing and/or loss of control of the airplane during landing operations.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Inspect the nose landing gear (NLG) assembly for cracks or damaged (defective) welding seams. Pay special attention to the NLG swivel tube and the engine truss in the area of the NLG attachment.	Initially inspect within the next 50 hours time-in-service (TIS) after the effective date of this AD, unless already done. Repetitively inspect thereafter at intervals not to exceed 50 hours TIS.	Follow GRUB Service Bulletin No. MSB1121–055 dated November 26, 2004.
(2) If you find cracks or defects during any inspection required in paragraph (e)(1) of this AD, replace the cracked or defective part.	Replace before further flight after the inspection in which cracks and/or defects are found. After you replace the cracked or defective part, continue with the repetitive inspections required paragraph (e)(1) of this AD at the 50 hours TIS intervals.	Follow GROB Service Bulletin No. MSB1121–055 dated November 26, 2004.

Note: The compliance time in this AD is different than the compliance time in GROB Service Bulletin No. MSB1121–055 dated November 26, 2004. The compliance time in this AD takes precedence over the compliance time in the service information.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Standards Office, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

Is There Other Information That Relates to This Subject?

(g) German AD Number D–2004–514, effective date: December 9, 2004, also addresses the subject of this AD.

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

(h) To get copies of the documents referenced in this AD, contact GROB Luft- und Raumfahrt, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Federal Republic of Germany; telephone: 011 49 8268 998139; facsimile: 011 49 8268 998200. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC, or on the Internet at *http://dms.dot.gov*. This is docket number FAA–2005–20589; Directorate Identifier 2005–CE–12–AD.

Issued in Kansas City, Missouri, on April 6, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7384 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20720; Directorate Identifier 2005–CE–17–AD]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Models PC–12 and PC–12/45 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 Pilatus Aircraft Ltd. (Pilatus) Models PC–12 and PC–12/45 airplanes. This proposed AD would require you to insert a temporary revision into the Limitations Section of the Pilot Operating Handbook (POH). This proposed AD would also require you to replace the pitch actuator with an improved design pitch actuator and make the necessary wiring and circuit breaker changes, as applicable. Installing the improved design pitch actuator terminates the need for the temporary revision in the POH. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Switzerland. We are issuing this proposed AD to prevent an out-of-trim condition from occurring when the flaps are at a 40-degree flight phase and the pilot disconnects the autopilot. This condition could lead to reduced ability to control the airplane.

DATES: We must receive any comments on this proposed AD by May 13, 2005.

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

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide Rulemaking Web Site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Fax:* 1–202–493–2251.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

To get the service information identified in this proposed AD, contact Pilatus Aircraft Ltd., Customer Liaison Manager, CH–6371 Stans, Switzerland; telephone: +41 41 619 6208; facsimile: +41 41 619 7311; e-mail:

SupportPC12@pilatus-aircraft.com or from Pilatus Business Aircraft Ltd., Product Support Department, 11755 Airport Way, Broomfield, Colorado 80021; telephone: (303) 465–9099; facsimile: (303) 465–6040.

To view the comments to this proposed AD, go to *http://dms.dot.gov*. This is docket number FAA–2005–20720; Directorate Identifier 2005–CE–17–AD.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on this proposed AD? We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include the docket number, "FAA–2005–20720; Directorate Identifier 2005–CE–17–AD" at the beginning of your comments. We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed rulemaking. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). This is docket number FAA–2005–20720; Directorate Identifier 2005-CE–17-AD. You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov*.

Are there any specific portions of this proposed AD I should pay attention to? We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. If you contact us through a nonwritten communication and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend this proposed AD in light of those comments and contacts.

Docket Information

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

Discussion

What events have caused this proposed AD? The Federal Office for Civil Aviation (FOCA), which is the airworthiness authority for Switzerland, recently notified FAA that an unsafe condition may exist on certain Pilatus Models PC–12 and PC–12/45 airplanes. The FOCA reports that an abrupt nose down pitch condition occurred on a PC–12 airplane.

Investigation revealed that the pilot disconnected the autopilot when the flaps were at a 40-degree selection.

Pilatus has determined that the pitch actuator sense circuitry becomes over-active during a 40-degree flight phase. Therefore, Pilatus designed a new pitch actuator that modifies sense output signals and removes the flap in motion signal to the autopilot.

What is the potential impact if FAA took no action? This condition, if not corrected, could result in an out-of-trim condition when the flaps are at a 40-degree flight phase and the pilot disconnects the autopilot. This condition could lead to reduced ability to control the airplane.

Is there service information that applies to this subject? Pilatus has issued PC12 Service Bulletin No. 22–004, dated December 21, 2004; and Temporary Revision No. 11 (Report No. 02211) or No. 40 (Report No. 01973–001).

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

—Replacing the pitch actuator, part number (P/N) 985.92.03.161, with an improved design pitch actuator, P/N 985.92.03.164; and

—Making the associated wiring and circuit breaker changes, as applicable.

What action did the FOCA take? The FOCA classified this service bulletin as mandatory and issued Swiss AD Number HB–2005–128, effective date March 29, 2005, to ensure the continued airworthiness of these airplanes in Switzerland.

Did the FOCA inform the United States under the bilateral airworthiness agreement? These Pilatus PC–12 and PC–12/45 airplanes are manufactured in Switzerland and are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Under this bilateral airworthiness agreement, the FOCA has kept us informed of the situation described above.

FAA's Determination and Requirements of This Proposed AD

What has FAA decided? We have examined the FOCA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since the unsafe condition described previously is likely to exist or develop on Pilatus Models PC–12 and PC–12/45 airplanes of the same type design that are registered in the United States, we are proposing AD action to prevent an out-of-trim condition from occurring when the flaps are at a 40-degree flight phase and the pilot disconnects the autopilot. This condition could lead to reduced ability to control the airplane.

What would this proposed AD require? This proposed AD would require you to insert the applicable temporary revision into the Pilot Operating Handbook (POH) and incorporate the actions in the previously-referenced service bulletin. The POH revision is no longer necessary when the improved design pitch actuator referenced in the service information is installed.

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

Costs of Compliance

How many airplanes would this proposed AD impact? We estimate that this proposed AD affects 330 airplanes in the U.S. registry.

What would be the cost impact of this proposed AD on owners/operators of the affected airplanes? We estimate the following costs to incorporate the

proposed Pilot Operating Handbook (POH) Temporary Revision:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work hour × $65 per hour = $65	Not applicable	$65	$21,450

Pilatus will provide warranty credit for replacing the pitch actuator to the extent stated in the service information.

Authority for This Rulemaking

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

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

Regulatory Findings

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

Would this proposed AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this proposed AD:

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

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

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

We prepared a summary of the costs to comply with this proposed AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket FAA–2005–20720; Directorate Identifier 005–CE–17–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Pilatus Aircraft Ltd.: Docket No. FAA–2005–20720; Directorate Identifier 2005–CE–17–AD.

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

(a) We must receive comments on this proposed airworthiness directive (AD) by May 13, 2005.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects Models PC–12 and PC–12/45 airplanes, Manufacturers Serial Numbers (MSN) 101 through 620, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Switzerland. The actions specified in this AD are intended to prevent an out-of-trim condition from occurring when the flaps are at a 40-degree flight phase and the pilot disconnects the autopilot. This condition could lead to reduced ability to control the airplane.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Insert Temporary Revision No. 11 (Report No. 02211) or No. 40 (Report No. 01973–001) into the Limitations Section of the PC–12 Pilot's Operating Handbook (POH).	Within the next 90 days after the effective date of this AD, unless already done.	The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may modify the POH as specified in paragraph (e)(1) of this AD. Make an entry into the aircraft records showing compliance with this the portion of the AD following section 43.9 of Federal Aviation Regulations (14 CFR 43.9).
(2) Replace the pitch actuator, part number (P/N) 985.92.03.161, with an improved design pitch actuator, P/N 985.92.03.164; and make the associated wiring and circuit breaker changes (as applicable).	Within the next 6 months after the effective date of this AD, unless already done.	Follow Pilatus PC12 Service Bulletin No. 22–004, dated December 21, 2004.

Actions	Compliance	Procedures
(3) Remove the Temporary Revision to the POH specified in paragraph (e)(1) of this AD after the pitch actuator is replaced as required in paragraph (e)(2) of this AD.	Before further flight after the pitch actuator is replaced with an improved design pitch actuator.	The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may modify the POH as specified in paragraph (e)(3) of of this AD. Make an entry into the aircraft records showing compliance with this portion of the AD following section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).
(4) Do not install a P/N 985.92.03.161 pitch actuator.	As of the effective date of this AD	Not applicable.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Standards Office, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

Is There Other Information That Relates to This Subject?

(g) Swiss AD Number HB–2005–128, effective date March 29, 2005, also addresses the subject of this AD.

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

(h) To get copies of the documents referenced in this AD, contact Pilatus Aircraft Ltd., Customer Liaison Manager, CH–6371 Stans, Switzerland; telephone: +41 41 619 6208; facsimile: +41 41 619 7311; e-mail: *SupportPC12@pilatus-aircraft.com* or from Pilatus Business Aircraft Ltd., Product Support Department, 11755 Airport Way, Broomfield, Colorado 80021; telephone: (303) 465–9099; facsimile: (303) 465–6040. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC, or on the Internet at *http://dms.dot.gov*. This is docket number FAA–2005–20720; Directorate Identifier 2005–CE–17–AD.

Issued in Kansas City, Missouri, on April 6, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7382 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20917; Directorate Identifier 2004–NM–85–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F Series Airplanes; and Model 747SR Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede two existing airworthiness directives (AD) for certain Boeing transport category airplanes. One AD currently requires doing certain inspections to detect cracks and corrosion around the lower bearing of the actuator attach fittings of the inboard and outboard flaps; repairing if necessary; and either overhauling the fittings or replacing them, which when done on certain actuator attach fittings ends the repetitive inspections. The other AD currently requires certain other inspections to detect discrepancies of the fittings of the flaps, and follow-on and corrective actions if necessary, which ends the repetitive inspections of the first AD. For certain airplanes, this proposed AD would require new inspections for discrepancies of the attach fittings of the flaps, and follow-on and corrective actions if necessary, which ends the repetitive inspections of both existing ADs. For all airplanes, this proposed AD would require repetitive overhaul/replacements of the fittings of both the inboard and outboard flaps. This proposed AD is prompted by reports of cracks of the attach fittings of the trailing edge flaps. We are proposing this AD to prevent cracking and other damage of the actuator attach fittings of the trailing edge flaps, which could result in abnormal operation or retraction of a trailing edge flap, and possible loss of controllability of the airplane.

DATES: We must receive comments on this proposed AD by May 31, 2005.

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

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

You can get the service information identified in this proposed AD from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

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

SUPPLEMENTARY INFORMATION:

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–2005–20917; Directorate Identifier 2004–NM–85–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications 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 may examine the AD docket 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

On June 20, 2001, we issued AD 2001–13–12, amendment 39–12292 (66 FR 34526, June 29, 2001), for certain Boeing Model 747 series airplanes. That AD requires repetitive inspections to detect cracks and corrosion around the lower bearing of the actuator attach fittings of the inboard and outboard flaps. That AD also requires repetitive overhauls for certain actuator attach fittings or repetitive replacement of the fittings with new fittings, as applicable, which terminates the repetitive inspections. That AD also provides for replacement of actuator attach fittings with improved fittings, which terminates all requirements of that AD. That AD was prompted by reports of cracks on the lower bearing journal of the inboard actuator attach fittings of the outboard trailing edge flaps due to stress corrosion. We issued that AD to detect and correct cracking on the actuator attach fittings of the trailing edge flaps, which could result in abnormal operation or retraction of a trailing edge flap, and consequent reduced controllability of the airplane.

On April 14, 2003, we issued AD 2003–08–11, amendment 39–13124 (68 FR 19937, April 23, 2003), for all Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F series airplanes; and Model 747SR series airplanes. That AD requires repetitive inspections to detect discrepancies of the actuator attach fittings of the inboard and outboard flaps, which are more comprehensive than those required by AD 2001–13–12, and follow-on and corrective actions as necessary. That AD was prompted by reports of three fractures of the attach fittings of the trailing edge flap actuator. We issued that AD to detect and correct cracking and other damage of the actuator attach fittings of the trailing edge flaps, which could result in abnormal operation or retraction of a trailing edge flap, and possible loss of controllability of the airplane.

In the preamble of AD 2003–08–11, we indicated that the actions required by that AD were considered "interim action," and that further rulemaking action was being considered to require repetitive replacement of the fittings with new or overhauled fittings. We now have determined that further rulemaking action is indeed necessary, and this proposed AD follows from that determination.

Relevant Service Information

We have previously reviewed Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002 (cited in AD 2003–08–11 as the appropriate source of service information for the required actions). The service bulletin describes procedures for repetitive inspections of the attach fittings of the inboard and outboard flaps to detect discrepancies (i.e., Part 1). The inboard fittings are to be inspected using borescopic and detailed visual methods; and the outboard fittings are to be inspected using borescopic, detailed visual, and ultrasonic methods. The service bulletin also describes procedures for repetitive detailed visual (inboard and outboard flaps) and ultrasonic (outboard flap only) inspections with the attach fittings removed to detect discrepancies (i.e., Part 2). Discrepancies include surface corrosion, pitting, cracks, migrated or rotated bushings, and damaged or missing cadmium plating. The service bulletin also describes procedures for corrective and follow-on actions if necessary (i.e., Parts 3 through 5), which includes repetitive detailed visual inspections to detect bushing migration and cracking and other damage of the actuator attach fittings; repetitive application of corrosion-inhibiting compound; and repetitive overhaul or replacement of any discrepant fitting with a new or overhauled fitting; as applicable. Repetitive overhauls of the attach fittings on the outboard and inboard flaps or repetitive replacements of those attach fittings with new or overhauled fittings (i.e., Part 5) ends the need for repetitive inspections.

The manufacturer advises that Boeing Alert Service Bulletin 747–57A2316 replaces Boeing Alert Service Bulletin 747–57A2310 (cited as the appropriate source of service information for the requirements of AD 2001–13–12). We have determined that accomplishing the actions specified in Boeing Service Bulletin 747–57A2316 will adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. Therefore, we are proposing this AD, which would supersede ADs 2001–13–12 and 2003–08–11. This proposed AD would continue to require the following actions specified in AD 2001–13–12:

- Repetitive inspections to detect cracks and corrosion around the lower bearing of the actuator attach fittings of

the inboard and outboard flaps, and repair if necessary; and

• Repetitive overhauls of the actuator attach fittings on the outboard flaps and a one-time overhaul of the fittings on the inboard flaps, which ends the applicable repetitive inspections described previously; or repetitive replacements of the fittings on the inboard and outboard flaps with new fittings or a one-time replacement of those fittings with improved fittings, which ends the repetitive inspections described previously.

In addition, this proposed AD would continue to require the following actions specified in AD 2003–08–11: Repetitive inspections to detect discrepancies of the actuator attach fittings of the inboard and outboard flaps (i.e., Part 1) and follow-on/corrective actions as necessary (i.e, Parts 2 and 5). Accomplishing the initial inspections (i.e., Part 1) would end the repetitive inspections around the lower bearing of the fittings of the inboard and outboard flaps described previously. This proposed AD would also require the actions specified in Parts 2 through 5 of Boeing Alert Service Bulletin 747–57A2316 described previously, except as discussed under "Difference Between the Proposed AD and the Service Bulletin." Accomplishing the actions in Part 2 of the service bulletin ends the inspections specified in Part 1 of the service bulletin. Accomplishing the actions in Part 5 of the service bulletin (i.e. repetitive overhauls or replacements of the attaching fittings at intervals not to exceed 8 years) ends all repetitive inspections for both inboard and outboard actuator attach fittings over eight years old. The compliance times are as follows:

• Part 1: 90 days (for inboard and outboard flaps);

• Part 2: 9 months (for inboard flaps), 18 months (for outboard flaps), and before further flight if any crack, corrosion, or damaged cad plating is found on either the inboard or outboard flap;

• Part 3: Repetitive intervals of 9 months (for inboard flaps only);

• Part 4: Repetitive intervals of 9 months (for outboard flaps only); and

• Part 5: Ranges from before the attach fitting is 8 years old, or within 2 years, whichever occurs first, to 3 years depending on the age of the outboard and inboard attach fittings. If any crack, corrosion, or damaged cad plating is found on either the inboard or outboard flap, the compliance time is before further flight.

Difference Between the Proposed AD and the Service Bulletin

Boeing Alert Service Bulletin 747–57A2316 refers to "detailed visual inspection" for discrepancies of the actuator attach fittings of the inboard and outboard flaps. We have determined that the procedures in the service bulletin should be described as a "detailed inspection." Note 1 has been included in this proposed AD to define this type of inspection.

Change to Existing ADs

This proposed AD would retain all requirements of ADs 2001–13–12 and 2003–08–11. Since those ADs were issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following two tables:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2001–13–12	Corresponding requirement in this proposed AD
paragraph (a)	paragraph (g)
paragraph (b)	paragraph (h)
paragraph (c)	paragraph (i)
paragraph (d)	paragraph (j)
paragraph (e)	paragraph (k)
paragraph (f)	paragraph (l)

Requirement in AD 2003–08–11	Corresponding requirement in this proposed AD
paragraph (a)	paragraph (m)
paragraph (b)	paragraph (n)
paragraph (c)	paragraph (o)
paragraph (d)	paragraph (p)

We also have changed all references to a "detailed visual inspection" in the existing ADs to "detailed inspection" in this action. In addition, we have added a new requirement that, as of the effective date of this AD, the repetitive overhauls and replacements in paragraphs (j)(1) and (k)(1) of this proposed AD (paragraphs (d) and (e)(1) of AD 2001–13–12), respectively, must be done in accordance with Part 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, at intervals not to exceed 8 years. The repetitive intervals for those repetitive requirements in AD 2001–13–12 are 8 years or 8,000 flight cycles, whichever occurs first. Because corrosion is time dependant rather than flight-cycle dependant, we determined that the intervals for the repetitive overhauls and replacements should be based on time only. We also determined that operators should accomplish those actions in accordance with the latest service bulletin.

Costs of Compliance

This proposed AD would affect about 1,000 Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F series airplanes; and Model 747SR series airplanes worldwide. There are about 181 airplanes on the U.S. registry. The average labor rate is $65 per hour. The following two tables provide the estimated costs for U.S. operators to comply with this proposed AD.

TABLE 1.—ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Fleet cost
Inspections (required by AD 2001–13–12).	2	None	$130, per inspection cycle	$23,530, per inspection cycle.
Inspections specified in Part 1 of the Accomplishment Instruction (AI) of the referenced service bulletin (required by AD 2003–08–11).	2	None	$130 per inspection cycle	$23,530 per inspection cycle.
Inspections specified in Part 2 of the AI of the referenced service bulletin (new proposed actions).	5	None	$325 per inspection cycle	$58,825 per inspection cycle.

TABLE 2.—ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane
Overhaul(s) as an alternative to the replacement.	37	None	$2,405.
Replacement(s) as an alternative to the overhaul.	4	$6,623 (for the four attach fittings on the outboard flaps) and $7,566 (for the four attach fittings on the inboard flaps).	$6,883 (for the four attach fittings on the outboard flaps) and $7,826 (for the four attach fittings on the inboard flaps), per replacement cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. 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 removing amendments 39–12292 (66 FR 34526, June 29, 2001) and 39–13124 (68 FR 19937, April 23, 2003) and adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2005–20917; Directorate Identifier 2004–NM–85–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this airworthiness directive (AD) action by May 31, 2005.

Affected ADs

(b) This AD supersedes AD 2001–13–12, amendment 39–12292; and AD 2003–08–11, amendment 39–13124.

Applicability: (c) This AD applies to all Boeing Model 747–100, –200B, –200F, –200C, –100B, –300, –100B SUD, –400, –400D, and –400F series airplanes; and Model 747SR series airplanes; certificated in any category.

Unsafe Condition

(d) This AD was prompted by reports of cracks of the attach fittings of the trailing edge flaps. We are issuing this AD to prevent cracking and other damage of the actuator attach fittings of the trailing edge flaps, which could result in abnormal operation or retraction of a trailing edge flap, and possible loss of controllability of the airplane.

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

Requirements of AD 2001–13–12

Affected Airplanes

(f) For Boeing Model 747 series airplanes, as listed in Boeing Service Bulletin 747–57A2310, Revision 2, dated February 22, 2001, do the actions required by paragraphs (g) through (l) of this AD, as applicable.

Actuator Attach Fittings That Have Not Been Overhauled or Replaced

(g) For actuator attach fittings on the outboard flaps that have not been overhauled in accordance with revisions of Boeing 747 Overhaul Manual (OHM) 57–52–55 dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001 (the effective date of AD 2001–13–12); and for actuator attach fittings on the inboard flap actuators that have not been overhauled in accordance with revisions of OHM 57–52–35, dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001: Accomplish the actions in paragraph (i), (j), or (k) of this AD at the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD.

(1) Prior to the accumulation of 8 years since date of manufacture or 8,000 total flight cycles, whichever occurs first.

(2) Within 6 months after August 3, 2001.

Actuator Attach Fittings That Have Been Overhauled or Replaced

(h) For actuator attach fittings on the outboard flaps that have been overhauled in accordance with revisions of OHM 57–52–55 dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001; and for actuator attach fittings on the inboard flap actuators that have been overhauled in accordance with revisions of OHM 57–52–35 dated prior to June 1, 1999, or replaced with a new fitting, prior to August 3, 2001: Accomplish the actions in paragraph (i), (j), or (k) of this AD at the later of the times specified in paragraphs (h)(1) and (h)(2) of this AD.

(1) Within 8 years or 8,000 total flight cycles after the attach fitting was overhauled or replaced, whichever occurs first.

(2) Within 6 months after August 3, 2001.

Inspections and Corrective Action

(i) Perform a detailed inspection to detect corrosion around the lower bearing journal on the actuator attach fittings on the inboard and outboard flaps, and perform an ultrasonic inspection to detect cracks around the lower bearing journal of the actuator attach fittings on the outboard flaps, in accordance with Boeing Service Bulletin 747–57A2310, Revision 1, dated November

23, 1999; or Revision 2, dated February 22, 2001.

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

Note 2: Inspections, overhauls, and replacements accomplished in accordance with Boeing Alert Service Bulletin 747–57A2310, dated June 17, 1999, are acceptable for compliance with the requirements of paragraph (i) of this AD.

(1) If no corrosion or cracks are detected, repeat the inspections required by paragraph (i) of this AD at intervals not to exceed 18 months. Within 5 years after the initial inspections required by paragraph (i) of this AD, accomplish the actions specified in paragraph (j) or (k) of this AD.

(2) If any corrosion is detected, prior to further flight, remove the corrosion by accomplishing the actions of either paragraph (i)(2)(i) or (i)(2)(ii) of this AD.

(i) If corrosion is within the limits of the Boeing 747 OHM: Prior to further flight, accomplish the actions specified in paragraph (j) or (k) of this AD.

(ii) If corrosion is not within the limits of the Boeing 747 OHM: Prior to further flight, accomplish the actions specified in paragraph (k) or (l) of this AD.

(3) If any crack is detected: Prior to further flight, accomplish the actions specified in paragraph (k) or (l) of this AD.

Overhaul

(j) Do the actions as specified in paragraphs (j)(1) and (j)(2) of this AD in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–57A2310, Revision 1, dated November 23, 1999; or Revision 2, dated February 22, 2001.

(1) Overhaul the actuator attach fittings on the outboard flaps. Repeat the overhaul of actuators on the outboard flaps as specified in Part 2 of the Work Instructions of the service bulletin thereafter at intervals not to exceed 8 years or 8,000 flight cycles, whichever occurs first. As of the effective date of this AD, the repetitive overhauls must be done in accordance with Part 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, at intervals not to exceed 8 years since last overhaul. Accomplishment of the overhaul of the actuator attach fittings on the outboard flaps constitutes terminating action for the repetitive inspection requirements of paragraph (i)(1) of this AD for outboard flaps.

(2) Overhaul the actuator attach fittings on the inboard flaps. Accomplishment of the overhaul of the actuator attach fittings on the inboard flaps constitutes terminating action for the requirements of paragraphs (g) through (l) of this AD for the actuator attach fittings on the inboard flaps.

Replacement

(k) Replace the actuator attach fittings on the inboard and outboard flaps in accordance with paragraph (k)(1) or (k)(2) of this AD.

(1) Replace the actuator attach fittings on the inboard and outboard flaps with new attach fittings in accordance with "Part 3—Replacement" of Boeing Service Bulletin 747–57A2310, Revision 1, dated November 23, 1999; or Revision 2, dated February 22, 2001. Accomplishment of this replacement constitutes terminating action for the repetitive inspections required by paragraph (i) of this AD for the replaced fitting. Within 8 years or 8,000 flight cycles following accomplishment of the replacement, whichever occurs first, repeat this replacement or accomplish the overhaul specified in paragraph (j) of this AD. As of the effective date of this AD, the repetitive replacements must be done in accordance with Part 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, at intervals not to exceed 8 years since last replacement.

(2) Replace the actuator attach fittings on the inboard and outboard flaps with improved attach fittings in accordance with "Part 4—Terminating Action" of Boeing Service Bulletin 747–57A2310, Revision 2, dated February 22, 2001. If accomplished, this replacement with improved fittings terminates the requirements of paragraphs (g) through (l) of this AD for the replaced fitting.

Note 3: Replacement of the actuator attach fittings on the inboard flaps with fittings that have been overhauled before the effective date of this AD, in accordance with Boeing OHM 57–52–35, Temporary Revision 57–8, dated June 10, 1999; Temporary Revision 57–10, dated May 8, 2000; or Full Revision 57–10, dated July 1, 2000; constitutes terminating action for the requirements of paragraphs (g) through (l) of this AD for the actuator attach fittings on the inboard flaps.

Repair

(l) During any inspection done in accordance with paragraph (i) of this AD, if corrosion is found that is outside the limits specified in the Boeing 747 OHM, or if any crack is detected: In lieu of replacement of the actuator attach fittings in accordance with paragraph (k) of this AD, repair the actuator attach fittings on the inboard and outboard flaps in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

Requirements of AD 2003–08–11

Inspection: Inboard Flap Attach Fittings

(m) Perform borescopic and detailed inspections to detect discrepancies of the inboard flap attach fittings, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Discrepancies include corrosion, pitting, and damaged or missing cadmium plating. Do the inspection at the applicable time specified in paragraph (m)(1) or (m)(2) of this AD.

(1) If the age of the fittings can be determined: Inspect within 14 years since the fittings were new or last overhauled, or within 90 days after May 8, 2003 (the effective date of AD 2003–08–11), whichever occurs later.

(2) If the age of the fittings cannot be determined: Inspect within 90 days after May 8, 2003.

Note 4: The exceptions specified in flag note 4 of Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, apply to the requirements of paragraphs (m) and (n) of this AD.

Inspection: Outboard Flap Attach Fittings

(n) Perform borescopic, detailed, and ultrasonic inspections to detect discrepancies of the outboard flap attach fittings, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Discrepancies include surface corrosion, pitting, damaged or missing cadmium plating, and cracks. Do the inspection at the applicable time specified in paragraph (n)(1) or (n)(2) of this AD.

(1) If the age of the fittings can be determined: Inspect within 8 years since the fittings were new or last overhauled, or within 90 days May 8, 2003, whichever occurs later.

(2) If the age of the fittings cannot be determined: Inspect within 90 days after May 8, 2003.

Follow-on Actions: No Discrepancies Found

(o) If no discrepancy is found during any inspection required by paragraph (m) or (n) of this AD: Do the actions specified by either paragraph (o)(1) or paragraph (o)(2) of this AD.

(1) Repeat the applicable inspections specified in paragraphs (m) and (n) of this AD at intervals not to exceed 9 months until the actions specified in paragraph (o)(2) of this AD have been accomplished.

(2) Perform a detailed inspection of the fitting to detect cracks, corrosion, damaged cadmium plating, or bushing migration, in accordance with and at the time specified in Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Do the follow-on actions in accordance with Parts 3, 4, and 5 of the Accomplishment Instructions of the service bulletin at the times specified in Figure 1 of the service bulletin, as applicable. Accomplishment of these actions terminates the initial and repetitive inspection requirements of paragraphs (m), (n), and (o)(1) of this AD.

Note 5: The exceptions specified in flag note 2 of Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, apply to those requirements of paragraphs (o)(2) and (p) of this AD that are specified in Part 2 of the service bulletin.

Corrective/Follow-on Actions: Discrepancies Found

(p) If any discrepancy is found during any inspection required by paragraph (m), (n), or (o) of this AD: Perform applicable corrective and follow-on actions at the time specified and in accordance with Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Before further flight: Replace any discrepant fitting in accordance with Part 5 of the Accomplishment Instructions of the service bulletin, and accomplish the follow-on actions for the other fittings common to that flap in accordance with Part 2 of the Accomplishment Instructions of the service bulletin. Replacement of a fitting terminates the initial and repetitive inspections—specified in paragraphs (m), (n), and (o) of this AD—for that fitting only.

Terminating Action for Certain Requirements

(q) Accomplishment of the actions required by paragraphs (m) and (n) of this AD ends the requirements of paragraphs (g) through (k) of this AD, except for the repetitive overhauls and repetitive replacements required by paragraphs (j)(1) and (k)(1) of this AD, respectively.

New Actions Required by This AD

Inspections: Attach Fittings of the Inboard and Outboard Flaps

(r) For airplanes on which the repetitive borescopic, detailed, or ultrasonic (as applicable) inspections required by paragraphs (m), (n), or (o)(1) of this AD are being done as of the effective date of this AD: Inspect as specified in Table 1 of this AD. Accomplishing these actions ends the initial and repetitive inspections required by paragraphs (m), (n), and (o)(1) of this AD.

TABLE 1.—INSPECTIONS OF ATTACH FITTINGS

Requirements	Description
(1) Compliance time	Except as provided by paragraph (u) of this AD, at the applicable time specified in Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002.
(2) Area to inspect	The attach fittings of the inboard and outboard flaps.
(3) Type of inspection	Detailed inspection (inboard and outboard flaps) and ultrasonic inspection (outboard flaps only).
(4) Discrepancies to detect	Surface corrosion, pitting, cracks, migrated or rotated bushings, and damaged or missing cadmium plating.
(5) In accordance with	Part 2 of the Work Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002.

Follow-on Actions: No Discrepancies Detected

(s) If no discrepancy is detected during any inspection required by paragraph (r) of this AD: Do the follow-on actions in accordance with Parts 3, 4, and 5, as applicable, of the Work Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, at the applicable times specified in Figure 1 of the service bulletin, except as provided by paragraph (u) of this AD.

Overhaul/Replacement and Follow-on/Corrective Actions: Discrepancies Detected

(t) If any discrepancy is detected during any inspection required by paragraph (r) of this AD: Do the actions specified in Table 2 of this AD at the applicable times specified in Figures 1 and 2 of the service bulletin, except as provided by paragraph (v) of this AD.

TABLE 2.—DISCREPANCIES FOUND

Requirements	In accordance with Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002—
(1) Overhaul or replace discrepant fitting with new fitting	Part 5 of Work Instructions.
(2) Do the follow-on and corrective actions for the other fitting common to that flap, except as specified in flag note 2 in Figure 1 of the service bulletin.	Parts 2 and 5 of Work Instructions, as applicable.

Compliance Time Requirements

(u) For the requirements of paragraph (r) of this AD: Where Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, states a compliance time "after the original issue date of the service bulletin," this AD requires compliance within the applicable compliance time after the effective date of this AD.

(v) For the requirements of paragraph (s) of this AD: Where Figure 1 of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002, specifies to repeat the overhaul or replacement "every 8 years," this AD requires compliance at intervals not to exceed 8 years.

Repetitive Overhaul or Replacement

(w) Except as provided in paragraph (x) of this AD, at the applicable time specified in paragraph (w)(1) or (w)(2) of this AD, overhaul the attach fittings on the outboard and inboard flaps or replace the attach fittings with new or overhauled fittings, in accordance with Part 5 of the Work Instructions of Boeing Alert Service Bulletin 747–57A2316, dated December 19, 2002. Repeat the overhaul or replacement thereafter at intervals not to exceed 8 years.

(1) If the age of the fittings can be determined: Overhaul or replace within 8 years since the fittings were new or last overhauled, or within 2 years after the effective date of this AD, whichever occurs later.

(2) If the age of the fittings cannot be determined: Assume that the fittings are more than 14 years old, and overhaul or replace within 2 years after the effective date of this AD.

(x) Accomplishing the repetitive overhauls required by paragraph (j)(1) or repetitive replacements required by paragraph (k)(1) of this AD is acceptable for compliance with the requirements of paragraph (w) of this AD.

Alternative Methods of Compliance (AMOCs)

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

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

(3) AMOCs approved previously in accordance with AD 2001–13–12 are approved as AMOCs with the actions required by paragraphs (g) through (l) of this AD, as applicable. However, AMOCs approved previously are not considered

terminating action for the repetitive overhauls or replacements requirements of this AD.

(4) AMOCs approved previously in accordance with AD 2003–08–11 are approved as AMOCs with the actions required by paragraphs (m) through (p) of this AD, as applicable.

Issued in Renton, Washington, on April 6, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7380 Filed 4–12–05; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulation Nos. 4 and 16]

RIN 0960–AG21

New Medical Criteria for Evaluating Language and Speech Disorders

AGENCY: Social Security Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are considering whether to propose new rules for evaluating language and speech disorders. The new rules would apply to adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Social Security Act (the Act). Specifically, we are considering whether to add a new body system in the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations (the listings) for these disorders. We invite you to send us comments about whether we should establish these new rules, as well as suggestions about what the proposed rules should include.

We will consider your comments and suggestions, as well as information about advances in medical knowledge, treatment, and methods of evaluating language and speech disorders, along with our program experience. If we decide to propose new listings for language and speech disorders, we will publish them as proposed rules for public comment in a Notice of Proposed Rulemaking (NPRM).

As part of our long-term planning for the disability programs, we are also interested in your ideas for how we may improve our programs for people with disabilities, including people who have disabilities based on language and speech disorders, and especially those who would like to work.

DATES: To be sure your comments are considered, we must receive them by June 13, 2005.

ADDRESSES: You may give us your comments by: Using our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or the Federal eRulemaking Portal at *http://www.regulations.gov;* e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs,* or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

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, Social Security Administration 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–0020 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number 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:

What Is the Purpose of This Notice?

We are considering whether to add a new body system to our listings for evaluating language and speech disorders. The new listings would apply to adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Act. The purpose of this notice is to give you an opportunity to send us comments about whether we should establish these new rules, and if so, suggestions about what these proposed rules should include. We are also asking for your comments and ideas about how we can improve our disability programs in the future for people with language and speech disorders.

Who Should Send Us Comments and Suggestions?

We invite comments and suggestions from anyone who has an interest in how we evaluate claims for benefits in our disability programs that are filed by people who have language and speech disorders. We are interested in comments and suggestions from people who apply for or receive benefits from us, including people who have language or speech disorders. We are also interested in comments and suggestions from members of the general public, individuals and organizations that advocate for people who have language and speech disorders, speech-language pathologists, physicians, other health care professionals, researchers, vocational specialists, people who make disability determinations for us, and any other people who may have ideas for us to consider.

Will We Respond to Your Comments From This Notice?

No, we will not respond directly to comments you send us because of this notice. However, after we consider your comments along with other information, such as that gained from relevant textbooks and our disability program experience, we will decide whether to propose new rules for evaluating language and speech disorders. If we propose new rules, we will publish them in an NPRM in the **Federal Register**. In accordance with the usual rulemaking procedures, you will have a chance to comment on the proposed new rules when we publish the NPRM. In the preamble to any final rules, we will summarize and respond to the significant comments made on the NPRM.

Why Are We Considering New Listings for Language and Speech Disorders?

In our current listings, language and speech disorders are addressed in six separate listings in part A, and in 12 separate listings in part B, and these listings are spread across five different body systems (Special Senses and Speech; Multiple Body Systems; Neurological; Mental Disorders; Immune System). Some of these listings have narrow applicability, while others use different terminology to describe a language or speech impairment. Therefore, we are considering whether it would be better to establish a new body system that would (1) Describe disability at the listing level for individuals who have very serious language or speech problems, (2) provide a more focused, but also more comprehensive, means of evaluating

language and speech problems than in the current listings, and (3) use more consistent terms and clearer severity criteria.

What Should You Comment About?

We are interested in any comments and suggestions you have about how we should consider language and speech disorders under the listings. We are interested in knowing whether you think it is a good idea to establish a new body system in our listings for language and speech disorders and, if so, what the new listings should say. For example, do you have ideas about how we should:

- Describe listing-level severity for adults and children with particular kinds of language and speech disorders?
- Consider other impairments that commonly occur together with language and speech disorders?
- Consider impairments that result in language or speech problems?
- Consider language and speech from a developmental standpoint?
- Incorporate academic and social communication demands on children?
- Incorporate criteria relevant to our definition of disability for adults?

We are also interested in knowing what guidelines you think we should include in the introductory section of the new body system.

The listings are only a part of our rules for evaluating disability. You can also make comments or suggestions to help us improve our other rules for evaluating claims for benefits filed by adults and children who have language and speech disorders.

In addition to your comments about possible new rules for evaluating language and speech disorders, we also welcome your comments about how the disability requirements of the Act and our regulations affect people who have language and speech disorders, especially those who would like to work, either full-time or part-time with supports. Your ideas can address our existing rules and regulations, or you can suggest changes to the law. For example, we know that many people who have certain disorders might not need benefits from us if they could get treatment before their disorders make them unable to work. Others may be unable to work, but may not need to stay out of work indefinitely if they could get treatment, therapy, or other interventions. Many people with permanent disorders can work if they have a supporting safety net (including title II disability benefits and SSI payments). Work can also be therapeutic for some people. Although the Act and our regulations include some access to health care through Medicare and Medicaid, some provision for vocational rehabilitation, and a number of work incentives, these provisions are generally for people who already qualify for benefits under our disability programs. These may be issues, however, that you would like to address.

We are interested in your ideas for how we may be able to improve our programs for people with disabilities, including people who have disabilities based on language and speech disorders. If we decide to propose new rules for evaluating these disorders, we will consider your ideas as we develop the NPRM for public comment. Where applicable, we will also consider them as part of our long-term planning for the disability programs.

What Other Information Will We Consider?

We will be considering information from many sources, including the following documents, for relevance to our policy for evaluating language and speech disorders.

- American Speech-Language-Hearing Association Ad Hoc Committee on Service Delivery in the Schools. (1993). Definitions of communication disorders and variations. Asha, 35 (Suppl. 10), 40–41.
- Bleile, K.M. (2003). Manual of Articulation and Phonological Disorders: Infancy through Adulthood (2nd ed.). Clifton Park, NY: Delmar Learning.
- Curlee, R.F. (1999). Stuttering and Related Disorders of Fluency (2nd ed.). New York: Thieme New York.
- Hillis, A.E. (2002). The Handbook of Adult Language Disorders: Integrating Cognitive Neuropsychology, Neurology, and Rehabilitation. New York: Psychology Press.
- Paul, R. (2001). Language Disorders from Infancy through Adolescence: Assessment and Interventions (2nd ed.). St. Louis, MO: Mosby.
- Rubin, J.S., Sataloff, R.T., and Korovin, G.S. (2003). Diagnosis and Treatment of Voice Disorders (2nd ed.). Clifton Park, NY: Delmar Learning.
- Shipley, K.G., and McAfee, J.G. (2004). Assessment in Speech-Language Pathology: A Resource Manual (3rd ed.). Clifton Park, NY: Delmar Learning.
- Tomblin, J.B., Morris, H.L., and Spriestersbach, D.C. (Eds.) (2000). *Diagnosis in Speech-Language Pathology*. San Diego, CA: Singular Publishing Group, Inc.

Other Information

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act, Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (see § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How Do We Define Disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	And you are . . .	Disability means that you have a medically determinable physical or mental impairment or combination of impairments that results in . . .
title II	an adult or a child	the inability to do any substantial gainful activity (SGA).
title XVI	a person age 18 or older	the inability to do any SGA.
title XVI	a person under age 18	marked and severe functional limitation.

How Do We Decide Whether You Are Disabled?

If you are seeking benefits under title II of the Act, or if you are an adult seeking benefits under title XVI of the Act, we use a five-step "sequential evaluation process" to decide whether you are disabled. We describe this five-step process in our regulations at §§ 404.1520 and 416.920. We follow the five steps in order, and we stop as soon as we can make a determination or decision. The steps are:

1. Are you working, and is the work you are doing substantial gainful activity? If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled, regardless of your medical condition or your age, education, and work experience. If you are not, we will go on to step 2.

2. Do you have a "severe" impairment? If you do not have an impairment or combination of impairments that significantly limits your physical or mental ability to do basic work activities, we will find that you are not disabled. If you do, we will go on to step 3.

3. Do you have an impairment(s) that meets or medically equals the severity of an impairment in the listings? If you do, and the impairment(s) meets the duration requirement, we will find that you are disabled. If you do not, we will go on to step 4.

4. Do you have the residual functional capacity to do your past relevant work? If you do, we will find that you are not disabled. If you do not, we will go on to step 5.

5. Does your impairment(s) prevent you from doing any other work that exists in significant numbers in the national economy, considering your residual functional capacity, age, education, and work experience? If it does, and it meets the duration requirement, we will find that you are disabled. If it does not, we will find that you are not disabled.

We use a different sequential evaluation process for children who apply for payments based on disability under title XVI of the Act. We describe that sequential evaluation process in § 416.924 of our regulations.

If you are already receiving benefits, we also use a different sequential evaluation process when we decide whether your disability continues. See §§ 404.1594, 416.994, and 416.994a of our regulations. All of the sequential evaluation processes, however, include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

What Are the Listings?

The listings are examples of impairments that we consider severe enough to prevent a person from doing any gainful activity, or that result in "marked and severe functional limitations" in children seeking SSI payments under title XVI of the Act. Although we publish the listings only in appendix 1 to subpart P of part 404 of our rules, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How Do We Use the Listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are a person age 18 or over, we apply the listings in part A when we evaluate your impairment(s); we never use the listings in part B.

If you are a person under age 18, we first use the criteria in part B. If the listings in part B do not apply, and the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A. (See §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe. (See §§ 404.1526 and 416.926.)

What If You Do Not Have An Impairment(s) That Meets or Medically Equals a Listing?

We use the listings only to decide that people are disabled or that they are still disabled. We will never deny your claim or decide that you no longer qualify for benefits simply because your impairment(s) does not meet or medically equal any listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the "sequential evaluation process" that we use to evaluate all disability claims. (See §§ 404.1520, 416.920, and 416.924.) Likewise, we will not decide that your disability has ended only because your impairment(s) does not meet or medically equal a listing.

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income (SSI), Reporting and recordkeeping requirements.

Dated: March 21, 2005.

Jo Anne B. Barnhart,

Commissioner of Social Security.

[FR Doc. 05–7356 Filed 4–12–05; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulation Nos. 4 and 16]

RIN 0960–AG20

Revised Medical Criteria for Evaluating Hearing Impairments and Disturbance of Labyrinthine-Vestibular Function

AGENCY: Social Security Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are planning to update and revise the rules we use to evaluate hearing impairments and disturbance of labyrinthine-vestibular function of adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Social Security Act (the Act). The rules we plan on revising are in sections 2.00 and 102.00 in the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations (the listings). We invite you to send us comments and suggestions for updating and revising these rules.

After we have considered your comments and suggestions, as well as information about advances in medical knowledge, treatment, and methods of evaluating hearing impairments and disturbance of labyrinthine-vestibular function, and our program experience, we intend to publish for public comment a Notice of Proposed Rulemaking (NPRM) that will propose specific revisions to the rules.

As part of our long-term planning for the disability programs, we are also interested in your ideas for how we may be able to improve our programs for people who have hearing impairments or disturbance of labyrinthine-vestibular function, especially those who would like to work.

DATES: To be sure your comments are considered, we must receive them by June 13, 2005.

ADDRESSES: You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs*, or the Federal eRulemaking Portal at *http://www.regulations.gov;* e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted in our Internet site at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs,* or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

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, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–0020 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 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:

What Is the Purpose of This Notice?

We are planning to update and revise the rules that we use to evaluate hearing impairments and disturbance of labyrinthine-vestibular function of adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Act. The purpose of this notice is to give you an opportunity to send us comments and suggestions for updating and revising those rules as we begin the rulemaking process. We are also asking for your comments and ideas about how we can improve our disability programs in the future for people with hearing impairments or disturbance of labyrinthine-vestibular function.

Who Should Send Us Comments and Suggestions?

We invite comments and suggestions from anyone who has an interest in the rules we use to evaluate claims for benefits filed by people who have hearing impairments or disturbance of labyrinthine-vestibular function. We are interested in getting comments and suggestions from people who apply for or receive benefits from us, members of the general public, advocates and organizations who advocate for people who have hearing impairments or disturbance of labyrinthine-vestibular function, experts in the evaluation of hearing impairment or disturbance of labyrinthine-vestibular function, researchers, people who make disability determinations and decisions for us, and any other individuals who may have ideas for us to consider.

Will We Respond to Your Comments From This Notice?

No, we will not respond directly to comments you send us because of this notice. However, after we consider your comments in response to this notice, along with other information, such as results of current medical research and our program experience, we will decide how to revise the rules we use to evaluate hearing impairments and disturbance of labyrinthine-vestibular function. When we propose specific revisions to the rules, we will publish an NPRM in the **Federal Register**. In accordance with the usual rulemaking procedures we follow, you will have a chance to comment on the revisions we propose when we publish the NPRM, and we will summarize and respond to the significant comments on the NPRM in the preamble to any final rules.

Which Rules Are We Considering for Updating and Revision?

We are considering for updating and revision the listings for hearing impairments in sections 2.00 and 102.00 and the listing for disturbance of labyrinthine-vestibular function in section 2.00. Sections 2.00 and 102.00 contain the listings for special senses and speech for adults (Part A, 2.00) and children (Part B, 102.00). Section 2.00 also has listings for disorders of vision and loss of speech. Section 102.00 also has a listing for disorders of vision. We are not asking for comments on the listings for disorders of vision or loss of speech in this notice. We intend to publish separately proposed rules that would update the criteria for those disorders.

Where Can You Find These Rules on the Internet?

You can find these rules on our Internet site at these locations:

- Sections 2.00 and 102.00 are in the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations at *http://www.ssa.gov/OP_Home/cfr20/404/404-ap10.htm.*
- You can also look up sections 2.00 and 102.00 of the listings at *http://www.ssa.gov/disability/professionals/bluebook/.*
- If you do not have Internet access, you can find the Code of Federal Regulations in some public libraries, Federal depository libraries, and public law libraries.

Why Are We Updating and Revising Our Rules for Evaluating Hearing Impairments and Disturbance of Labyrinthine-Vestibular Function?

We last published final rules making comprehensive revisions to the part A listings for evaluating hearing impairments and disturbance of labyrinthine-vestibular function on March 27, 1979 (44 FR 18170). We last published final rules making comprehensive revisions to the part B listings for evaluating hearing impairments on March 16, 1977 (42 FR 14705). On April 24, 2002, we made a technical revision to the introductory text in section 2.00B2, "*Vertigo associated with disturbances of labyrinthine-vestibular function, including Meniere's disease,*" to incorporate imaging techniques other than x-rays (67 FR 20018). However, we have not comprehensively revised the part A rules since 1979 or the part B rules since 1977.

The current listings for hearing impairments for adults (2.00) and children (102.00), and the current listing for disturbance of labyrinthine-vestibular function for adults (2.00), will no longer be effective on July 1, 2005, unless we extend them or revise and promulgate them again.

What Should You Comment About?

We are interested in any comments and suggestions you have about the listings for hearing impairments and disturbance of labyrinthine-vestibular function in sections 2.00 and 102.00 of our listings. For example, with regard to our listings, we are interested in knowing if:

- You think we should continue to have these listings, but you have concerns about the current listings; such as whether you think we should change any of our medical criteria or whether you think the listings are difficult to use or understand.

• You would like to see these listings include something that they do not include now; such as separate criteria for individuals who have had cochlear implants, or a listing for disturbance of labyrinthine-vestibular function for children.

In addition to your comments about our regulations, we are also interested in any ideas you have about how the disability requirements of the Act and our regulations affect people who have hearing impairments or disturbance of vestibular-labyrinthine function, especially those who would like to work, full-time or part-time, with supports. Your ideas can address our existing rules and regulations or suggest changes to the law. For example, we know that many people who have disturbance of labyrinthine-vestibular function might not need benefits from us if they could get treatment before their disease or injury makes them unable to work. Others may be unable to work but may not need to stay out of work indefinitely if they could get treatment or other interventions. Many people with permanent impairments can work if they have a supporting safety net (including title II disability benefits and SSI payments). Work can also be therapeutic for some people. Although the Act and our regulations include some access to health care through Medicare and Medicaid, some provisions for vocational rehabilitation, and a number of work incentives, these provisions are generally for people who already qualify for benefits under our disability programs.

We will consider your ideas as we develop the NPRM we intend to publish for public comment, and, where applicable, as part of our long-term planning for the disability program.

What Other Information Will We Consider?

We will also be considering information from other sources, including the following recent documents, for relevance to our policy for evaluating hearing impairments or disturbances of labyrinthine-vestibular impairments.

• National Research Council, Committee on Disability Determinations for Individuals with Hearing Impairments. *Hearing Loss: Determining Eligibility for Social Security Benefits.* Washington DC: The National Academies Press, 2004 (available at *http://www.nap.edu/catalog/11099.html*).

• David C. Dale and Daniel D. Federman, eds. "Neurology." *ACP Medicine (2004)*, Elliot M. Frohman, New York: WebMD Professional Publishing, 2004.

• Michael Cunningham and Edward O. Cox. "Hearing Assessment in Infants and Children: Recommendations Beyond Neonatal Screening." *Pediatrics*, 111(2), February 2003:436–440.

• Joint Committee on Infant Hearing. "Year 2000 Position Statement: Principles and Guidelines for Early Hearing Detection and Intervention Programs." *Pediatrics*, 106(4), October 2000:798–817.

• American Speech-Language Hearing Association (2004). Guidelines for the Audiologic Assessment of Children from Birth to 5 Years of Age [Guidelines]. (Available at *http://www.asha.org/members/deskref-journals/deskref/default.*

Other Information:

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

• Workers insured under the Act,

• Children of insured workers, and

• Widows, widowers, and surviving divorced spouses (see § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How Do We Define Disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	*and you are . . .*	*disability means you have a medically determinable impairment(s) as described above and that results in . . .*
title II	an adult or child.	the inability to do any substantial gainful activity (SGA).
title XVI ...	a person age 18 or older.	the inability to do any SGA.
title XVI ...	a person under age 18.	marked and severe functional limitations.

How Do We Decide Whether You Are Disabled?

If you are seeking benefits under title II of the Act, or if you are an adult seeking benefits under title XVI of the Act, we use a five-step "sequential evaluation process" to decide whether you are disabled. We describe this five-step process in our regulations at §§ 404.1520 and 416.920. We follow the five steps in order and stop as soon as we can make a determination or decision. The steps are:

1. Are you working, and is the work you are doing substantial gainful activity? If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled, regardless of your medical condition or your age, education, and work experience. If you are not, we will go on to step 2.

2. Do you have a "severe" impairment? If you do not have an impairment or combination of impairments that significantly limits your physical or mental ability to do basic work activities, we will find that you are not disabled. If you do, we will go on to step 3.

3. Do you have an impairment(s) that meets or medically equals the severity of an impairment in the listings? If you do, and the impairment(s) meets the duration requirement, we will find that you are disabled. If you do not, we will go on to step 4.

4. Do you have the residual functional capacity to do your past relevant work? If you do, we will find that you are not disabled. If you do not, we will go on to step 5.

5. Does your impairment(s) prevent you from doing any other work that exists in significant numbers in the national economy, considering your residual functional capacity, age, education, and work experience? If it does, and it meets the duration requirement, we will find that you are disabled. If it does not, we will find that you are not disabled.

We use a different sequential evaluation process for children who apply for payments based on disability under title XVI of the Act. We describe that sequential evaluation process in § 416.924 of our regulations.

If you are already receiving benefits, we also use a different sequential evaluation process when we decide whether your disability continues. See §§ 404.1594, 416.994, and 416.994a of our regulations. All of the sequential evaluation processes, however, include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

What Are the Listings?

The listings are examples of impairments that we consider severe enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments based on disability, the listings describe impairments that we consider severe enough to result in marked and severe functional limitations. Although the listings are contained only in appendix 1 to subpart P of part 404 of our regulations, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How Do We Use the Listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are a person age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are a person under age 18, we first use the criteria in part B of the listings. If the listings in part B do not apply, and the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A. (See §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe. (See §§ 404.1526 and 416.926.)

What If You Do Not Have an Impairment(s) That Meets or Medically Equals a Listing?

We use the listings only to decide that you are disabled or that you are still disabled. We will never deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the "sequential evaluation process" described above. Likewise, we will not decide that your disability has ended only because your impairment(s) does not meet or medically equal a listing.

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: March 21, 2005.

Jo Anne B. Barnhart,

Commissioner of Social Security.

[FR Doc. 05–7355 Filed 4–12–05; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulation Nos. 4 and 16]

RIN 0960–AF35

Revised Medical Criteria for Evaluating Neurological Impairments

AGENCY: Social Security Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are planning to update and revise the rules we use to evaluate neurological impairments of adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Social Security Act (the Act). The rules we plan on revising are sections 11.00 and 111.00 in the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations (the listings). We invite you to send us comments and suggestions for updating and revising these rules.

After we have considered your comments and suggestions, as well as information about advances in medical knowledge, treatment, and methods of evaluating neurological disorders, and our program experience, we intend to publish for public comment a Notice of Proposed Rulemaking (NPRM) that will propose specific revisions to the rules.

As part of our long-term planning for the disability programs, we are also interested in your ideas for how we may be able to improve our programs for people who have neurological disorders, especially those who would like to work.

DATES: To be sure your comments are considered, we must receive them by June 13, 2005.

ADDRESSES: You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or the Federal eRulemaking Portal at *http://www.regulations.gov*; e-mail to *regulations@ssa.gov*; telefax to (410) 966–2830, or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted in our Internet site at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs*, or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

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/LawRegs*.

FOR FURTHER INFORMATION CONTACT: Fran O. Thomas, Social Insurance Specialist, Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 966–9822 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 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:

What Is the Purpose of This Notice?

We are planning to update and revise the rules that we use to evaluate neurological impairments of adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Act. The purpose of this notice is to give you an opportunity to send us comments and suggestions for updating and revising those rules as we begin the rulemaking process. We are also asking for your comments and ideas about how we can improve our disability programs in the future for people with neurological disorders.

Who Should Send Us Comments and Suggestions?

We invite comments and suggestions from anyone who has an interest in the rules we use to evaluate claims for benefits filed by people who have neurological disorders. We are interested in getting comments and suggestions from people who apply for or receive benefits from us, members of the general public, advocates and organizations who advocate for people who have neurological disorders, experts in the evaluation of neurological

diseases and injuries, researchers, people who make disability determinations and decisions for us, and any other individuals who may have ideas for us to consider.

Will We Respond To Your Comments From This Notice?

No, we will not respond directly to comments you send us because of this notice. However, after we consider your comments in response to this notice, along with other information such as results of current medical research and our program experience, we will decide how to revise the rules we use to evaluate neurological impairments. When we propose specific revisions to the rules, we will publish an NPRM in the **Federal Register**. In accordance with the usual rulemaking procedures we follow, you will have a chance to comment on the revisions we propose when we publish the NPRM, and we will summarize and respond to the significant comments on the NPRM in the preamble to any final rules.

Which Rules Are We Considering for Updating and Revision?

We are considering two sections of our listings for updating and revision, sections 11.00 and 111.00. These are the listings for neurological impairments for adults (Part A, 11.00) and children (Part B, 111.00). They include, but are not limited to, such impairments as epilepsy, multiple sclerosis, traumatic brain injury, stroke, cerebral palsy, muscular dystrophy, and myasthenia gravis.

Where Can You Find These Rules on the Internet?

You can find these rules on our Internet site at these locations:

- Sections 11.00 and 111.00 are in the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations at *http://www.ssa.gov/OP_Home/cfr20/404/404-ap10.htm*.
- You can also look up sections 11.00 and 111.00 of the listings at *http://www.ssa.gov/disability/professionals/bluebook/*.
- If you do not have Internet access, you can find the Code of Federal Regulations in some public libraries, Federal depository libraries, and public law libraries.

Why Are We Updating and Revising Our Rules for Evaluating Neurological Impairments?

We last published final rules containing comprehensive revisions to the listings for neurological impairments in the **Federal Register** on December 6, 1985 (50 FR 50068). Although we also published final rules revising the preface to the neurological body system on August 21, 2000 (65 FR 50746), made technical revisions to the listings that included some changes to the neurological body system listings on April 24, 2002, and moved the listings for malignant brain tumors to our Malignant Neoplastic Diseases body system on November 15, 2004 (69 FR 67018), we have not comprehensively revised the rules since 1985.

The current listings for neurological impairments for adults (11.00) and children (111.00) will no longer be effective on July 1, 2005, unless we extend them or revise and promulgate them again.

What Should You Comment About?

We are interested in any comments and suggestions you have about sections 11.00 and 111.00 of our listings. For example, with regard to our listings, we are interested in knowing if:

- You have concerns about any of the current neurological listings provisions for adults or children; such as whether you think we should change any of our criteria or whether you think a listing is difficult to use or understand.
- You would like to see our neurological listings include something that they do not include now; such as conditions and/or new medical criteria that you believe should be added to the listings.
- You think it would be beneficial to change the current disease-specific listing format to a more inclusive category format such as "Vascular disorders," "Demyelinating disorders," and "Movement disorders."
- You think these listings should continue to include functional criteria that consider all aspects of listed neurological impairments such as motor and sensory deficits, cognitive/behavioral abnormalities, speech/language limitations, and vision/hearing losses.
- You are aware of criteria we should use to define disabling epilepsy at the listing level.

In addition to your comments about our regulations, we are also interested in any ideas you have about how the disability requirements of the Act and our regulations affect people who have neurological disorders, especially those who would like to work, full-time or part-time with supports. Your ideas can address our existing rules and regulations or suggest changes to the law. For example, we know that many people who have neurological disorders might not need benefits from us if they could get treatment before their disease or injury makes them unable to work. Others may be unable to work but may not need to stay out of work indefinitely if they could get treatment or other interventions. Many people with permanent impairments can work if they have a supporting safety net (including title II disability benefits and SSI payments). Work can also be therapeutic for some people. Although the Act and our regulations include some access to health care through Medicare and Medicaid, some provisions for vocational rehabilitation, and a number of work incentives, these provisions are generally for people who already qualify for benefits under our disability programs.

We will consider your ideas as we develop the NPRM we intend to publish for public comment, and, where applicable, as part of our long-term planning for the disability program.

What Other Information Will We Consider?

We will also be considering information from other sources, including the following recent documents, for relevance to our policy for evaluating neurological impairments.

- "Management of Treatment-Resistant Epilepsy." *Evidence Report/Technology Assessment: Number 77.* Rockville, MD: Agency for Healthcare Research and Quality (AHRQ Publication No. 03–E028) April, 2004. This report is available at *http://www.ncbi.nlm.nih.gov/books/bv.fcgi?rid=hstat1a.chapter.11665*
- "Criteria to Determine Disability Related to Multiple Sclerosis." *Evidence Report/Technology Assessment: Number 100.* Rockville, MD: Agency for Healthcare Research and Quality (AHRQ Publication No. 03–E028) May, 2004. This report is available at *http://www.ahrq.gov/clinic/epcsums/msdissum.htm#contents*

Other Information:

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act,
- Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (*see* § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How Do We Define Disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	And you are . . .	Disability means you have a medically determinable impairments(s) as described above and that results in . . .
title II	an adult or child	the inability to do any substantial gainful activity (SGA).
title XVI	a person age 18 or older	the inability to do any SGA.
title XVI	a person under age 18	marked and severe functional limitations.

How Do We Decide Whether You Are Disabled?

If you are seeking benefits under title II of the Act, or if you are an adult seeking benefits under title XVI of the Act, we use a five-step "sequential evaluation process" to decide whether you are disabled. We describe this five-step process in our regulations at §§ 404.1520 and 416.920. We follow the five steps in order and stop as soon as we can make a determination or decision. The steps are:

1. Are you working, and is the work you are doing substantial gainful activity? If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled, regardless of your medical condition or your age, education, and work experience. If you are not, we will go on to step 2.

2. Do you have a "severe" impairment? If you do not have an impairment or combination of impairments that significantly limits your physical or mental ability to do basic work activities, we will find that you are not disabled. If you do, we will go on to step 3.

3. Do you have an impairment(s) that meets or medically equals the severity of an impairment in the listings? If you do, and the impairment(s) meets the duration requirement, we will find that you are disabled. If you do not, we will go on to step 4.

4. Do you have the residual functional capacity to do your past relevant work? If you do, we will find that you are not disabled. If you do not, we wwill go on to step 5.

5. Does your impairment(s) prevent you from doing any other work that exists in significant numbers in the national economy, considering your residual functional capacity, age, education, and work experience? If it does, and it meets the duration requirement, we will find that you are disabled. If it does not, we will find that you are not disabled.

We use a different sequential evaluation process for children who apply for payments based on disability under title XVI of the Act. We describe that sequential evaluation process in § 416.924 of our regulations.

If you are already receiving benefits, we also use a different sequential evaluation process when we decide whether your disability continues. See §§ 404.1594, 416.994, and 416.994a of our regulations. All of the sequential evaluation processes, however, include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

What Are the Listings?

The listings are examples of impairments that we consider severe enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments based on disability, the listings describe impairments that we consider severe enough to result in marked and severe functional limitations. Although the listings are contained only in appendix 1 to subpart P of part 404 of our regulations, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How Do We Use the Listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are a person age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are a person under age 18, we first use the criteria in part B of the listings. If the listings in part B do not apply, and the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A. (*See* §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe. (See §§ 404.1526 and 416.926.)

What If You Do Not Have An Impairment(s) That Meets or Medically Equals a Listing?

We use the listings only to decide that you are disabled or that you are still disabled. We will never deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the "sequential evaluation process" described above. Likewise, we will not decide that your disability has ended only because your impairment(s) does not meet or medically equal a listing.

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: March 21, 2005.

Jo Anne B. Barnhart,

Commissioner of Social Security.

[FR Doc. 05–7357 Filed 4–12–05; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulation Nos. 4 and 16]

RIN 0960–AF58

Revised Medical Criteria for Evaluating Respiratory System Disorders

AGENCY: Social Security Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are planning to update and revise the rules we use to evaluate respiratory disorders of adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Social Security Act (the Act). The rules we plan on revising are sections 3.00 and 103.00 in the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations (the listings). We invite you to send us comments and suggestions for updating and revising these rules.

After we have considered your comments and suggestions, as well as information about advances in medical knowledge, treatment, and methods of evaluating respiratory disorders, and our program experience, we intend to publish for public comment a Notice of Proposed Rulemaking (NPRM) that will propose specific revisions to the rules.

As part of our long-term planning for the disability programs, we are also interested in your ideas for how we may be able to improve our programs for people who have respiratory disorders, especially those who would like to work.

DATES: To be sure your comments are considered, we must receive them by June 13, 2005.

ADDRESSES: You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or the Federal eRulemaking Portal at *http://www.regulations.gov;* e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted in our Internet site at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs,* or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

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, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–0020 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 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:

What Is the Purpose of This Notice?

We are planning to update and revise the rules that we use to evaluate respiratory disorders of adults and children who apply for, or receive, disability benefits under title II and Supplemental Security Income (SSI) payments based on disability under title XVI of the Act. The purpose of this notice is to give you an opportunity to send us comments and suggestions for updating and revising those rules as we begin the rulemaking process. We are also asking for your comments and ideas about how we can improve our disability programs in the future for people with respiratory disorders.

Who Should Send Us Comments and Suggestions?

We invite comments and suggestions from anyone who has an interest in the rules we use to evaluate claims for benefits filed by people who have respiratory disorders. We are interested in getting comments and suggestions from people who apply for or receive benefits from us, members of the general public, advocates and organizations who advocate for people who have respiratory disorders, experts in the evaluation of respiratory disorders, researchers, people who make disability determinations and decisions for us, and any other individuals who may have ideas for us to consider.

Will We Respond To Your Comments From This Notice?

No, we will not respond directly to comments you send us because of this notice. However, after we consider your comments in response to this notice, along with other information such as medical research and our program experience, we will decide how to revise the rules we use to evaluate respiratory impairments. When we propose specific revisions to the rules, we will publish an NPRM in the **Federal Register**. In accordance with the usual rulemaking procedures we follow, you will have a chance to comment on the revisions we propose when we publish the NPRM, and we will summarize and respond to the significant comments on the NPRM in the preamble to any final rules.

Which Rules Are We Considering for Updating and Revision?

We are considering two sections of our listings for updating and revision, sections 3.00 and 103.00. These are the listings for respiratory impairments for adults (Part A, 3.00) and children (Part B, 103.00). They include, but are not limited to, such impairments as emphysema, chronic bronchitis, asthma, cystic fibrosis (CF), chronic obstructive pulmonary disease (COPD), sleep-related breathing disorders, lung transplants, and bronchopulmonary dysplasia (BPD).

Where Can You Find These Rules on the Internet?

You can find these rules on our Internet site at these locations:

- Sections 3.00 and 103.00 are in the Listing of Impairments in appendix 1 to subpart P of part 404 of our regulations at *http://www.ssa.gov/OP_Home/cfr20/404/404-ap10.htm.*
- You can also look up sections 3.00 and 103.00 of the listings at *http://www.ssa.gov/disability/professionals/bluebook/.*
- If you do not have Internet access, you can find the Code of Federal Regulations in some public libraries, Federal depository libraries, and public law libraries.

Why Are We Updating and Revising Our Rules for Evaluating Respiratory System Disorders?

We last published final rules containing comprehensive revisions to the listings for respiratory impairments in the **Federal Register** on October 7, 1993 (58 FR 52346). The current listings for respiratory impairments for adults (3.00) and children (103.00) will no longer be in effect on July 1, 2005, unless we extend them or revise and promulgate them again.

What Should You Comment About?

We are interested in any comments and suggestions you have for revising sections 3.00 and 103.00 of our listings. For example, with regard to our listings, we are interested in knowing if:

- You have concerns about any of the current respiratory system listing provisions for adults or children; such as whether you think we should change any of our medical criteria or whether you think a listing is difficult to use or understand.
- You would like to see our respiratory listings include something

that they do not include now; such as conditions and/or new medical criteria that you believe should be added to the listings.

- You are aware of criteria we should use to define disabling asthma at the listing level.
- You are aware of criteria we should use to define disabling bronchopulmonary dysplasia (BPD) at the listing level.

In addition to your comments about our regulations, we are also interested in any ideas you have about how the disability requirements of the Act and our regulations affect people who have respiratory disorders, especially those who would like to work, full-time or part-time with supports. Your ideas can address our existing rules and regulations or suggest changes to the law. For example, we know that many people who have respiratory disorders might not need benefits from us if they could get treatment before their disorders make them unable to work. Others may be unable to work but may not need to stay out of work indefinitely if they could get treatment or other interventions. Many people with permanent disorders can work if they have a supporting safety net (including title II disability benefits and SSI payments). Work can also be therapeutic for some people. Although the Act and our regulations include some access to health care through Medicare and Medicaid, some provisions for vocational rehabilitation, and a number of work incentives, these provisions are generally for people who already qualify for benefits under our disability programs.

We will consider your ideas as we develop the NPRM we intend to publish for public comment, and, where applicable, as part of our long-term planning for the disability program.

What Other Information Will We Consider?

We will also be considering information from many sources, including the following recent documents, for relevance to our policy for evaluating respiratory impairments.

- Expert Panel Report: Guidelines for the Diagnosis and Management of Asthma-Update on Selected Topics. National Institute of Health (NIH Publication No. 02–5075). Bethesda, MD: U.S. Department of Health and Human Services, 2002. This report is available at *http://www.nhlbi.nih.gov/guidelines/asthma/asthgdln.htm*
- Expert Panel Report II: Guidelines for the Diagnosis and Management of Asthma. National Institute of Health (NIH Publication No. 97–4053). Bethesda, MD: U.S. Department of Health and Human Services, 1997. This report is available at *http://www.nhlbi.nih.gov/guidelines/asthma/asthgdln.htm*

Other Information:

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act,
- Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (see § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How Do We Define Disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	*And you are . . .*	*Disability means you have a medically determinable impairment(s) as described above and that results in . . .*
title II	an adult or child	the inability to do any substantial gainful activity (SGA).
title XVI	a person age 18 or older	the inability to do any SGA.
title XVI	a person under age 18	marked and severe functional limitations

How Do We Decide Whether You Are Disabled?

If you are seeking benefits under title II of the Act, or if you are an adult seeking benefits under title XVI of the Act, we use a five-step "sequential evaluation process" to decide whether you are disabled. We describe this five-step process in our regulations at §§ 404.1520 and 416.920. We follow the five steps in order and stop as soon as we can make a determination or decision. The steps are:

1. Are you working, and is the work you are doing substantial gainful activity? If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled, regardless of your medical condition or your age, education, and work experience. If you are not, we will go on to step 2.

2. Do you have a "severe" impairment? If you do not have an impairment or combination of impairments that significantly limits your physical or mental ability to do basic work activities, we will find that you are not disabled. If you do, we will go on to step 3.

3. Do you have an impairment(s) that meets or medically equals the severity of an impairment in the listings? If you do, and the impairment(s) meets the duration requirement, we will find that you are disabled. If you do not, we will go on to step 4.

4. Do you have the residual functional capacity to do your past relevant work? If you do, we will find that you are not disabled. If you do not, we will go on to step 5.

5. Does your impairment(s) prevent you from doing any other work that exists in significant numbers in the national economy, considering your residual functional capacity, age, education, and work experience? If it does, and it meets the duration requirement, we will find that you are disabled. If it does not, we will find that you are not disabled.

We use a different sequential evaluation process for children who apply for payments based on disability under title XVI of the Act. We describe that sequential evaluation process in § 416.924 of our regulations.

If you are already receiving benefits, we also use a different sequential evaluation process when we decide whether your disability continues. See §§ 404.1594, 416.994, and 416.994a of our regulations. All of the sequential evaluation processes, however, include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

What Are the Listings?

The listings are examples of impairments that we consider severe

enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments based on disability, the listings describe impairments that we consider severe enough to result in marked and severe functional limitations. Although the listings are contained only in appendix 1 to subpart P of part 404 of our regulations, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How Do We Use the Listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are a person age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are a person under age 18, we first use the criteria in part B of the listings. If the listings in part B do not apply, and the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A. (*See* §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe. (See §§ 404.1526 and 416.926.)

What If You Do Not Have an Impairment(s) That Meets or Medically Equals a Listing?

We use the listings only to decide that you are disabled or that you are still disabled. We will never deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the "sequential evaluation process" described above. Likewise, we will not decide that your disability has ended only because your impairment(s) does not meet or medically equal a listing.

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: March 21, 2005.

Jo Anne B. Barnhart,

Commissioner of Social Security.

[FR Doc. 05–7358 Filed 4–12–05; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulation Nos. 4 and 16]

RIN 0960–AG15

Representation of Parties; Recognition, Disqualification, and Reinstatement of Representative

AGENCY: Social Security Administration.

ACTION: Proposed rules.

SUMMARY: We propose to revise our regulations to identify additional bases upon which we may bring charges to disqualify an individual from acting as a representative before the Social Security Administration (SSA), and to set forth the conditions under which we will reinstate an individual whom we have disqualified as a representative because the individual collected or received, and retains, a fee in excess of the amount we authorized. These proposed rules revise our regulations on the representation of parties to implement section 205 of the Social Security Protection Act of 2004 (SSPA) and to make additional changes in these regulations that relate to the changes required by this legislation. The rules also propose three technical changes in our regulations on the representation of parties.

DATES: To be sure that we consider your comments, we must receive them by June 13, 2005.

ADDRESSES: You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or the Federal eRulemaking Portal at *http://www.regulations.gov;* e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs*, or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

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: Richard Bresnick, Social Insurance Specialist, Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–1758 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Who Is Permitted to Represent Claimants Before SSA?

Section 206(a)(1) of the Social Security Act (the Act) provides that attorneys and non-attorneys may represent claimants before SSA. Prior to enactment of the SSPA, Public Law 108–203, on March 2, 2004, section 206(a)(1) specified that "[a]n attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts' is entitled to represent claimants before SSA. Section 206(a)(1) also authorized SSA to prescribe rules and regulations governing recognition of individuals other than attorneys.

Section 205 of the SSPA amended section 206(a)(1) of the Act with respect to the recognition and disqualification of certain attorneys as claimants' representatives. As amended, section 206(a)(1) provides that the Commissioner of Social Security (the Commissioner), after due notice and opportunity for hearing, may refuse to recognize as a representative, and may disqualify a representative already recognized, any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or who has been disqualified from participating in or appearing before any Federal program or agency. Section 206(a)(1) as amended further provides that the Commissioner may also, after due notice and opportunity for hearing, refuse to recognize, and may disqualify, as a non-attorney representative, any attorney who has been disbarred or suspended

from any court or bar to which he or she was previously admitted to practice.

Section 205 of the SSPA also amended section 206(a)(1) of the Act with respect to reinstatement of certain individuals (whether or not they are attorneys) who have been disqualified or suspended from appearing before SSA. Under the Act as amended, a representative who has been disqualified or suspended from appearing before SSA as a result of collecting or receiving a fee in excess of the amount authorized shall be barred from appearing before SSA as a representative until full restitution is made to the claimant and, thereafter, may be considered for reinstatement only under such rules as the Commissioner may prescribe.

Proposed Changes

As amended, section 206(a)(1) of the Act identifies certain specific bases upon which, after notice and opportunity for hearing, we may refuse to recognize an attorney as a representative or disqualify an attorney whom we have already recognized as a representative. We propose to implement these statutory provisions by revising our regulations at 20 CFR 404.1745 and 416.1545, which describe the circumstances in which we may file charges seeking to suspend or disqualify an individual from acting in a representational capacity before us. Specifically, we propose to revise these sections to expand the stated bases upon which we may file such charges to include those in which we have evidence that a representative has been, by reason of misconduct—

- Disbarred or suspended from any court or bar to which he or she was previously admitted to practice, or
- Disqualified from participating in or appearing before any Federal program or agency.

Sections 404.1745 and 416.1545 as a whole pertain to our bringing of charges that may seek either to suspend or to disqualify a representative. As we explain below in connection with changes we are proposing in our regulations dealing with the decisions hearing officers make on charges brought against representatives (20 CFR 404.1770 and 416.1570), disqualification will be the sole sanction available if the charges against a representative are sustained because the representative has been, by reasons of misconduct, disbarred or suspended from any court or bar to which he or she was previously admitted to practice or disqualified from participating in or appearing before any Federal program or agency.

Sections 404.1745 and 416.1545, as they currently exist and as they are proposed for revision, apply with respect to both attorney and non-attorney representatives. Under the proposed regulations, we will have authority to bring charges to disqualify a non-attorney representative if we have evidence that the representative has been, by reason of misconduct—

- Disbarred or suspended from any court or bar to which he or she was previously admitted to practice, or
- Disqualified from participating in or appearing before any Federal program or agency.

As amended by the SSPA, section 206(a)(1) of the Act specifically provides that, after providing due notice and an opportunity for hearing, SSA "may refuse to recognize, and may disqualify, as a non-attorney representative any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice." Thus, the Act provides that disbarment or suspension by a court or bar may be a basis for disqualifying an individual from representational functions before SSA irrespective of whether the individual seeks to represent individuals as an attorney or non-attorney. Although it provides that we may refuse to recognize or disqualify an attorney who has been disqualified from participating in or appearing before a Federal program or agency, the Act as amended does not also state that we may refuse to recognize a non-attorney (or former attorney) who has been disqualified from participating in or appearing before any Federal program or agency. We are proposing to make disqualification from participating in or appearing before any Federal program or agency a basis for bringing charges to disqualify a non-attorney in order to make our rules, with respect to recognition of non-attorneys, consistent with our rules for attorneys. By making this a basis for bringing charges against non-attorneys as well as attorneys, we can ensure that the additional protections provided by the SSPA are available for all claimants, regardless of whether their representatives are attorneys or non-attorneys.

We are proposing this rule regarding non-attorney representatives under the general authority of the Commissioner, as set forth in section 206(a)(1) of the Act, to prescribe rules and regulations "governing the recognition" of non-attorney representatives and to require such representatives to "show that they are of good character and in good repute" and capable of providing claimants valuable services. Under the proposed rule, if we determine, after providing due notice and opportunity for a hearing, that a non-attorney individual has been disqualified from participating in or appearing before a Federal program or agency for reasons of misconduct, we will disqualify the individual as having failed to show that he or she is of good character and in good repute and will thereafter, absent reinstatement in accordance with the provisions of 20 CFR 404.1799 and 416.1599, refuse to recognize the individual as a representative. The effect of this rule is to require a non-attorney whom we charge with having been disqualified from participating in or appearing before a Federal program or agency for reasons of misconduct to show, in accordance with our rules at 20 CFR 404.1750ff. and 416.1550ff. on hearing and deciding charges against representatives, that he or she has not been disqualified from participating in or appearing before a Federal program or agency for reasons of misconduct and is thus, in that respect, of good character and in good repute.

This rule codifies a practice we currently apply under Program Operations Manual System section GN 03970.011, which sets forth a non-exclusive list of circumstances in which we may bring charges (under §§ 404.1745 and 416.1545) to suspend or disqualify a non-attorney from practice before us for lack of good character and reputation. We believe we should codify that disqualification by a Federal program or agency may be a basis for bringing charges against a non-attorney representative because the Act as amended by the SSPA is silent on that issue, even though it provides that we may bring charges against a non-attorney for disbarment or suspension by a court or bar. Our codification of this particular basis for bringing charges based on a lack of good character and reputation does not limit our discretion to bring charges against a non-attorney representative, as we do at present, whenever we believe that we have evidence that a non-attorney fails to meet the qualification requirement concerning good character and reputation included in the provisions of §§ 404.1705 and 416.1505 on "Who may be your representative."

Under §§ 404.1745 and 416.1545 as proposed for revision, we have discretion in determining whether to bring charges when we have evidence that an individual has been disbarred, suspended or disqualified by a court, bar, Federal program or Federal agency. One factor we will consider in determining whether to bring charges is whether the individual has been

reinstated by the court, bar, Federal program or Federal agency that disbarred, suspended or disqualified the individual. Reinstatement will not necessarily preclude the bringing of charges. Further, we may also bring charges if the disbarment, suspension or disqualification by a court, bar, Federal program or agency became final prior to the enactment of section 205 of the SSPA.

Under the Act as amended by the SSPA, we have discretionary authority to refuse to permit an individual to function as a representative before us because that individual has been disbarred, suspended or disqualified by a court, bar or Federal agency. To implement that authority, we propose to revise §§ 404.1770 and 416.1570 to explain that in deciding whether to impose that sanction we will consider the reasons for the disbarment, suspension, or disqualification action of the court, bar or Federal agency and will not disqualify the individual from acting as a representative before SSA if the court, bar, or Federal agency action was taken for reasons unrelated to misconduct (*e.g.*, solely for administrative reasons such as failure to pay dues or failure to complete continuing legal education requirements). Sections 404.1770 and 416.1570 as proposed for revision also explain that this exception to disqualification will not apply if the administrative action was taken by the court, bar or Federal program or agency in lieu of disciplinary proceedings (*e.g.*, the acceptance of a voluntary resignation pending disciplinary action), and that although we will consider the reasons for the disbarment, suspension, or disqualification action in determining whether to disqualify an individual from appearing before us as a representative, we will not re-examine or revise the factual or legal conclusions that led to the disbarment, suspension or disqualification action.

As proposed for revision, §§ 404.1770 and 416.1570 will also explain what we mean by the terms "disqualified," "Federal program," and "Federal agency" for the purposes of deciding whether an individual has been disqualified from participating in or appearing before any Federal program or agency. For that purpose, "disqualified" will refer to any action that prohibits an individual from participating in or appearing before the program or agency, regardless of how long the prohibition lasts or the specific terminology used. The program or agency need not use the term "disqualified" to describe the action. For example, an agency may use analogous terms such as "suspend," "decertify," "exclude," "expel," or "debar" to describe the individual's disqualification from participating in the program or the agency. For the purposes of deciding whether an individual has been disqualified from participating in or appearing before any Federal program or agency, "Federal program" will refer to any program established by an Act of Congress or administered by a Federal agency and "Federal agency" will refer to any authority of the executive branch of the Government of the United States.

As previously noted, we also propose to revise §§ 404.1770 and 416.1570 to provide that disqualification will be the only sanction that may be applied if charges against a representative (attorney or non-attorney) are sustained because the representative has been, by reason of misconduct, disbarred or suspended from any court or bar to which he or she was previously admitted to practice or disqualified from participating in or appearing before any Federal program or agency. The Act, as amended by the SSPA, states only that we may "refuse to recognize" and, where recognition has already occurred, "disqualify" an individual who has been disbarred, suspended or disqualified by a court, bar or Federal program or agency. Under our rules on reinstatement, a suspended representative is automatically reinstated at the end of the period of suspension (20 CFR 404.1797 and 416.1597). By contrast, under §§ 404.1799 and 416.1599 of our rules, if an individual has been disqualified, reinstatement can occur only if the individual asks the Appeals Council of our Office of Hearings and Appeals for permission to serve as a representative again and the Appeals Council decides that it is reasonable to expect that the individual will, in the future, act in accordance with the provisions of section 206(a) of the Act and our rules and regulations. We cannot ensure that reinstatement is warranted on that basis in cases in which the sanction imposed by us is a suspension. Based on the above, we believe that disqualification is the only appropriate sanction where charges are sustained because we find that a representative has been, by reason of misconduct, disbarred, suspended or disqualified by a court, bar or Federal program or agency.

We also propose to revise §§ 404.1770 and 416.1570 to state that, if the charges against the representative are sustained because the representative has collected or received, and retains, a fee for representational services in excess of the amount authorized, disqualification will be the only sanction available. This change is intended to ensure that such a representative is barred from appearing before SSA until full restitution has been made, as required by the Act as amended by the SSPA. The proposed rule recognizes that restitution is required only where the representative has not already made full restitution at the time at which we sustain charges of collecting or receiving an unauthorized fee. The representative "retains" an unauthorized fee that has been collected or received if full restitution has not been made for any reason. If a representative makes full restitution before the charges against the representative have been sustained, we are not precluded from finding that the representative has charged, collected, or retained a fee in violation of §§ 404.1740(c)(2) and/or 416.1540(c)(2), and suspending or disqualifying that representative from practice.

We propose to revise 20 CFR 404.1790 and 416.1590, which deal with decisions made by the Appeals Council where a party to the hearing requests review of a hearing officer's decision in a sanction case, to conform these sections to the changes proposed in §§ 404.1770 and 416.1570 to limit the sanction available to disqualification where charges are sustained either because the representative has been, by reason of misconduct, disbarred or suspended from any court or bar to which he or she was previously admitted to practice or disqualified from participating in or appearing before any Federal program or agency, or because the representative has collected or received, and retains, a fee in excess of the amount authorized. As proposed for revision, §§ 404.1790 and 416.1590 will provide that the Appeals Council may not modify a hearing officer's decision to impose a suspension, instead of a disqualification, when disqualification is the only sanction available under §§ 404.1770 and 416.1570.

We also propose to revise our rules on reinstatement in §§ 404.1799 and 416.1599 to provide that, if the representative has been disqualified because he or she was disbarred or suspended from a court or bar, the Appeals Council will grant reinstatement to the individual as a representative only if the individual not only satisfies the Council with respect to the required expectation of future behavior, but also shows that he or she has been admitted (or readmitted) to and is in good standing with the court or bar from which he or she had been disbarred or suspended. This provision ensures that an individual will not be reinstated as a representative unless the individual can satisfy the court or bar

that disbarred or suspended the individual that he or she is fit to act in a representational capacity again.

We also propose to include in §§ 404.1799 and 416.1599 a similar rule for reinstatement of a representative who has been disqualified because he or she was disqualified from participating in or appearing before any Federal program or agency. This rule will provide that such an individual must not only satisfy the Appeals Council with respect to the required expectation of future behavior, but also show that he or she is once again qualified to participate in or appear before that Federal program or agency.

We propose further to revise §§ 404.1799 and 416.1599 to state that, if a representative has been disqualified as a result of collecting or receiving, and retaining, a fee for representational services in excess of the amount authorized, full restitution of the excess fee must be made before the person may be considered for reinstatement. This proposed change will implement the provision of the SSPA requiring us to bar from appearing before us, until full restitution is made, a representative who has been disqualified or suspended from appearing before us as a result of collecting or receiving a fee in excess of the amount authorized.

Other Proposed Changes

We propose to make a technical change to 20 CFR 404.1750(e)(2) and 416.1550(e)(2), which explain how a representative must answer a notice containing a statement of charges. Our current rules direct that the answer be filed with Special Counsel Staff in SSA's Office of Hearings and Appeals. This component no longer exists. (See 68 FR 59231 and 68 FR 61240.) The notice containing a statement of charges provides specific instructions on how and where to file an answer. Therefore, we propose to revise this rule to reflect that the representative must file the answer with SSA, at the address specified in the notice, within the 30-day time period.

We also propose to make a technical change to 20 CFR 404.1755 and 416.1555 to specify that the Deputy Commissioner for Disability and Income Security Programs, or his or her designee is, as the official who decides to initiate a representative sanction proceeding, also the official who may withdraw charges against a representative. This change is needed because questions have arisen about who in the agency has authority to withdraw charges.

Finally, we also propose to make a technical change to 20 CFR 404.1765 and 416.1565 to state that the Office of the General Counsel will represent the Deputy Commissioner for Disability and Income Security Programs in all representative sanction proceedings, including those involving a request for reinstatement by a suspended or disqualified individual. This amendment is necessary because the former Special Counsel Staff previously represented the Deputy Commissioner. (See 56 FR 24129.)

Clarity of These Proposed Rules

Executive Order 12866, as amended by Executive Order 13258, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these rules easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- What else could we do to make the rules easier to understand?

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these rules meet the requirements for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, they were subject to OMB review.

Regulatory Flexibility Act

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

Paperwork Reduction Act

The proposed rules contain information collection activities at 20 CFR 404.1750(e)(2) and 416.1550(e)(2). However, the activities are exempt under 44 U.S.C. 3518(c) from the clearance requirements of 44 U.S.C. 3507 as amended by section 2 of Public Law 104–13 (May 22, 1995), the Paperwork Reduction Act of 1995.

(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; 96.006, Supplemental Security Income.)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income.

Dated: March 8, 2005.

Jo Anne B. Barnhart,

Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend subpart R of part 404 and subpart O of part 416 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart R—[Amended]

1. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, and 702(a)(5) of the Social Security Act (42 U.S.C. 405(a), 406, and 902(a)(5)).

2. Amend § 404.1745 by removing the word "or" at the end of paragraph (b), changing the period to a semicolon at the end of paragraph (c), and adding new paragraphs (d) and (e) to read as follows:

§ 404.1745 Violation of our requirements, rules, or standards.

* * * * *

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 404.1770(a)); or

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 404.1770(a)).

3. Amend § 404.1750 by revising paragraph (e)(2) to read as follows:

§ 404.1750 Notice of charges against a representative.

* * * * *

(e) * * *

(2) File the answer with the Social Security Administration, at the address

specified on the notice, within the 30-day time period.

* * * * *

4. Amend § 404.1755 by revising the first sentence to read as follows:

§ 404.1755 Withdrawing charges against a representative.

The Deputy Commissioner for Disability and Income Security Programs (or other official the Commissioner may designate), or his or her designee, may withdraw charges against a representative. * * *

5. Amend § 404.1765(l) by adding a second sentence, to read as follows:

§ 404.1765 Hearing on charges.

* * * * *

(l) *Representation.* * * * The Deputy Commissioner for Disability and Income Security Programs (or other official the Commissioner may designate), or his or her designee, will be represented by one or more attorneys from the Office of the General Counsel.

* * * * *

6. Amend § 404.1770 by redesignating existing paragraphs (a)(2) and (a)(3) as (a)(3) and (a)(4), by adding new paragraph (a)(2), and revising redesignated paragraph (a)(3)(ii), to read as follows:

§ 404.1770 Decision by hearing officer.

(a) * * *

(2) In deciding whether an individual has been, by reason of misconduct, disbarred or suspended by a court or bar, or disqualified from participating in or appearing before any Federal program or agency, the hearing officer will consider the reasons for the disbarment, suspension, or disqualification action. If the action was taken for solely administrative reasons (*e.g.*, failure to pay dues or to complete continuing legal education requirements), that will not disqualify the individual from acting as a representative before SSA. However, this exception to disqualification does not apply if the administrative action was taken in lieu of disciplinary proceedings (*e.g.*, acceptance of a voluntary resignation pending disciplinary action). Although the hearing officer will consider whether the disbarment, suspension, or disqualification action is based on misconduct when deciding whether an individual should be disqualified from acting as a representative before us, the hearing officer will not re-examine or revise the factual or legal conclusions that led to the disbarment, suspension or disqualification. For purposes of determining whether an individual has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency—

(i) *Disqualified* refers to any action that prohibits an individual from participating in or appearing before a Federal program or agency, regardless of how long the prohibition lasts or the specific terminology used.

(ii) *Federal program* refers to any program established by an Act of Congress or administered by a Federal agency.

(iii) *Federal agency* refers to any authority of the executive branch of the Government of the United States.

(3) * * *

(ii) Disqualify the representative from acting as a representative in dealings with us until he or she may be reinstated under § 404.1799. Disqualification is the sole sanction available if the charges have been sustained because the representative has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or disqualified from participating in or appearing before any Federal program or agency, or because the representative has collected or received, and retains, a fee for representational services in excess of the amount authorized.

* * * * *

7. Amend § 404.1790 by revising paragraph (b) to read as follows:

§ 404.1790 Appeals Council's decision.

* * * * *

(b) The Appeals Council, in changing a hearing officer's decision to suspend a representative for a specified period, shall in no event reduce the period of suspension to less than 1 year. In modifying a hearing officer's decision to disqualify a representative, the Appeals Council shall in no event impose a period of suspension of less than 1 year. Further, the Appeals Council shall in no event impose a suspension when disqualification is the sole sanction available in accordance with § 404.1770(a)(3)(ii).

* * * * *

8. Amend § 404.1799 by revising paragraph (d) to read as follows:

§ 404.1799 Reinstatement after suspension or disqualification—period of suspension not expired.

* * * * *

(d)(1) The Appeals Council shall not grant the request unless it is reasonably satisfied that the person will in the future act according to the provisions of section 206(a) of the Act, and to our rules and regulations.

(2) If a person was disqualified because he or she had been disbarred or suspended from a court or bar, the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court or bar from which he or she had been disbarred or suspended.

(3) If a person was disqualified because he or she had been disqualified from participating in or appearing before a Federal program or agency, the Appeals Council will grant the request for reinstatement only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she is now qualified to participate in or appear before that Federal program or agency.

(4) If the person was disqualified as a result of collecting or receiving, and retaining, a fee for representational services in excess of the amount authorized, the Appeals Council will grant the request only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that full restitution has been made.

* * * * *

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart O—[Amended]

9. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 702(a)(5) and 1631(d) of the Social Security Act (42 U.S.C. 902(a)(5) and 1383(d)).

10. Amend § 416.1545 by removing the word "or" at the end of paragraph (b), changing the period to a semicolon at the end of paragraph (c), and adding new paragraphs (d) and (e) to read as follows:

§ 416.1545 Violation of our requirements, rules, or standards.

* * * * *

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 416.1570(a)); or

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 416.1570(a)).

11. Amend § 416.1550 by revising paragraph (e)(2) to read as follows:

§ 416.1550 Notice of charges against a representative.

* * * * *

(e) * * *

(2) File the answer with the Social Security Administration, at the address

specified on the notice, within the 30-day time period.

* * * * *

12. Amend § 416.1555 by revising the first sentence to read as follows:

§ 416.1555 Withdrawing charges against a representative.

The Deputy Commissioner for Disability and Income Security Programs (or other official the Commissioner may designate), or his or her designee, may withdraw charges against a representative. * * *

13. Amend § 416.1565(l) by adding a second sentence, to read as follows:

§ 416.1565 Hearing on charges.

* * * * *

(l) *Representation.* * * * The Deputy Commissioner for Disability and Income Security Programs (or other official the Commissioner may designate), or his or her designee, will be represented by one or more attorneys from the Office of the General Counsel.

* * * * *

14. Amend § 416.1570 by redesignating existing paragraphs (a)(2) and (a)(3) as (a)(3) and (a)(4), by adding new paragraph (a)(2), and revising redesignated paragraph (a)(3)(ii), to read as follows:

§ 416.1570 Decision by hearing officer.

(a) * * *

(2) In deciding whether an individual has been, by reason of misconduct, disbarred or suspended by a court or bar, or disqualified from participating in or appearing before any Federal program or agency, the hearing officer will consider the reasons for the disbarment, suspension, or disqualification action. If the action was taken for solely administrative reasons (*e.g.*, failure to pay dues or to complete continuing legal education requirements), that will not disqualify the individual from acting as a representative before SSA. However, this exception to disqualification does not apply if the administrative action was taken in lieu of disciplinary proceedings (*e.g.*, acceptance of a voluntary resignation pending disciplinary action). Although the hearing officer will consider whether the disbarment, suspension, or disqualification action is based on misconduct when deciding whether an individual should be disqualified from acting as a representative before us, the hearing officer will not re-examine or revise the factual or legal conclusions that led to the disbarment, suspension or disqualification. For purposes of determining whether an individual has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency—

(i) *Disqualified* refers to any action that prohibits an individual from participating in or appearing before a Federal program or agency, regardless of how long the prohibition lasts or the specific terminology used.

(ii) *Federal program* refers to any program established by an Act of Congress or administered by a Federal agency.

(iii) *Federal agency* refers to any authority of the executive branch of the Government of the United States.

(3) * * *

(ii) Disqualify the representative from acting as a representative in dealings with us until he or she may be reinstated under § 416.1599. Disqualification is the sole sanction available if the charges have been sustained because the representative has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or disqualified from participating in or appearing before any Federal program or agency, or because the representative has collected or received, and retains, a fee for representational services in excess of the amount authorized.

* * * * *

15. Amend § 416.1590 by revising paragraph (b) to read as follows:

§ 416.1590 Appeals Council's decision.

* * * * *

(b) The Appeals Council, in changing a hearing officer's decision to suspend a representative for a specified period, shall in no event reduce the period of suspension to less than 1 year. In modifying a hearing officer's decision to disqualify a representative, the Appeals Council shall in no event impose a period of suspension of less than 1 year. Further, the Appeals Council shall in no event impose a suspension when disqualification is the sole sanction available in accordance with § 416.1570(a)(3)(ii).

* * * * *

16. Amend § 416.1599 by revising paragraph (d) to read as follows:

§ 416.1599 Reinstatement after suspension or disqualification —period of suspension not expired.

* * * * *

(d)(1) The Appeals Council shall not grant the request unless it is reasonably satisfied that the person will in the future act according to the provisions of section 206(a) of the Act, and to our rules and regulations.

(2) If a person was disqualified because he or she had been disbarred or suspended from a court or bar, the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court or bar from which he or she had been disbarred or suspended.

(3) If a person was disqualified because he or she had been disqualified from participating in or appearing before a Federal program or agency, the Appeals Council will grant the request for reinstatement only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she is now qualified to participate in or appear before that Federal program or agency.

(4) If the person was disqualified as a result of collecting or receiving, and retaining, a fee for representational services in excess of the amount authorized, the Appeals Council will grant the request only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that full restitution has been made.

* * * * *

[FR Doc. 05–7353 Filed 4–12–05; 8:45 am]
BILLING CODE 4191–02–P

DEPARTMENT OF THE TREASURY

31 CFR Part 29

RIN 1505–AB55

Federal Benefit Payments Under Certain District of Columbia Retirement Plans

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Treasury proposes to amend its DC Pensions rules promulgated pursuant to the Balanced Budget Act of 1997, as amended (the Act). The Act was effective on October 1, 1997. The Act assigns to the Secretary of the Treasury responsibility for payment of benefits based on service accrued as of June 30, 1997, under the retirement plans for District of Columbia teachers and police officers and firefighters, and payment of benefits under the retirement plan for District of Columbia judges regardless of when service accrued. The amended regulations will implement the Secretary's authority under the Act to ensure the accuracy of payments made to annuitants before the effective date of the Act. The amended regulations will also reflect changes made in the District of Columbia Retirement Protection

Improvement Act of 2004 (the 2004 Act). In addition, the amended regulations will include several technical changes as specified below.

DATES: Written comments must be received on or before June 13, 2005.

ADDRESSES: Submit comments to the Office of the Assistant General Counsel for General Law and Ethics, Attention: DC Pensions Rulemaking Project, Room 2209A, Main Treasury Building, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. Because paper mail in the Washington, DC, area may be subject to delay, it is recommended that comments be submitted electronically to: *dcpensions@do.treas.gov*. All comments should be captioned with "DC Pensions Rulemaking Comments." Please include your name, affiliation, address, e-mail address, and telephone number in your comment. Comments will be available for public inspection by appointment only at the Reading Room of the Treasury Library, Room 1318, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. To make appointments, call (202) 622–0990.

FOR FURTHER INFORMATION CONTACT: Elizabeth Cuffe, Office of the General Counsel, MT Room 2209A, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220 (202–622–1682, not a toll-free call).

SUPPLEMENTARY INFORMATION: Title XI of the Balanced Budget Act of 1997, Public Law 105–33, 111 Stat. 251, 712–731, 756–759, as amended (the Act), transferred certain pension liabilities from the District of Columbia Government to the Federal Government. The Act requires that the Secretary of the Treasury (the Secretary) pay certain benefits based on service accrued on or before June 30, 1997, under the retirement plans for District of Columbia teachers (Teachers Plan) and police officers and firefighters (Police and Firefighters Plan), and for benefits under the retirement plan for District of Columbia judges (Judges Plan) regardless of when service accrued. On December 23, 2004, the District of Columbia Retirement Protection Improvement Act of 2004, Public Law 108–489, 118 Stat. 3966 (the 2004 Act) was enacted. The 2004 Act amended the Act, in part, to create a new fund from the two funds that had financed the Teachers Plan and the Police and Firefighters Plan and to provide the Judges Plan with procedures for resolving denied benefit claims.

1. Federal Government's Responsibilities

The Act provides the Secretary with authority to ensure the accuracy of Federal Benefit Payments made before October 1, 1997, under the Police and Firefighters Plan and the Teachers Plan. Section 11012 of the Act requires the Secretary to make benefit payments under the Police and Firefighters Plan and Teachers Plan based on service accrued on or before June 30, 1997. An annuitant's entitlement to the correct payment amount based on that service, but not more than that amount, does not expire. Thus, the Secretary's authority to review and ensure the accuracy of all payments based on service accrued on or before June 30, 1997, extends to all such payments whether made before or after the October 1, 1997, effective date of the Act.

In the case of the Judges Plan, section 11251(a) of the Act (codified at DC Official Code § 11–1570(c)(2)(A)) vests in the Secretary authority over Federal Benefit Payments made under the Judges Plan before the October 1, 1997, effective date of the Act. Accordingly, the Secretary has authority to ensure the accuracy of payments made before October 1, 1997, under the Judges Plan, the Police and Firefighters Plan, and the Teachers Plan.

The proposed amendments to Part 29 reflect the authority of the Secretary as provided in the sections of the Act discussed above and the manner in which that authority is being administered by the Treasury Department.

The 2004 Act amended the Act to create the District of Columbia Teachers, Police Officers, and Firefighters Federal Pension Fund with the assets transferred from the District of Columbia Federal Pension Liability Trust Fund and the Federal Supplemental District of Columbia Pension Fund, which funds were terminated. The 2004 Act also amended the Act to provide the Judges Plan with procedures for resolving denied benefit claims.

2. Proposed Regulations

The Secretary has the authority under section 11083 and paragraph 11251(b) (codified as DC Official Code § 11–1572(a)) of the Act "to issue regulations to implement, interpret, administer and carry out the purposes of this [Act], and, in the Secretary's discretion, those regulations may have retroactive effect." The current regulations by their terms apply only to Federal Benefit Payments made on or after October 1, 1997, the effective date of the Act. See 31 CFR 29.101(c). Therefore, the Department of the Treasury proposes to amend current regulations to implement the Secretary's authority under the Act to ensure the accuracy of payments made to annuitants prior to the October 1, 1997, effective date of the Act. The Department also proposes to amend the current regulations to reflect the changes made in the 2004 Act and to make several technical changes as specified below.

The **Authority** paragraph supplies the reference to the provisions of the Act that provide the statutory authority for Part 29. This paragraph is amended to simplify the citation.

Section 29.101(a) provides the statutory basis of the Part 29 rules. This paragraph is amended to conform to the amended language of the **Authority** provision and the definition of Act in section 29.103(a).

Section 29.101(c) provides the scope of coverage of the Part 29 D.C. Pensions regulations. This paragraph is amended to delete the current limitation to payments made on or after October 1, 1997, and thereby to include payments made before October 1, 1997, under the Teachers Plan, the Police and Firefighters Plan, and the Judges Plan.

Section 29.101(e) is added to specify that the regulations do not apply to the District of Columbia replacement plan, which covers payments based on service accrued after June 30, 1997, pursuant to section 11042 of the Act.

Section 29.103(a) provides a definition for Act. This definition is amended to simplify the definition and to accurately reflect the applicable sections of the Act.

Section 29.103(a) provides a definition for Benefits Administrator. This definition is amended to include citations to the District of Columbia Retirement Protection Improvement Act of 2004, Public Law 108–489, 118 Stat. 3966 (the 2004 Act) and to clarify that the interim benefits administration period under the Judges Plan is independent of the interim District benefits administration period under the Teachers Plan and the Police and Firefighters Plan.

Section 29.103(a) provides a definition for Federal Benefit Payment. This definition is amended to include payments made before October 1, 1997, under the Teachers Plan, the Police and Firefighters Plan, and the Judges Plan and to make clear that, pursuant to section 11012(b) of the Act, service accrued after June 30, 1997, shall not be credited for purposes of determining the amount of any Federal Benefit Payment under the Teachers Plan and the Police and Firefighters Plan.

Section 29.103(a) also provides a definition for Retirement Funds. This definition is amended to include the funds used to make payments under the Teachers Plan, the Police and Firefighters Plan, and the Judges Plan before October 1, 1997, and to reflect changes to the funds made in the 2004 Act.

Section 29.201(a) is amended to use the word "Act" rather than the full name of the Act.

Section 29.401(a)(2) and (3) are amended to include citations to the portions of the 2004 Act that provide the Judges Plan with procedures for resolving denied benefit claims.

Section 29.401(c) is added to exclude from the coverage of Subpart D claims and appeals that were filed against the District of Columbia before the effective date of the Act. This limitation is based on section 11723 of the Act, which requires the District of Columbia to continue to defend civil actions and proceedings already in process and which prohibits claims against the United States for civil actions and proceedings already begun against the District of Columbia before the effective date of the Act.

Section 29.402 provides a definition for Act. This definition is deleted and the definition in § 29.103(a) will be in effect for all of Part 29.

Section 29.402 provides a definition for Benefits Administrator. This definition is deleted and the definition in § 29.103(a) will be in effect for all of Part 29.

Section 29.501(e) is added to exclude from the coverage of Subpart E debt collection claims asserted by the District of Columbia before the effective date of the Act and requests for waiver of collection filed with the District of Columbia before the effective date of the Act. This limitation is based on section 11723 of the Act, which requires the District of Columbia to continue to defend civil actions and proceedings already in process and which prohibits claims against the United States for civil actions and proceedings already begun against the District of Columbia before the effective date of the Act.

Regulatory Flexibility Act

It is hereby certified that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation only affects the determination of the Federal portion of retirement benefits to certain former employees of the District of Columbia. Accordingly, a regulatory flexibility analysis is not required by the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Executive Order 12866

This proposed rule is not a significant regulatory action as defined by Executive Order 12866, 58 FR 51735. Therefore, a regulatory assessment is not required.

List of Subjects in 31 CFR Part 29

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Intergovernmental relations, Law enforcement officers, Pensions, Retirement, Teachers.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, we propose to amend Title 31, Part 29, Code of Federal Regulations, as follows:

PART 29—FEDERAL BENEFIT PAYMENTS UNDER CERTAIN DISTRICT OF COLUMBIA RETIREMENT PROGRAMS

1. The authority citation for Part 29 is revised to read as follows:

Authority: Subtitle A, Subchapter B of Chapter 4 of Subtitle C, and Chapter 3 of Subtitle H, of Pub. L. 105–33, 111 Stat. 712–731, 756–759, and 786–787; as amended.

2. In § 29.101, paragraphs (a) and (c) are revised, and paragraph (e) is added, to read as follows:

§ 29.101 Purpose and scope.

(a) This part contains the Department's regulations implementing Subtitle A, Subchapter B of Chapter 4 of Subtitle C, and Chapter 3 of Subtitle H, of Title XI of the Balanced Budget Act of 1997, Pub. L. 105–33, 111 Stat. 251, 712–731, 756–759, enacted August 5, 1997, as amended.

* * * * *

(c) This part applies to Federal Benefit Payments.

* * * * *

(e) This part does not apply to the District of Columbia replacement plan, which covers payments based on service accrued after June 30, 1997, pursuant to section 11042 of the Act.

3. In § 29.103, definitions for Act, Benefits Administrator, Federal Benefit Payment, and Retirement Funds in paragraph (a) are revised to read as follows:

§ 29.103 Definitions.

(a) In this part—

Act means Subtitle A, Subchapter B of Chapter 4 of Subtitle C, and Chapter 3 of Subtitle H, of Title XI of the Balanced Budget Act of 1997, Pub. L. 105–33, 111 Stat. 251, 712–731, 756–759, as amended.

Benefits Administrator means:

(1) For the Teachers Plan and the Police and Firefighters Plan under section 11041(a) of the Act:

(i) During the interim benefits administration period, the District of Columbia government; or

(ii) After the end of the interim benefits administration period:

(A) The Trustee selected by the Department under sections 11035(a) or 11085(a) of the Act;

(B) The Department, if a determination is made under sections 11035(d) or 11085(d) of the Act that, in the interest of economy and efficiency, the function of the Trustee shall be performed by the Department rather than the Trustee; or

(C) Any other agent of the Department designated to make initial benefit determinations and/or to recover or recoup or waive recovery or recoupment of overpayments of Federal Benefit Payments, or to recover or recoup debts owed to the Federal Government by annuitants; or

(2) For the Judges Plan under section 11252(b) of the Act:

(i) During the interim benefits administration period, the District of Columbia government; or

(ii) After the end of the interim benefits administration period for the Judges Plan:

(A) The Trustee selected by the Department under section 11251(a) of the Act;

(B) The Department, if a determination is made under section 11251(a) of the Act that, in the interest of economy and efficiency, the function of the Trustee shall be performed by the Department rather than the Trustee; or

(C) Any other agent of the Department designated to make initial benefit determinations and/or to recover or recoup or waive recovery or recoupment of overpayments of Federal Benefit Payments, or to recover or recoup debts owed to the Federal Government by annuitants.

* * * * *

Federal Benefit Payment means a payment for which the Department is responsible under the Act, to which an individual is entitled under the Judges Plan, the Police and Firefighters Plan, or the Teachers Plan, in such amount and under such terms and conditions as may apply under such plans, including payments made under these plans before, on, or after the October 1, 1997, effective date of the Act. Service after June 30, 1997, shall not be credited for purposes of determining the amount of

any Federal Benefit Payment under the Teachers Plan and the Police and Firefighters Plan.

* * * * *

Retirement Funds means the District of Columbia Teachers, Police Officers, and Firefighters Federal Pension Fund established under section 11081 of the Act, the District of Columbia Judicial Retirement and Survivors Annuity Fund established under section 11252 of the Act, and their predecessor funds.

* * * * *

4. Section 29.201 is revised to read as follows:

§ 29.201 Purpose and scope.

This subpart contains information concerning the relationship between the Department and the District government in the administration of the Act and the functions of each in the administration of that Act.

5. In § 29.401, paragraphs (a)(2) and (3) are amended, and paragraph (c) is added, to read as follows:

§ 29.401 Purpose.

(a) * * *

(2) The procedures for determining an individual's eligibility for a Federal Benefit Payment and the amount and form of an individual's Federal Benefit Payment as required by sections 11021 and 11251(a) (codified at D.C. Official Code § 11–1570(c)(2)(a)) of the Act;

(3) The appeal rights available under section 11022(a) of the Act and section 3 of the 2004 Act (codified at D.C. Official Code § 11–1570(c)(3)) to claimants whose claim for Federal Benefit Payments is denied in whole or in part; and

* * * * *

(c) This part does not apply to claims and appeals filed before October 1, 1997. Such claims must be pursued with the District of Columbia.

6. In § 29.402, the definitions for Act and Benefits Administrator are removed.

7. In § 29.501, paragraph (e) is added to read as follows:

§ 29.501 Purpose; incorporation by reference; scope.

* * * * *

(e) This part does not apply to debt collection claims asserted and requests for waivers of collection initiated before October 1, 1997. Such debt collection claims must be pursued by the District of Columbia and such requests for waivers of collection must be pursued with the District of Columbia.

Dated: April 6, 2005.

Rochelle F. Granat,

Director, Office of DC Pensions.

[FR Doc. 05–7291 Filed 4–12–05; 8:45 am]

BILLING CODE 4810–25–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2004–0411; AD–FRL–7898–9]

RIN 2060–AK80

National Emission Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Achievable Control Technology Standards; and National Emission Standards for Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rules; amendments.

SUMMARY: The EPA is proposing to amend the National Emissions Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Control Technology Standards which were promulgated in June 1999 (64 FR 34863), and the National Emission Standards for Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations which were promulgated in July 2002 (67 FR 46258). The proposed amendments would clarify the compliance requirements for benzene waste streams, clarify the requirements for heat exchangers and heat exchanger systems, and stipulate the provisions for offsite waste transfer in the national emission standards for ethylene process units. The proposed amendments would also correct the regulatory language that make emissions from ethylene cracking furnaces during decoking operations an exception to the provisions and delineate overlapping requirements for storage vessels and transfer racks.

In addition, the proposed amendments would also correct errors in the proposed rule for the Acrylic and Modacrylic Fiber Production source category which were not corrected as indicated in the preamble to the June 1999 final rule (64 FR 34863).

In the Rules and Regulations section of this **Federal Register**, we are taking direct final action on the proposed amendments because we view these revisions as noncontroversial and anticipate no adverse comments. We have explained our reasons for the amendments in the direct final rules. If we have no adverse comments, we will take no further action on the proposed amendments. If we receive adverse comments, we will withdraw only those amendments on which we receive adverse comments. We will publish a timely withdrawal in the **Federal Register** indicating which amendments will become effective and which amendments are being withdrawn. If all or part of the direct final rules in the Rules and Regulations section of this **Federal Register** is withdrawn, all comments pertaining to those amendments will be addressed in a subsequent final rulemaking based on these proposed amendments. We will not institute a second comment period on the subsequent final action. Any parties interested in commenting must do so at this time.

DATES: *Comments.* Written comments must be received on or before May 31, 2005.

Public Hearing. If anyone contacts us by April 20, 2005 requesting to speak at a public hearing, we will hold a public hearing on April 28, 2005. If a public hearing is held, it will be held at EPA's RTP Campus in Research Triangle Park, NC, or an alternate site nearby. Persons interested in attending the public hearing should contact Ms. Dorothy Apple at (919) 541–4487 to verify that a hearing will be held and its location.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0411, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* EPA Docket Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a duplicate copy, if possible.
- *Hand Delivery:* Air and Radiation Docket, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

We request that a separate copy also be sent to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

Instructions: Direct your comments to Docket ID No. OAR–2004–0411. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, *regulations.gov*, or e-mail. The EPA EDOCKET and the federal *regulations.gov* Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Submitting CBI. Do not submit information that you consider to be CBI electronically through EDocket, regulations.gov, or e-mail. Send or deliver information identified as CBI to only the following address: Mr. Warren Johnson, c/o OAQPS Document Control Officer (Room C439–01), U.S. EPA, Research Triangle Park, 27711, Attention Docket ID No. OAR–2004–0411. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Dockets. The docket number for the amendments to these standards is OAR–2004–0411. Other dockets incorporated by reference include Docket Nos. A–97–17 and A–97–18 for the Generic MACT, and A–98–22 for the emissions standards for ethylene production. The docket includes background information and supported the proposal and promulgation of the Generic MACT standards (40 CFR part 63, subparts XX and YY).

All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center (EPA/DC), EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/edocket/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified above. 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, electronic copies of recently proposed and final rules will also be available on the WWW through EPA's Technology Transfer Network (TTN). Following signature, a copy of these direct final rules will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *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.

FOR FURTHER INFORMATION CONTACT: Mr. Warren Johnson, Organic Chemicals Group, Emission Standards Division (C504–04), Office of Air Quality Planning and Standards, EPA, Research Triangle Park, NC 27711; telephone number (919) 541–5124; facsimile number (919) 541–3470; electronic mail (e-mail) address *johnson.warren@epa.gov*. For information concerning corrections to the Acrylic/Modacrylic Fiber Production source category of the Generic MACT, contact Ms. Ellen Wildermann; Policy, Planning and Standards Group; Emission Standards Division (C439–04), Office of Air Quality Planning and Standards, EPA, Research Triangle Park, North Carolina 27711, (919) 541–5408, e-mail address *wildermann.ellen@epa.gov*.

SUPPLEMENTARY INFORMATION: *Regulated Entities.* The entities potentially affected by this action include the following categories of sources:

Category	NAICS code	SIC code	Examples of potentially regulated entities
Industrial	325110	2869	Producers of ethylene from refined petroleum or liquid hydrocarbons.
	3252	2824	Producers of either acrylic fiber or modacrylic fiber synthetics composed of acrylonitrile (AN) units.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Not all facilities listed classified under the NAICS code or SIC code are affected. To determine

whether your facility is affected by this action, you should examine the applicability criteria in § 63.1100 of the final generic MACT standards. If you have any questions regarding the applicability of these technical corrections to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section. For further information on these proposed rules, please see the information provided in the direct final rules action that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Statutory and Executive Order Reviews

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with the proposed rule amendments.

For purposes of assessing the impacts of the proposed rule amendments on small entities, a small entity is defined as: (1) A small business in the North American Industrial Classification System (NAICS) code 325 that has up to 500; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule amendments on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The proposed rule amendments will not impose any requirements on small entities. The proposed rule amendments provide clarifications and corrections to previously issued rules. Before promulgating the rule on acrylic and modacrylic fiber production in 1999 (64 FR 34863), we concluded that each standard applied to five or fewer major sources. In addition, we conducted a limited assessment of the economic effect of the proposed standards on small entities that showed no adverse economic effect for any small entities within any of these source categories. Similarly, before promulgating the rules on ethylene production in 2002 (67 FR 46258), we determined that there were no small entities affected by those rules.

For a discussion of other administrative requirements for the proposed rules, see the direct final rules action in the Rules and Regulations section of today's **Federal Register**.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and Procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: April 7, 2005.

Stephen L. Johnson,

Acting Administrator.

[FR Doc. 05–7405 Filed 4–12–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–7899–2]

RIN 2060–AM51

Protection of Stratospheric Ozone: Substitute Refrigerant Recycling; Amendment to the Definition of Refrigerant

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing changes to correct the final rule published in the **Federal Register** on March 12, 2004. Specifically, EPA is proposing to amend the regulatory text for the definitions of refrigerant and technician and the prohibition against venting substitute refrigerants. EPA is also proposing to amend the prohibition against venting substitute refrigerants to reflect the proposed changes to the definitions. These changes are being proposed to make certain that the regulations promulgated on March 12, 2004 cannot be construed as a restriction on the sales of substitutes that do not consist of an ozone-depleting substance (ODS), such as pure hydrofluorocarbon (HFC) and perfluorocarbon (PFC) substitutes.

DATES: Comments on this proposed rule must be received on or before May 13, 2005, unless a public hearing is requested. If requested by April 28, 2005 a hearing will be held on May 13, 2005 and the comment period will be extended until May 31, 2005. Inquires regarding a public hearing should be directed to the contact person listed below.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2004–0070 by one of the following methods:

- Federal eRulemaking portal *http://www.regulations.gov*. Follow the on-line instructions for submitting comments;
- Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments;
- Fax comments to (202) 566–1741; or
- Mail/hand delivery: Submit comments to Air and Radiation Docket at EPA West, 1301 Constitution Avenue NW., Room B108, Mail Code 6102T, Washington, DC 20460, Phone: (202) 566–1742.

Instructions: Direct your comments to Docket ID No. OAR–2004–0070. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit

EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air and Radiation Docket EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Julius Banks; (202) 343–9870; Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205J); 1200 Pennsylvania Avenue, NW.; Washington, DC 20460. The Stratospheric Ozone Information Hotline, 800–296–1996, and the Ozone Web page, *http://www.epa.gov/ozone/title6/608/regulations/index.html*, can also be contacted for further information concerning this correction.

SUPPLEMENTARY INFORMATION: EPA views this as a noncontroversial action and anticipates no adverse comment. Therefore, in today's **Federal Register**, we are publishing a separate Direct Final rulemaking to correct the definitions of refrigerant and technician and amend the prohibition against the knowing venting of substitutes. The Direct Final rule will be effective on June 13, 2005 without further notice unless we receive adverse comment regarding the intent of the amended definitions and the amended prohibition by May 13, 2005. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments on the proposed rule in a subsequent final rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

EPA emphasizes that it is not re-proposing the June 11, 1998 proposal (63 FR 32044) to restrict the sale of hydrofluorocarbon (HFC) and perfluorocarbon (PFC) substitutes, but is only taking action to correct the definitions of refrigerant and technician at § 82.152 and amend the venting prohibition at § 82.154(a) to make certain that the definitions and prohibition are consistent with the expressed intent of the March 12, 2004 (69 FR 11946) final rule to not restrict the sales of such substitutes. EPA discussed and responded to comments concerning the sales restrictions on substitutes for refrigerants, and its extension to substitutes for refrigerants that consist in part or whole of a class I or class II ozone-depleting substance in the March 12, 2004 final rulemaking (69 FR 11969). Comments that are submitted in response to this notice that pertain to the merits of or implementation of a sales restriction on HFC or PFC substitutes are considered to be outside of the scope of today's action.

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I. Regulated Entities

Entities potentially regulated by this action include those that manufacture, own, maintain, service, repair, or dispose of all types of air-conditioning and refrigeration equipment (*i.e.*, appliances as defined by § 82.152); those who sell, purchase, or reclaim refrigerants and their substitutes; and those who own refrigerant recycling or recovery equipment. This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your company is regulated by this action, you should carefully examine the applicability criteria contained in section 608 of the Clean Air Act Amendments of 1990 (the Act). The applicability criteria are discussed below and in regulations published on December 30, 1993 (58 FR 69638). If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Overview

On March 12, 2004 (69 FR 11946), EPA amended the rule on refrigerant recycling, promulgated under section 608 of the Act, to clarify how the requirements of section 608 apply to substitutes for chlorofluorocarbon (CFC) and hydrochlorofluorocarbon (HCFC) refrigerants. This rule explicated the self-effectuating statutory prohibition against the knowing venting of substitutes to the atmosphere during the maintenance, service, repair, and disposal of appliances that became effective on November 15, 1995. The rule also exempted certain substitutes from the venting prohibition on the basis of current evidence that their release is adequately addressed by other authorities; hence, such release does not pose a threat to the environment under section 608 (69 FR 11949).

EPA also amended the refrigerant recovery and recycling requirements for CFC and HCFC refrigerants to accommodate the proliferation of new substitutes for these refrigerants on the market, and to clarify that the venting prohibition applies to all substitutes and refrigerants for which EPA has not made a determination that their release "does not pose a threat to the environment," including HFC and PFC substitutes. The March 12, 2004 final rule was not intended to either mandate section 608 technician certification for those maintaining, repairing, or servicing appliances using substitutes that do not consist of a class I or class II ODS or to restrict the sale of substitutes that do not contribute to the depletion of the stratospheric ozone layer, such as pure HFC and PFC substitutes (69 FR 11946).

III. Today's Action

With this action, EPA is proposing to correct the definitions of refrigerant and technician at § 82.152 and amend the prohibition against the knowing venting of substitutes at § 82.154(a), to reflect the intent and preamble language of the March 12, 2004 final rule to not regulate the use or sale of substitutes that do not consist of a class I or class II ozone-depleting substance.

A. Correction to the Definition of Refrigerant

While the intent of the March 12, 2004 final rule was not to restrict the sale of refrigerant substitutes that do not contribute to the depletion of the stratospheric ozone layer (69 FR 11946), the accompanying regulatory text could be construed as having the opposite effect. Specifically, the final rule's definition of refrigerant at § 82.152 (69 FR 11957) stated that refrigerant means, for purposes of this subpart, any substance consisting in part or whole of a class I or class II ozone-depleting substance that is used for heat transfer purposes and provides a cooling effect, or any substance used as a substitute for such a class I or class II substance by any user in a given end-use, except for the following substitutes in the following end-uses:

(1) Ammonia in commercial or industrial process refrigeration or in absorption units;

(2) Hydrocarbons in industrial process refrigeration (processing of hydrocarbons);

(3) Chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds);

(4) Carbon dioxide in any application;

(5) Nitrogen in any application; or

(6) Water in any application.

EPA is aware that the above definition of refrigerant could be construed as being at odds with the preamble that discusses the Agency's intent to not restrict the sale of substitutes that do not consist of a class I or class II ODS. The unintentional inclusion of the phrase or any substance used as a substitute for such a class I or class II substance * * *, implies that any substance, including pure HFCs and PFCs, used as a substitute for such a class I or class II substance would be captured under the definition of refrigerant. If left uncorrected, this could create ambiguity about the interpretation of the regulations promulgated at 40 CFR part 82, subpart F (*i.e.*, section 608 regulations) and could have unintended implications on the prohibitions, required practices, and reporting and recordkeeping requirements of the regulations promulgated under section 608 of Title VI of the Clean Air Act (*e.g.*, mandatory certification of technicians servicing appliances using pure HFC refrigerants and a restriction on the sale of HFC substitutes to certified technicians).

Therefore, EPA is proposing to correct the definition of refrigerant by deleting the aforementioned phrase. The proposed definition at § 82.152 reads: Refrigerant means, for purposes of this subpart, any substance consisting in part or whole of a class I or class II ozone-depleting substance that is used for heat transfer purposes and provides a cooling effect. EPA has deleted the text specifying the exempted substitutes (namely, ammonia in commercial or industrial process refrigeration or in absorption units; hydrocarbons in industrial process refrigeration (processing of hydrocarbons); chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds); carbon dioxide in any application; nitrogen in any application; or water in any application). Since these substances do not contain a class I or class II ODS, such a level of specificity is not required within the amended definition.

EPA requests comment on whether the proposed definition of refrigerant accurately reflects the Agency's intent to only include those substitutes that contain a class I or class II ODS, and hence contribute to depletion of the stratospheric ozone layer. EPA also seeks comment on whether the deleted text specifying the exempted substitutes provides greater clarity to the definition.

B. Amendment to the Prohibition Against Venting Substitutes

The proposed correction to the definition of refrigerant requires an amendment to the regulatory refrigerant venting prohibition at § 82.154(a). The March 12, 2004 amendment to the section 608 regulatory venting prohibition (69 FR 11979) states that Effective May 11, 2004, no person maintaining, servicing, repairing, or disposing of appliances may knowingly vent or otherwise release into the environment any refrigerant from such appliances. * * * If not addressed, the proposed definition of refrigerant would exclude pure HFC and PFC substitutes [1] from the venting prohibition, because they do not consist in part or whole of a class I or class II ozone-depleting substance. The preamble to the March 12, 2004 final rule made clear that the Agency intended to exempt certain substitutes, namely, ammonia in commercial or industrial process refrigeration or in absorption units; hydrocarbons in industrial process refrigeration (processing of hydrocarbons); chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds); carbon dioxide in any application; nitrogen in any application; or water in any application (69 FR 11949–54) from the statutory venting prohibition, because their release is adequately addressed by other entities; therefore, their release does not pose a threat to the environment under section 608 of Title VI of the Clean Air Act. However, EPA did not make such a finding for substitutes consisting in part or whole of an HFC or PFC substitute. So it remains illegal to knowingly vent substitutes consisting in part or whole of an HFC or PFC substitute during the maintenance, service, repair, or disposal of appliances (69 FR 11947).

In accordance with section 608(c)(2) of Title VI of the Clean Air Act (as amended in 1990), *de minimis* releases associated with good faith attempts to recapture and recycle or safely dispose of such substitutes shall not be subject to the prohibition. EPA has not promulgated regulations mandating certification of refrigerant recycling/recovery equipment intended for use with substitutes; therefore, EPA is not proposing a regulatory provision for the mandatory use of certified recovery/recycling equipment as an option for determining *de minimis* releases of substitutes. However, the lack of a regulatory provision should not be interpreted as an exemption to the venting prohibition for non-exempted substitutes. The regulatory prohibition at § 82.154(a) reflects the statutory reference to *de minimis* releases of substitutes as they pertain to good faith attempts to recapture and recycle or safely dispose of such substitutes.

In order to emphasize that the knowingly venting of HFC and PFC substitutes remains illegal during the maintenance, service, repair, and disposal of appliances and to make certain that the *de minimis* exemption for refrigerants remains in the regulatory prohibition, EPA is proposing to adopt the statutory section 608(c)(2) venting prohibition into the section 608 regulatory prohibition at § 82.154(a). The proposed definition of refrigerant means that refrigerant releases shall be considered *de minimis* only if they occur when: (1) The required practices set forth in § 82.156 are observed, recovery or recycling machines that meet the requirements set forth in § 82.158 are used, and the technician certification provisions set forth in § 82.161 are observed; or (2) The requirements set forth for the service of motor vehicle air-conditioners (MVACs) in subpart B (*i.e.*, section 609) of this part are observed. EPA is also proposing to list, in the regulatory prohibition at § 82.154(a), the substitutes that have been exempted from the statutory

[1] As defined at § 82.152, Substitute means any chemical or product, whether existing or new, that is used by any person as an EPA approved replacement for a class I or II ozone-depleting substance in a given refrigeration or air-conditioning end-use.

venting prohibition. EPA is proposing this edit in order to clarify which substitutes are exempt from the venting prohibition. Hence, EPA is proposing to amend the prohibition at § 82.154(a) to read: (a) Effective June 13, 2005, no person maintaining, servicing, repairing, or disposing of appliances may knowingly vent or otherwise release into the environment any refrigerant or substitute from such appliances, with the exception of the following substitutes in the following end-uses:

(1) Ammonia in commercial or industrial process refrigeration or in absorption units;

(2) Hydrocarbons in industrial process refrigeration (processing of hydrocarbons);

(3) Chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds);

(4) Carbon dioxide in any application;

(5) Nitrogen in any application; or

(6) Water in any application.

The knowing release of a refrigerant or non-exempt substitute subsequent to its recovery from an appliance shall be considered a violation of this prohibition. *De minimis* releases associated with good faith attempts to recycle or recover refrigerants or non-exempt substitutes are not subject to this prohibition. Refrigerant releases shall be considered *de minimis* only if they occur when: (1) The required practices set forth in § 82.156 are observed, recovery or recycling machines that meet the requirements set forth in § 82.158 are used, and the technician certification provisions set forth in § 82.161 are observed; or (2) The requirements set forth in subpart B of this part are observed.

EPA requests comment as to whether the proposed edits to the regulatory venting prohibition accurately reflects the Agency's intent to *not exclude* HFC and PFC substitutes from the section 608(c)(2) venting prohibition. Thereby making certain that it remains unlawful for any person, in the course of maintaining, servicing, repairing, or disposing of an appliance, to knowingly vent or otherwise knowingly release HFC and PFC substitutes into the environment. EPA also seeks comment on whether the proposed edits maintain the exemptions to the prohibition for *de minimis* releases associated with good faith attempts to recapture and recycle or properly dispose of substitutes. Finally, EPA seeks comment on whether the edits accurately depict the Agency's exemption to the venting prohibition for the following substitutes: (1) Ammonia in commercial or industrial process refrigeration or in absorption units; (2) Hydrocarbons in industrial process refrigeration (processing of hydrocarbons); (3) Chlorine in industrial process refrigeration (processing of chlorine and chlorine compounds); (4) Carbon dioxide in any application; (5) Nitrogen in any application; or (6) Water in any application.

C. Correction to the Definition of Technician

In 1994, EPA finalized the definition of technician at § 82.152 to read: Technician means any person who performs maintenance, service, or repair that could be reasonably expected to release class I or class II refrigerants from appliances, *except for MVACs,* into the atmosphere * * * (59 FR 55912 (November 9, 1994)). On June 11, 1998 (63 FR 32089), EPA proposed an amendment to the definition of technician to include persons who perform maintenance, service, repair, or disposal that could be reasonably expected to release class I substances, class II substances, or substitutes from appliances into the atmosphere (63 FR 32059). The intent of proposed amendment to the definition was to require section 608 technician certification for persons maintaining, repairing, servicing, or disposing of appliances containing non-exempt substitutes; however, EPA did not intend to remove the phrase except for MVACs from the definition of technician.

A petition for review challenging the March 12, 2004 final rule stated that the amended definition of technician could be misinterpreted to mean that technicians servicing and maintaining MVACs must also have section 608 technician certification. EPA did not intend for the amended definition of technician at § 82.152 to include persons servicing or repairing MVACs, and therefore is proposing to revert back to the original definition. EPA seeks comment on whether the proposal to revert back to the original definition of technician satisfies the Agency's intent to not require technician certification under section 608 for persons servicing or repairing MVACs.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51,735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

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

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

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

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to Executive Order 12866 review.

B. Paperwork Reduction Act

OMB has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 82, subpart F under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB Control Number 2060–0256, EPA ICR number 1626.08. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672. This action does not impose any new information collection burden beyond the already-approved ICR.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control

number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by Small Business Administration size standards primarily engaged in the supply and sale of motor vehicle air-conditioning refrigerants as defined by NAIC codes 42114, 42193, and 441310; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this proposed rule are small business as defined by Small Business Administration size standards primarily engaged in the supply and sale of motor vehicle air-conditioning refrigerants as defined by NAIC codes 42114, 42193, and 441310. We have determined that approximately 819 small entities will experience an impact ranging from 0.001 percent to 0.163 percent, based on their annual sales and revenues.

Although this proposed rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. EPA is proposing this rulemaking to make certain that the regulatory text in the March 12, 2004 rulemaking (63 FR 11946) is consistent with the intent to not restrict the sale of substitutes that do not consist of a class I or class II ozone-depleting substance, while making certain that the statutory prohibition against knowingly releasing such substitutes remains. This rule proposes to correct the definitions of refrigerant and technician and makes certain that only substances consisting whole or in part of a class I or class II ODS are covered under the section 608 refrigerant regulations. Hence any burden associated with technician certification or sales of refrigerant substitutes not consisting of an ODS is removed by correcting these definitions. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government Agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule supplements the statutory self-effectuating prohibition against venting refrigerants by ensuring that certain service practices are conducted that reduce emissions and establish equipment and reclamation certification requirements. These standards are amendments to the recycling standards under section 608 of the Clean Air Act. Many of these standards involve reporting requirements and are not expected to be a high cost issue. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

For the reasons outlined above, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255 (August 10, 1999)), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The regulations promulgated under today's action are done so under Title VI of the Act which does not grant delegation rights to the States. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249 (November 9, 2000)), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This proposed rule does not have tribal implications, as specified

in Executive Order 13175. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045: Protection of Children from Environmental Health & Safety Risks (62 FR 19885 (April 23, 1997)) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to the Executive Order because it does not concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. This rule amends the recycling standards for refrigerants to protect the stratosphere from ozone depletion, which in turn protects human health and the environment from increased amounts of UV radiation.

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve voluntary consensus standards.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Exports, Imports, Reporting and recordkeeping requirements.

Dated: April 7, 2005.

Stephen L. Johnson,

Acting Administrator.

[FR Doc. 05–7406 Filed 4–12–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 67

[USCG–2003–14472]

RIN 1625–AA63

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 221

[Docket No. MARAD–2003–15171]

RIN 2133–AB51

Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade; Second Rulemaking

AGENCIES: Coast Guard, DHS, and Maritime Administration, DOT.

ACTION: Joint notice of proposed rulemaking; withdrawal.

SUMMARY: The Coast Guard and the Maritime Administration (MARAD) are withdrawing their joint notice of proposed rulemaking on documentation, under the lease-financing provisions, of vessels engaged in the coastwise trade. The joint notice of proposed rulemaking was superseded by legislation. A new notice of proposed rulemaking addressing the provisions of the new legislation will be published in the future.

DATES: The joint notice of proposed rulemaking is withdrawn on April 13, 2005.

FOR FURTHER INFORMATION CONTACT: Patricia Williams, Deputy Director, National Vessel Documentation Center, Coast Guard, telephone 304–271–2506 or John T. Marquez, Jr., Maritime Administration, telephone 202–366–5320.

SUPPLEMENTARY INFORMATION:

Background

On February 4, 2004, the Coast Guard and the Maritime Administration (MARAD) published a joint notice of proposed rulemaking entitled "Vessel Documentation: Lease Financing for Vessels Engaged in the Coastwise Trade; Second Rulemaking" in the **Federal Register** (69 FR 5403). The rulemaking concerned the documentation of vessels under the lease-financing provisions of 46 U.S.C. 12106(e) and asked the following questions:

1. To what extent and how should the Coast Guard prohibit or restrict the chartering back (whether by time charter, voyage charter, space charter, contract of affreightment, or other contract for the use of a vessel) of a lease-financed vessel to the owner, the parent, or to a subsidiary or affiliate of the parent? (Coast Guard.)

2. To ensure that control of a lease-financed vessel engaged in the coastwise trade is not returned to the owner or a member of its group, should the Maritime Administrator's approval be required before an interest in or control of a U.S. documented vessel is transferred to a non-U.S. citizen? (Maritime Administration.)

3. What limitations, if any, should the Coast Guard impose on the grandfather rights of lease-financed vessels with a coastwise endorsement issued before February 4, 2004? (Coast Guard.)

4. Should the Coast Guard require that an application for coastwise endorsement under the lease-financing regulations be audited by a third party to further ensure that the transaction in fact qualifies under the lease-financing laws and regulations? (Coast Guard.)

Discussion of Comments on the Joint Notice of Proposed Rulemaking

The comments received on the questions above clearly indicated that the lease-financing statute was subject to significantly differing interpretations and needed clarification. Congress also arrived at this conclusion and passed new legislation, signed into law on August 9, 2004, (discussed below) to clarify the lease-financing statute. However, because this legislation did not address the issue of third-party audits (question number 4 above) and because the notice of proposed rulemaking did not contain proposed regulatory text on that issue, comments to that question will be considered under the future Coast Guard rulemaking discussed below.

New Legislation

On August 9, 2004, the President signed the Coast Guard and Maritime Transportation Act of 2004 (Pub. L. 108–293) (the Act), which addressed most of the questions listed above and negated the need for this rulemaking as follows:

On the question of charters back to the owner (questions 1 and 2 above), section 608(a) of the new Act added new paragraph (f) to 46 U.S.C. 12106 to clarify Congress's position on the issue by requiring that the owner of a lease-financed vessel certify annually that it (or, if the vessel is owned by a trust or similar arrangement, the beneficiary of the trust or similar arrangement) is independent from, and not an affiliate of, any charterer of the vessel or any person who has the right, directly or indirectly, to control or direct the movement or use of the vessel.

On the question of limitations to grandfather rights (question number 3 above), section 608(c) of the Act required that the amendments made by section 608 and any regulations published after February 4, 2004, with respect to coastwise endorsements do not apply to a certificate of documentation, or renewal of one, endorsed with a coastwise endorsement for a vessel under 46 U.S.C. 12106(e) or a replacement vessel of a similar size and function, that was issued before August 9, 2004, as long as the vessel is owned by the person named in the certificate, or by a subsidiary or affiliate of that person, and as long as the controlling interest in the owner has not been transferred to a person that was not an affiliate of the owner as of August 9, 2004. A similar grandfather provision in section 608(c) of the Act was applied to offshore supply vessels, except that it was limited only to 3 years after enactment of the Act or until August 9, 2007.

On the question of third-party auditing of applications for coastwise endorsements (question number 4 above), the Act did not address the issue and it is being carried forward to the future rulemaking discussed below.

Future Rulemaking

The new Act requires that the Coast Guard publish final regulations by August 8, 2005, to carry out section 608 of the Act, including amendments made by the Act to 46 U.S.C. 12106. Therefore, the Coast Guard will publish in the **Federal Register** a new notice of proposed rulemaking with opportunity for public comment to address these changes. In addition, the Coast Guard will again consider the issue of third-party audits in the new notice and will address, in that notice, all comments on the subject submitted since the February 4, 2004, notice.

Withdrawal

For the reasons stated above, the Coast Guard and MARAD are withdrawing the joint notice of proposed rulemaking published on February 4, 2004 (69 FR 5403).

Authority: The Coast Guard's portion of this rulemaking is taken under authority of 46 U.S.C. 2103 and 12106 and Department of Homeland Security Delegation No. 0170.1. The Maritime Administration's portion of this rulemaking is taken under authority of 46 App. U.S.C. 802, 803, 808, 835, 839, 1114(b), 1195, 46 U.S.C. chs.301 and 313; 49 U.S.C. 336; 49 CFR 1.66.

Dated: November 2, 2004.

Thomas H. Collins,

Admiral, Coast Guard Commandant.

Dated: March 29, 2005.

By Order of the Maritime Administrator.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 05–7436 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket Nos. 03–103, 05–42; FCC 04–287]

Air-Ground Telecommunications Services

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission requests comment on competitive bidding procedures for commercial and general aviation Air-Ground Radiotelephone Service licenses. In a related document, the Commission has revised the rules and band plan governing the commercial Air-Ground Radiotelephone Service. If mutually exclusive applications are filed for the new commercial Air-Ground Radiotelephone Service licenses that are made available, the Commission will resolve such applications by competitive bidding. The Commission also will resolve by competitive bidding pending mutually exclusive applications for general aviation Air-Ground Radiotelephone Service licenses. To date, the Commission has accepted for filing nine groups of mutually exclusive general aviation applications, which are currently pending. An auction will be scheduled to resolve these applications. The auction will be limited to the parties in each of the nine groups of applicants that have filed mutually exclusive applications, which constitute closed filing groups.

DATES: Submit comments on or before May 3, 2005, and submit reply comments on or before May 13, 2005. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lynne Milne, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, at 202–418–7055. or via e-mail at *Lynne.Milne@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the *Notice of Proposed Rulemaking* (*NPRM*) portion of the Commission's *Report and Order and Notice of Proposed Rulemaking*, FCC 04–287, in WT Docket Nos. 03–103 and 05–42, adopted December 15, 2004, and released February 22, 2005. The Commission is concurrently publishing a summary of the *Report and Order* in the **Federal Register**. The full text of the document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor: Best Copy & Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 800–378–3160, facsimile 202–488–5563, or via e-mail at *fcc@bcpiweb.com*. The full text may also be downloaded at: *http://www.fcc.gov*. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov*.

Synopsis of the Notice of Proposed Rulemaking

A. Incorporation by Reference of the Part 1 Standardized Auction Rules

1. In this *NPRM*, we propose to conduct auctions of both commercial and general aviation Air-Ground Radiotelephone Service licenses in conformity with the general competitive bidding rules set forth in part 1, subpart Q, of the Commission's Rules, and substantially consistent with the bidding procedures that have been employed in previous Commission auctions.

2. Specifically, we propose to employ the part 1 rules governing, among other

things, designated entities, application and payment procedures, collusion issues, and unjust enrichment. Under this proposal, such rules would be subject to any modifications that the Commission may adopt in its part 1 Competitive Bidding proceeding. In addition, consistent with current practice, matters such as the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau ("WTB") pursuant to its delegated authority. We seek comment on this proposal. In particular, we request comment on whether any of our part 1 competitive bidding rules would be inappropriate, or should be modified, for auctions of either commercial or general aviation air-ground licenses.

3. With respect to the commercial air-ground licenses we are making available, we are providing applicants with the opportunity to bid on licenses constituting different band configurations. Accordingly, the determination of whether individual commercial air-ground license applications are mutually exclusive for purposes of section 309(j) will be based on whether different applicants have applied for licenses in different band plan license configurations as well as on whether different applicants have applied for the same licenses. In other words, because only one band configuration will be implemented, applicants that apply for licenses in different configurations will be considered to have filed mutually exclusive applications. We tentatively conclude, however, that this and any other differences from our past auctions do not necessitate any changes to our part 1 competitive bidding rules, and that WTB can address such differences through its standard practice of seeking comment on and adopting procedures for specific auctions. We seek comment on this tentative conclusion.

B. Provisions for Designated Entities

4. In authorizing the Commission to use competitive bidding via section 309(j), Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." In addition, section 309(j)(3)(B) of the Communications Act requires that in establishing eligibility criteria and bidding methodologies, the Commission promote "economic opportunity and competition * * * by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." One of the principal means by which the Commission furthers these statutory goals is the award of bidding credits to small businesses. The Commission defines eligibility requirements for small business bidding credits on a service-specific basis, taking into account the capital requirements and other characteristics of the particular service.

5. We tentatively conclude that small business bidding credits are appropriate for commercial Air-Ground Radiotelephone Service licenses. We base this conclusion on the fact that no commercial air-ground license will authorize the use of as much spectrum as other nationwide services for which the Commission has declined to adopt small business bidding credits. In addition, we believe that the operation of a commercial air-ground service may require lower capital expenditures than other nationwide services, such as satellite services, because the necessary infrastructure may be less costly. Thus, we tentatively conclude that small businesses may be able to attract the necessary capital to provide commercial air-ground service, particularly if they are assisted by bidding credits. We seek comment on these tentative conclusions.

6. Having tentatively concluded that small businesses may be able to provide commercial air-ground service, we nonetheless recognize that such operations may be very capital-intensive relative to other services provided to smaller geographic areas. We therefore propose to use the same small business definitions we have adopted for other capital-intensive services that serve large geographic areas. Specifically, we propose to define a small business as an entity with average annual gross revenues for the three preceding years not exceeding $40 million, and to define a very small business as an entity with average annual gross revenues for the three preceding years not exceeding $15 million. We also propose a 15 percent bidding credit for small businesses and a 25 percent bidding credit for very small businesses, as set forth in our standardized schedule at 47 CFR 1.2110(f)(2).

7. We request comment on these proposals. In particular, we invite commenters to discuss the expected capital requirements and other characteristics of the commercial air-ground operations that may be provided using the licenses made available by the *Report and Order*, and the relationship of such requirements and characteristics to small business definitions and bidding credits. We invite commenters to provide comparisons with other services for which the Commission has established bidding credits. To the extent commenters support a different bidding credit regime than the one proposed here, they should support their proposals with relevant information. Such comments should provide information on, for example, the technology that a commercial air-ground licensee is likely to employ, the cost of deployment, and other factors that may affect capital requirements for commercial air-ground operations.

8. We also seek comment on whether our proposed designated entity provisions, if applied to the commercial Air-Ground Radiotelephone Service, would promote participation by businesses owned by minorities and by women, as well as participation by rural telephone companies. To the extent that commenters propose additional provisions to enhance participation by minority-owned or women-owned businesses, commenters should address how we should craft such provisions to meet the relevant standards of judicial review.

9. In contrast to the commercial air-ground licenses made available by the *Report and Order*, general aviation air-ground licenses are specialized licenses that are generally valued by relatively small businesses. For this reason, we expect that small businesses interested in acquiring these licenses are unlikely to have difficulty obtaining the capital needed to participate in an auction. We seek comment on whether small business bidding credits would be appropriate for the general aviation Air-Ground Radiotelephone Service.

Procedural Matters

A. Initial Regulatory Flexibility Analysis

10. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (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 requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before May 3, 2005. Reply comments must be filed on or before May 13, 2005. The Commission will send a copy of this *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

1. Need for, and Objectives of, the Proposed Rules

11. The *Report and Order* addresses revisions to the rules and spectrum band plan for the 800 MHz commercial Air-Ground Radiotelephone Service spectrum. The *Report and Order* makes available new nationwide air-ground licenses in three band configurations: (1) Band plan 1, comprised of two overlapping, shared, cross-polarized 3 MHz licenses (licenses A and B, respectively), (2) band plan 2, comprised of an exclusive 3 MHz license and an exclusive 1 MHz license (licenses C and D, respectively), and (3) band plan 3, comprised of an exclusive 1 MHz license and an exclusive 3 MHz license (licenses E and F, respectively), with the blocks at opposite ends of the band from the second configuration. Licenses will have a ten-year term. Licenses will be awarded to winning bidders for the licenses comprising the configuration that receives the highest aggregate gross bid, subject to long-form license application review.

12. If mutually exclusive applications are filed for the commercial air-ground licenses that comprise the three band configurations defined in the *Report and Order*, the Commission will be required to resolve such applications by competitive bidding pursuant to the requirements of section 309(j) of the Communications Act. Similarly, the Commission is required to resolve by competitive bidding mutually exclusive general aviation air-ground applications. To date, the Commission has accepted for filing nine groups of mutually exclusive general aviation applications, which are currently pending. Therefore, WTB will, pursuant to its delegated authority, schedule an auction to resolve these applications.

13. In the *NPRM*, we request comment on a number of issues relating to competitive bidding procedures for both commercial air-ground and general aviation licenses. We propose to conduct auctions of both commercial and general aviation air-ground licenses in conformity with the general competitive bidding rules set forth in part 1, subpart Q, of the Commission's Rules, and substantially consistent with the bidding procedures that have been employed in previous Commission auctions. Specifically, we propose to employ the part 1 rules governing, among other things, designated entities, application and payment procedures, collusion issues, and unjust enrichment. Under this proposal, such rules would be subject to any modifications that the Commission may adopt in its part 1 Competitive Bidding proceeding. In addition, consistent with current practice, matters such as the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by WTB pursuant to its delegated authority. We seek comment on this proposal as well as on whether any of our Part 1 competitive bidding rules would be inappropriate, or should be modified, for auctions of either commercial or general aviation air-ground licenses.

14. With respect to the commercial air-ground licenses we are making available, we are providing applicants with the opportunity to bid on licenses constituting different band configurations. Accordingly, the determination of whether individual commercial air-ground license applications are mutually exclusive for purposes of section 309(j) will be based on whether different applicants have applied for licenses in different band plan license configurations as well as on whether different applicants have applied for the same licenses. In other words, because only one band configuration will be implemented, applicants that apply for licenses in different configurations will be considered to have filed mutually exclusive applications. We tentatively conclude, however, that this and any other differences from our past auctions do not necessitate any changes to our part 1 competitive bidding rules, and that WTB can address such differences through its standard practice of seeking comment on and adopting procedures for specific auctions. We seek comment on this tentative conclusion.

15. We tentatively conclude that small business bidding credits are appropriate for the commercial air-ground service. We base this conclusion on the fact that no commercial air-ground license will authorize the use of as much spectrum as other nationwide services for which the Commission has declined to adopt small business bidding credits. In addition, we believe that the operation of a commercial air-ground service may require lower capital expenditures than other nationwide services, such as satellite services, because the necessary infrastructure may be less costly. Thus, we tentatively conclude that small businesses may be able to attract the necessary capital to provide commercial air-ground service, particularly if they are assisted by bidding credits. We seek comment on these tentative conclusions.

16. Having tentatively concluded that small businesses may be able to provide commercial air-ground service, we nonetheless recognize that such operations may be very capital-intensive relative to other services provided to smaller geographic areas. We therefore propose to use the same small business definitions we have adopted for other capital-intensive services that serve large geographic areas. Specifically, we propose to define a small business as an entity with average annual gross revenues for the three preceding years not exceeding $40 million, and to define a very small business as an entity with average annual gross revenues for the three preceding years not exceeding $15 million. (We are coordinating these size standards with the U.S. Small Business Administration.) We also propose a 15 percent bidding credit for small businesses and a 25 percent bidding credit for very small businesses, as set forth in our standardized schedule at 47 CFR 1.2110(f)(2).

17. We request comment on these proposals. In particular, we invite commenters to discuss the expected capital requirements and other characteristics of the commercial air-ground operations that may be provided using the licenses made available by the *Report and Order*, and the relationship of such requirements and characteristics to small business definitions and bidding credits. We invite commenters to provide comparisons with other services for which the Commission has established bidding credits. To the extent commenters support a different bidding credit regime than the one proposed here, they should support their proposals with relevant information. Such comments should provide information on, for example, the technology that a commercial air-ground licensee is likely to employ, the cost of deployment, and other factors that may affect capital requirements for commercial air-ground operations.

18. We also seek comment on whether our proposed designated entity provisions, if applied to the commercial air-ground service, would promote participation by businesses owned by minorities and by women, as well as participation by rural telephone companies. To the extent that commenters propose additional provisions to enhance participation by minority-owned or women-owned businesses, commenters should address how we should craft such provisions to meet the relevant standards of judicial review.

19. In contrast to the commercial air-ground licenses made available by the *Report and Order*, general aviation air-ground licenses are specialized licenses that are generally valued by relatively small businesses. For this reason, we expect that small businesses interested in acquiring these licenses are unlikely

to have difficulty obtaining the capital needed to participate in an auction. We seek comment on whether small business bidding credits would be appropriate for the general aviation air-ground service.

2. Legal Basis

20. The proposed action is authorized under §§ 1, 4(i), 11, 303(r) and (y), 308, 309, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 161, 303(r), 303(y), 308, 309, and 332.

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

21. 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).

22. *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. According to the most recent Trends in Telephone Service data, 719 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data. We have estimated that 294 of these are small, under the SBA small business size standard.

23. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service. Again, we note that SBA has a 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. *See also* paragraph 19, *supra*, which describes two proposed small business size standards for the commercial Air-Ground Radiotelephone Service.

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

24. This *NPRM* does not propose any new reporting, recordkeeping, or other compliance requirements but merely proposes to extend the Commission's existing part 1 competitive bidding and application requirements to the commercial and general aviation Air-Ground Radiotelephone Service.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

25. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: "(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 or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) and exemption from coverage of the rule, or any part thereof, for small entities."

26. Specifically to assist small businesses, the *NPRM* proposes to establish the same small business size standards and associated small business bidding credits for the commercial Air-Ground Radiotelephone Service as the Commission has adopted for a number of other wireless services, and also asks whether small business bidding credits would be appropriate for the general aviation Air-Ground Radiotelephone Service. The Commission will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. We invite comment on any additional significant alternatives parties believe should be considered and on how the approach outlined in the *NPRM* will impact small entities, including small non-profits and small governmental entities.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

27. None.

Initial Paperwork Reduction Act of 1995 Analysis

28. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

29. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before May 3, 2005, and reply comments on or before May 13, 2005. Comments and reply comments should be filed in both WT Docket Nos. 03–103 and 05–42. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

30. Comments may be filed either by filing electronically, such as by using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies. Parties are strongly urged to file their comments using ECFS. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Only one copy of an electronic submission must be filed. In completing the transmittal screen, the electronic filer should include its full name, Postal Service mailing address, and the applicable docket or rulemaking number, WT Docket Nos. 03–103 and 05–42. Parties also may submit comments electronically by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and

should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

31. Parties who choose to file by paper may submit such filings by hand or messenger delivery, by U.S. Postal Service mail (First Class, Priority, or Express Mail), or by commercial overnight courier. Parties must file an original and four copies of each filing in WT Docket Nos. 03–103 and 05–42. Parties that want each Commissioner to receive a personal copy of their comments must file an original plus nine copies. If paper filings are hand-delivered or messenger-delivered for the Commission's Secretary, they must be delivered to the Commission's contractor at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002–4913. To receive an official "Office of the Secretary" date stamp, documents must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission. (The filing hours at this facility are 8 a.m. to 7 p.m.) If paper filings are submitted by mail though the U.S. Postal Service (First Class mail, Priority Mail, and Express Mail), they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. If paper filings are submitted by commercial overnight courier (*i.e.*, by overnight delivery other than through the U.S. Postal Service), such as by Federal Express or United Parcel Service, they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. (The filing hours at this facility are 8 a.m. to 5:30 p.m.)

32. Parties may also file with the Commission some form of electronic media submission (*e.g.*, diskettes, CDs, tapes, etc.) as part of their filings. In order to avoid possible adverse affects on such media submissions (potentially caused by irradiation techniques used to ensure that mail is not contaminated), the Commission advises that they should not be sent through the U.S. Postal Service. Hand-delivered or messenger-delivered electronic media submissions should be delivered to the Commission's contractor at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002–4913. Electronic media sent by commercial overnight courier should be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743.

33. Regardless of whether parties choose to file electronically or by paper, they should also send one copy of any documents filed, either by paper or by e-mail, to each of the following: (1) Best Copy & Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, facsimile (202) 488–5563, or e-mail at *www.fcc@bcpiweb.com*; and (2) Richard Arsenault, Mobility Division, Wireless Telecommunications Bureau, 445 12th Street, SW., Washington, DC 20554, or e-mail at *Richard.Arsenault@fcc.gov*.

34. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. These documents also will be available electronically at the Commission's Disabilities Issues Task Force Web site, *http://www.fcc.gov/dtf*, and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy & Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160, facsimile (202) 488–5563, or via e-mail at *www.fcc@bcpiweb.com*. This document is also available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418–7426, TTY (202) 418–7365, *Brian.Millin@fcc.gov*, or send an e-mail to *access@fcc.gov*.

C. Ex Parte Rules Regarding the NPRM—Permit-But-Disclose Comment Proceeding

35. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed in accordance with Commission rules. *See generally* 47 CFR 1.1202, 1.1203, and 1.1206.

Ordering Clauses

36. Pursuant to the authority contained in sections 1, 4(i), 11, and 303(r) and (y), 308, 309, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 161, 303(r), (y), 308, 309, and 332, this Notice of Proposed Rulemaking is hereby *adopted*, and parts 1 and 22 of the Commission's rules are amended accordingly.

37. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

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

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–6950 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 69

[WC Docket No. 05–25; RM–10593; FCC 05–18]

Special Access Rates for Price Cap Local Exchange Carriers

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Commission initiates a rulemaking proceeding to determine the regulatory framework to apply to price cap local exchange carriers (LECs) interstate special access services after June 30, 2005, including whether to maintain, modify, or repeal the pricing flexibility rules. Bell Operating Company (BOC) interstate special access services have assumed increasing significance as a key input for business customers, commercial mobile radio service (CMRS) providers, interexchange carriers (IXCs), and competitive LECs, and BOC revenues from these services have increased significantly since price cap regulation began.

DATES: Comments are due on or before June 13, 2005 and reply comments are due on or before July 12, 2005.

ADDRESSES: All filings must be sent to the Commission's Secretary, Marlene H. Dortch, 445 12th Street, SW., TW–B204, Washington, D.C. 20554. Parties should also send a copy of their paper filings to Margaret Dailey, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5–A232, 445 12th Street, SW., Washington, DC 20554. Parties shall also serve one copy with the Commission's copy contractor, Best

Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Margaret Dailey, Wireline Competition Bureau, Pricing Policy Division (202) 418–1520, *margaret.dailey@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM) in WC Docket No. 05–25, RM–10593, FCC 05–18, adopted on January 19, 2005, and released on January 31, 2005. The full text of this document is available on the Commission's Internet site at *http://www.fcc.gov* and for public inspection Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m. in the FCC's Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365. The full text of the NPRM may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563, e-mail at *fcc@bcpiweb.com*, or via its Web-site at *http://www.bcpiweb.com*.

Initial Paperwork Reduction Act of 1995 Analysis

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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. 44 U.S.C. 3506(c)(4).

Introduction

This NPRM, adopted January 19, 2005 and released January 31, 2005 in WC Docket No. 05–25, RM–10593, FCC 05–18, initiates a proceeding to determine the regulatory framework to apply to incumbent price cap LECs interstate special access services after June 30, 2005, including whether to maintain, modify, or repeal the pricing flexibility rules.

Background

Price cap LECs charge IXCs, competitive LECs, CMRS providers, and end users for access services in accordance with parts 61 and 69 of the Commission's rules, 47 CFR parts 61 and 69. There are two types of access service: (1) Special access, which does not use local switches, instead employing dedicated facilities that run directly between end users and IXCs or between two end users; and (2) switched access, which uses local switches. Charges for special access are divided into channel termination charges and channel mileage charges. The special access rates for incumbent price cap LECs currently are subject to two pricing regimes—price caps and pricing flexibility.

Price Cap Regulation

Prior to 1991 the Commission determined the appropriate charges for access service through rate-of-return regulation, pursuant to which LECs were limited to recovering their costs plus a prescribed return on investment. In 1991, in the LEC Price Cap Order, 55 FR 42375, Oct. 19, 1990, the Commission implemented price cap regulation, which, in contrast to rate-of-return regulation, limits the profits a LEC may earn by focusing on the prices that a LEC may charge and the revenues it may generate from interstate access services. Price cap carriers whose interstate access charges are set by price cap rules are permitted to earn returns significantly higher, or potentially lower, than the prescribed rate of return that incumbent LECs are allowed to earn under rate-of-return rules. Price cap regulation encourages incumbent LECs to improve their efficiency by harnessing profit-making incentives to reduce costs, invest efficiently in new plant and facilities and develop and deploy innovative services, while setting price ceilings at reasonable levels. Price cap regulations also give incumbent LECs greater flexibility in determining the amount of revenues that may be recovered from a given access service. The price cap rules group services together into different baskets, service categories, and service subcategories, and then identify the total permitted revenues for each basket or category of services. Within these baskets or categories, incumbent LECs are given some discretion to determine the portion of revenue that may be recovered from specific services, and thus to alter the rate levels associated with a given service. In the short run, the behavior of individual companies has no effect on the prices they are permitted to charge, and they are able to keep any additional profits resulting from reduced costs. This creates an incentive to cut costs and to produce efficiently. In this way, price caps act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary.

With passage of the Telecommunications Act of 1996, Pub. Law 104–104, 110 Stat. 56, the Commission began reforming access charges, stating in the Access Charge Reform Order, 62 FR 31939, June 11, 1997, that it would rely on competition as the primary method for bringing about cost-based access charges and anticipating that it would lessen, and eventually eliminate, rate regulation as competition developed. To assist in this effort, the Commission said it would require price cap LECs to start forward-looking cost studies no later than February 8, 2001, for all services then remaining under price caps.

Subsequently, in 2000, in the CALLS Order, 65 FR 38684, June 21, 2000, the Commission adopted the industry-proposed CALLS plan, which represents a five-year interim regime designed to phase out implicit subsidies in access charges and move towards a more market-based approach to rate setting. In adopting the CALLS plan, the Commission offered price cap LECs the choice of completing the forward-looking cost studies required by the Access Charge Reform Order or voluntarily making the rate reductions required under the five-year CALLS plan. All price cap carriers opted for the CALLS plan.

The CALLS plan separated special access services into their own basket and applied a separate X-factor to the special access basket. The X-factor under the CALLS plan, unlike under prior price cap regimes, is not a productivity factor, but represents a transitional mechanism to lower special access rates for a specified period of time. The special access X-factor was 3.0 percent in 2000 and 6.5 percent in 2001, 2002, and 2003. In addition to the X-factor, access charges under the CALLS plan are adjusted for inflation as measured by the Gross Domestic Product-Price Index (GDP–PI). For the final year of the CALLS plan (July 1, 2004—June 30, 2005), the special access X-factor is set equal to inflation, thereby freezing rate levels. Thus, absent the implementation of a new price cap regime when the CALLS plan expires, price cap LECs' special access rates will remain frozen at 2003 levels unless the Commission makes regulatory changes requiring adjustments in PCIs. In adopting the CALLS plan, the Commission hoped that, by the end of the five-year interim period, competition would exist to such a degree that deregulation of access charges for price cap LECs would be the next logical step.

Pricing Flexibility

In addition to general access charge reform, the Commission began exploring whether and how to remove price cap LECs' access services from regulation once they became subject to substantial competition. In 1999, it adopted the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, which established triggers to measure the extent to which competitors had made irreversible, sunk investment in collocation and transport facilities. A price cap LEC that satisfies these triggers may obtain pricing flexibility to offer special access services at unregulated rates through generally available and individually negotiated tariffs (*i.e.*, contract tariffs). A price cap LEC may obtain pricing flexibility in two phases, each on a Metropolitan Statistical Area (MSA) basis. Under Phase I, a price cap LEC may offer volume and term discounts and contract tariffs for interstate special access services unconstrained by the Commission's part 61 and part 69 rules. The price cap LEC, however, must continue to offer its generally available, price cap constrained (*i.e.*, subject to parts 61 and 69) tariff rates for these services. Under Phase II, a price cap LEC may file individualized special access contract tariffs, subject only to continuing to make available generalized special access tariff offerings. Neither the contract tariffs nor the general offerings are constrained by parts 61 or 69.

AT&T's Petition for Rulemaking

On October 15, 2002, AT&T filed a Petition for Rulemaking requesting that the Commission revoke the pricing flexibility rules and revisit the CALLS plan as it pertains to the rates that price cap LECs, and the BOCs in particular, charge for special access services. AT&T claims that the Pricing Flexibility Order's triggers fail to predict price-constraining competitive entry and such entry has not occurred. It further contends that, based on ARMIS date, the BOCs' interstate special access revenues more than tripled between 1996 and 2001, and that their returns on special access services were between 21 and 49 percent in 2001, but that for every MSA for which pricing flexibility was granted, BOC special access rates either remained flat or increased. Thus, AT&T claims that BOC special access rates are unjust and unreasonable in violation of section 201 of the Communications Act, 47 U.S.C. 201, and the Commission must initiate a rulemaking to revisit its pricing flexibility rules. During the pendency of this rulemaking, AT&T requests that the Commission grant interim relief by: (1) Reducing the rates for all special access services subject to Phase II pricing flexibility to the rates that would generate an 11.25 percent rate of return, and (2) imposing a moratorium on granting the BOCs further pricing flexibility.

Price cap LECs generally oppose the AT&T Petition for Rulemaking. They claim that their special access rates are reasonable and lawful, that there is robust competition in the market for special access services, that the collocation-based triggers of the Pricing Flexibility Order accurately measure competition, and that the data relied upon by AT&T are unreliable. The BOCs also contend that their special access revenues per line declined between 1996 and 2001.

Notice of Proposed Rulemaking

The Commission commences this rulemaking to seek comment on the interstate special access regime that it should put in place post-CALLS. We also seek comment on whether, as part of a special access regulatory regime, we should maintain, modify, or repeal the Commission's pricing flexibility rules. Thus we grant AT&T's petition inasmuch as we initiate a rulemaking proceeding.

As a separate issue we seek comment on what interim relief, if any, is necessary to ensure that special access rates remain reasonable while we consider what regulatory regime will follow the CALLS plan. Given the complexities discussed in the following NPRM, there is a strong likelihood that we will not complete the rulemaking proceeding before expiration of the CALLS plan on June 30, 2005. The record here contains substantial evidence suggesting that productivity in the provision of special access services has increased and continues to increase. Currently, however, the CALLS plan contains no productivity factor to require price cap LECs to share any of their productivity gains with end users. 47 CFR 61.45(b)(1)(iv). Accordingly, we anticipate adopting an order prior to June 30, 2005, that will establish an interim plan to ensure special access price cap rates remain just and reasonable while the Commission considers the record in the rulemaking proceeding. One interim option would be to impose the last productivity factor adopted by the Commission and upheld upon judicial review, 5.3 percent. We seek comment on this option and other reasonable interim alternatives. The Commission requests that any party that comments on the appropriate post-CALLS special access regulatory regime and/or proposes that the Commission alter in any way the existing pricing flexibility rules include in its comments specific language that would codify its proposed special access regulatory regime and/or its proposed pricing flexibility rule change(s).

Price Cap LEC Interstate Special Access Rates Post CALLS

First, we must determine the type of rate regulation, if any, that should apply. We tentatively conclude that we should continue to regulate special access rates under a price cap regime and that the price cap regime should continue to include pricing flexibility rules that apply where competitive market forces constrain special access rates. Such a regime, we tentatively conclude, would result in just and reasonable rates as required by section 201 of the Communications Act, 47 U.S.C. 201. We seek comment on these tentative conclusions. We also seek comment on how to resolve the major issues involved in implementing a price cap regime for special access services, as outlined below.

Changes in the Special Access Market

Automated Reporting Management Information System (ARMIS) data show that, in the 2001–2003 period, BOC special access operating revenues, operating expenses, accounting rates of return, and the number of special access lines increased annually (*i.e.*, compound annual growth rates over the period) by approximately 12; 7, 17, and 18 percent, respectively. BOC special access average investment decreased at a compounded annual rate of less than one percent over the same period. The overall (*i.e.*, not compounded annually) BOC interstate special access accounting rates of return were approximately 38, 40, and 44 percent in 2001, 2002, and 2003, respectively. In the period 1992–2000, a period that precedes the CALLS plan and significant pricing flexibility, BOC interstate special access operating revenues, operating expenses, average investment, accounting rates of return, and special access lines increased at a compounded annual rate of approximately 16, 12, 11, 11, and 32 percent, respectively. The overall (non-compounded) BOC special access accounting rates of return varied over this period from a low of approximately 7 percent in 1995 to a high of approximately 28 percent in 2000.

These accounting data suggest that the BOCs have realized special access scale economies throughout the entire period of price cap regulation, including before and after the Commission adopted pricing flexibility and the CALLS plan. Special access line demand increased at

a significantly higher rate than operating expenses and investment throughout both periods, suggesting that the BOCs realized scale economies in both periods. Although, some parties contend that the accounting rates of return derived from ARMIS data are meaningless, we use ARMIS data here for the limited purpose of examining the relationship between demand growth and growth in expenses and investment. To the extent the accounting rules have remained the same over the period analyzed, the analysis of growth rates and scale economies should not be significantly affected by the cost allocation issues these parties raise. We invite parties to comment on the relevance of these data and the relationship between demand growth and growth in expenses and investment in the special access market. To demonstrate the possible impact of cost allocations during the price cap period of regulation, including before and after the Commission adopted pricing flexibility and the CALLS plan, we invite parties: (1) To remove from the BOCs' interstate special access operating expenses and average investment data reported in ARMIS any expenses and investments that are not directly assignable; and (2) to calculate the compound annual growth rates for BOC interstate special access operating expenses and average investment using these adjusted data.

Developing a Special Access Price Cap Regime

The PCI, the core component of price cap regulation, has three basic components: (1) A measure of inflation, *i.e.*, the Gross Domestic Product (chain weighted) Price Index (GDP–PI); (2) a productivity factor or "X-Factor," that represents the amount by which price cap LECs can be expected to outperform economy-wide productivity gains; and (3) adjustments to account for "exogenous" cost changes that are outside the LEC's control and not otherwise reflected in the PCI. While we seek comment on whether and, if so, how to develop a new special access price cap, we focus our inquiry below on productivity and growth issues and on developing service categories and subcategories. Parties may comment on whether we should include inflation and exogenous cost adjustments in a new special access price cap regime. We tentatively conclude, however, that, except as otherwise discussed herein, we should retain the same method of revising the PCI to reflect inflation and exogenous cost adjustments that presently apply to special access services.

Productivity Factor or X-Factor. The productivity or X-factor contained in the PCI has varied over the course of price cap regulation. Most recently, in the CALLS Order, 65 FR 38684, June 21, 2000, the Commission changed the X-factor from a productivity-based factor to a transitional mechanism to reduce special access rates for a specified period, setting the special access X-factor at 3.0 percent in 2000, 6.5 percent for the next three years, and equal to the GDP–PI thereafter, essentially freezing the special access PCI (after accounting for exogenous cost adjustments). In recent years, the BOCs have earned special access accounting rates of return substantially in excess of the prescribed 11.25 rate of return that applies to rate of return LECs. The BOCs' collective average special access accounting rates of return over the last six years (1998–2003) have been 18, 23, 28, 38, 40, and 44 percent, respectively. We seek comment on whether a rate of return in excess of the Commission's prescribed rate of return for rate-of-return LECs is a valid benchmark for determining the need for an X-factor, or an X-factor that is higher than the factor under the CALLS plan or the pre-CALLS price cap regime. If it is appropriate for us to examine an X-factor in light of these rates of return, we seek comment on whether we should re-impose a productivity-based X-factor as a method of reducing the special access PCI.

We ask parties to submit studies quantifying an appropriate X-factor for special access services. In the Phase I Accounting Streamlining Order, 65 FR 16328, March 28, 2000, the Commission sought to reduce incumbent LEC accounting and reporting requirements by, among other things, eliminating the requirement that LECs report the expense matrix data used in calculating the X-factor, but expected LECs to provide such data upon request. We now request that price cap LECs submit their expense matrix data from 1994 to 2004 (or 2003, if 2004 data are not yet available). These data should correspond exactly to the expense matrix data required in 1999 under part 32 of the Commission's rules, 47 CFR 32.5999(f).

Given that we propose to address special access services independent of switched access services, we seek comment on whether it is necessary to estimate and apply to special access services an X-factor that is unique to these services. Assuming that this is necessary, we seek comment on whether it is possible to calculate accurately such an X-factor. If it is only possible to measure productivity accurately for the entire firm, or for some broader category of services than special access services, we invite commenters to address the reasonableness of applying this broader X-factor to special access services alone. We seek comment on the consequences of using in the special access PCI a productivity factor that is based on a broad-based productivity study such as the total factor productivity growth rate (TFP) study prepared by Commission staff in support of the 6.5 percent X-factor adopted in the 1997 Price Cap Review Order, 62 FR 31939, June 11, 1997.

Growth Factor. In the LEC Price Cap Order, 55 FR 42375, Oct. 19, 1990, the Commission adopted a price cap formula for the common line basket that included a growth or "g" factor to account for price cap LEC average cost decreases attributable to demand growth. While the Commission has applied a uniform X-factor for a multi-year period to all price cap carriers and price cap services, the "g" factor, in contrast, varies by LEC, year, and service because it relies on each individual LEC's prior year's demand growth rate for a specific service element or basket. In the LEC Price Cap Order, because per-minute traffic growth was not directly indicative of per-line cost increases, the Commission developed "g" to represent per-minute growth per access line. The Commission found that including "g" would give all of the benefits of MOU demand growth to IXCs, while excluding "g" would give all of the benefits of MOU demand growth to LECs. The Commission therefore incorporated g/2 into the PCI formula because it found that both IXCs and LECs contribute to demand growth.

If we adopt new special access price cap regulation for price cap LECs, it may also be appropriate to include a factor in the special access PCI formula similar to the "g" factor currently in the common line formula. ARMIS data suggest that special access line demand growth does not produce a proportional increase in special access costs. In such a circumstance, use of a special access PCI formula that does not include a growth factor may produce unreasonable rates. We therefore invite parties to comment on whether a special access PCI formula should include a growth factor similar to the "g" factor in the common line PCI formula. We also seek comment on how to define a special access line growth factor. For example, should this factor be based on the change in DS–1 equivalent capacity, changes in DS–3 equivalent capacity, or some basis other than capacity equivalents? We seek comment on whether the demand growth benefits reflected in a "g" factor should be

shared between the LECs and the special access customers. Finally, parties advocating for a "g" factor should comment on how to avoid including demand growth-related efficiencies in both the "g" factor and the X-factor.

Sharing and Low End Adjustment. In establishing the initial price cap regime in 1990, in the LEC Price Cap Order, 55 FR 42375, Oct. 19, 1990, the Commission required price cap LECs to share with their customers 50 percent of their earnings above a rate of return of 12.25 or 13.25 percent, depending on whether an individual price cap LEC selected a productivity factor of 3.3 or 4.3 percent. Price cap LECs with rates of return above 16.25 or 17.25 percent had to share 100 percent of their excess earnings, depending on the productivity factor selected. The Commission also allowed price cap LECs with rates of return less than 10.25 percent to make a "low end adjustment," or to increase their PCIs in the following year to a level that would allow them to earn at least a 10.25 percent rate of return. The Commission adjusted the sharing and low end adjustment rules in the 1995 Price Cap Review Order, 60 FR 19526, April 19, 1995, and, in the 1997 Price Cap Review Order, 62 FR 31939, June 11, 1997, it eliminated the sharing requirements altogether, finding that sharing severely blunts the incentives of price cap regulation by reducing the rewards for LEC efficiency gains. The Commission also found that eliminating sharing requirements removed the last vestige of rate-of-return regulation that had created incentives to shift costs between services to evade sharing in the interstate jurisdiction. We tentatively conclude, for the same reasons that the Commission eliminated sharing, that we should not now require LECs to share earnings if we decide to adopt a price cap plan for special access services. We seek comment on this tentative conclusion.

In the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, the Commission eliminated the low end adjustment mechanism for price cap LECs that qualify for and elect to exercise either Phase I or Phase II pricing flexibility. The Commission retained the low-end adjustment for price cap LECs that have not qualified for and elected to exercise either Phase I or Phase II pricing flexibility to protect these LECs from events beyond their control that would affect earnings to an extraordinary degree. For the same reason, we tentatively conclude that, if we adopt a price cap plan for special access services, we should retain a low-end adjustment mechanism for price cap LECs that have not implemented pricing flexibility. We seek comment on this tentative conclusion. We further seek comment on the nature of a low-end adjustment for special access services only. We request that parties identify the relationship between the low-end adjustment level and any new authorized rate of return we develop in this proceeding. For example, should the low-end adjustment continue to be 100 basis points below the authorized rate of return?

Rate Structure—Interstate Special Access Baskets and Bands

Within the special access service price cap basket, services currently are grouped into service categories and subcategories. 47 CFR 61.42(e)(3). Similar services are grouped together into service categories within a single basket to act as a substantial bar on the LEC's ability to engage in anticompetitive behavior, including cost shifting. The Commission in the LEC Price Cap Order, 55 FR 42375, Oct. 19, 1990, established upper and lower pricing bands for each separate category or subcategory, initially setting pricing bans for most service categories at five percent above and below the Service Band Index (SBI). Subsequently, it eliminated the lower service band indices, finding that the PCI and upper pricing bands adequately control predatory pricing and that greater downward pricing flexibility would benefit consumers both directly through lower prices and indirectly by encouraging only efficient entry. The Commission seeks comment on what categories and subcategories we should establish in a special access service basket if we adopt a price cap method to regulate special access prices. Should the Commission retain without modification the existing special access categories and subcategories? If not, parties should identify the specific categories and subcategories of special access service that they contend we should adopt. We also ask parties to discuss the advantages and disadvantages of having a special access basket with relatively few categories or subcategories compared to one with many.

We seek comment on whether to place competitive services and non-competitive services in separate and distinct categories and/or subcategories. Arguably, this would minimize the opportunity for a LEC to offset rate decreases for services for which there are competitive alternatives with rate increases for services for which there are no competitive alternatives. AT&T alleges that such competitive imbalances occur for DS1 and DS3 channel termination services between the LEC end office and the customer premises, where often there is little or no competition. It also claims that competition might not be quite so limited for DS1 and DS3 channel terminations between the IXC POP and the LEC serving wire center, and DS1 and DS3 channel mileage facilities between the LEC end office and the LEC serving wire center. We seek comment on whether we should establish separate categories for DS1 and/or DS3 special access services and subcategories for (1) special access channel terminations between the LEC end office and the customer premises, (2) special access channel terminations between the IXC POP and the LEC serving wire center, or (3) any other special access product market. Should any special access services be combined into a single category or subcategory? We also seek comment on whether we should take the same approach with regard to high capacity services above the DS–3 level (*e.g.*, OCn), or whether these higher capacity services should be placed in a high capacity category without sub-categories for special access channel terminations to customer premises, special access channel terminations to the IXC POP, and other special access facilities.

Some price cap LECs assert that broadband service such as DSL services account for a significant and growing portion of their special access revenues. These services may be subject to competition from high-speed cable modem services or wireless broadband offerings. We seek comment on whether to establish a separate category or subcategory for broadband services that are subject to some competition or are likely to be subject to competition in the near future. We note that, in the LEC Price Cap Order, 55 FR 42375, Oct. 19, 1990, the Commission excluded packet-switched services from price cap regulation because they were not included in its study of LEC productivity. We seek comment on whether such services should be included in price caps today. If not, what is the proper regulatory treatment of these services?

We seek comment on whether to establish separate subcategories for wholesale services and retail services. Arguably, this approach would minimize the extent to which a price cap LEC could manipulate headroom by offsetting rate decreases that apply to services purchased by a wholesale customer (*e.g.*, a rate decrease for a DS3 channel termination service purchased by an IXC) with rate increases that apply

to services purchased by an end-user customer (*e.g.*, a rate increase for a retail DSL service purchased by a small business or residential customer.) We seek comment on whether this objective is desirable.

We also seek comment on what criteria and data we should examine to determine which services to place in which categories or subcategories. We ask parties to propose categories or subcategories, to explain in detail the bases for their proposed categories or subcategories, and to support their proposals with data and studies. Do competitive or non-competitive services placed in the same subcategory need to have similar demand or supply elasticities? Should we establish separate categories or subcategories based on special access line densities? For example, channel termination services extending between a LEC end office and customer premises in areas where there are more than 10,000 special access lines per square mile could be placed in a particular subcategory. We also seek comment on whether to use a single basket or multiple baskets and the advantages and disadvantages of each approach.

For the same reasons that the Commission eliminated the lower pricing bands, we tentatively conclude that there should be no lower band for service categories or subcategories to restrict the price cap LECs' downward pricing flexibility. We seek comment on this tentative conclusion. We seek comment on the upper band value to limit the price cap LECs' upward pricing flexibility for the categories or subcategories. Should we retain five percent as the value? Should we use different values for different categories or subcategories? What criteria and data should we use to determine these values?

Initial Special Access Price Cap Rates Post-CALLS

We must ensure that the initial rates under a new price cap plan will be just and reasonable. 47 U.S.C. 201(b). In this proceeding AT&T asserts that current special access rates are too high based on BOC special access rates of return, and that current rates for special access under price caps are lower than rates established after a grant of pricing flexibility. The BOCs respond that accounting rates of return are meaningless and the Commission expected that rates in some instances would increase when a carrier is granted pricing flexibility. They also present evidence purporting to show that overall special access revenues per line have decreased. As a preliminary matter, therefore, we solicit comment as to whether it is necessary for us to reinitialize rates to ensure that they are just and reasonable. To the extent we decide to reinitialize rates, we solicit comment as to several alternative approaches.

Rate-of-Return Benchmark. We seek comment on whether the 11.25 percent rate of return that the Commission prescribed for LECs in 1991 is a valid benchmark for determining that a price cap LECs' special access rates are just and reasonable. The costs of debt and equity financing that are supposed to be reflected in the rate of return likely have changed significantly since 1991. If parties believe that we should use rate of return as a benchmark for determining the reasonableness of price cap LEC special access rates, is there a rate of return other than 11.25 percent that we should use to make that determination? We invite parties to submit studies supporting an alternative rate of return.

The aim of price cap regulation is rates that approximate the rates a competitive firm would charge, and competitive firms make business decisions based on economic, not accounting, rates of return. Thus the BOCs contend that accounting rates of return do not represent a valid basis for evaluating price cap rates in general, and that our cost allocation rules and the current separations freeze may undermine the usefulness of an examination of rates of return derived from ARMIS data. Accordingly, we seek comment generally on whether accounting rates of return are meaningful statistics for evaluating the reasonableness of price cap rates. What factors may affect the relevance of ARMIS data to our examination of special access rates? Even if the overall accounting rate of return has evidentiary value, we also seek comment on whether an accounting rate of return for a subset of services, *i.e.*, the special access basket, is meaningful to this inquiry. The allocation of common costs to multiple services according to our accounting rules necessarily reflects policy judgments that may not reflect how price cap LECs would allocate common costs if they operated in fully competitive markets. Thus we seek comment on the need to evaluate the special access rate of return in the context of the price cap LECs' overall rates of return. We note that the Commission has never examined accounting rates of return for specific categories of services to determine whether a price cap LEC must share over-earnings or can make a low-end adjustment to compensate for underearnings, but instead has determined whether such adjustments should be made based on the price cap LEC's overall interstate access rate of return. We therefore seek comment on what measures or indicators we may use in addition to, or in lieu of, rate of return to determine whether current special access rates are just and reasonable. We invite parties to submit any such measures or indicators they deem appropriate.

The recent significant growth in BOC DSL subscribers and revenues creates a unique issue in using the accounting rate of return solely for the special access basket. Some BOCs may book the full amount for DSL revenues as special access revenues, while at the same time, the incremental cost booked to the special access category for DSL service may not be nearly as large as these DSL revenues. Generally, there are no incremental DSL-related loop-side structure costs (*e.g.*, for trenching, poles, manholes, or conduit) booked to the special access category. These otherwise account for a large majority of a typical price cap LEC's total network costs. We seek comment on the extent to which the accounting treatment of DSL revenues, expenses, and investment under the Commission's rules accounts for the BOCs' recent high special access rates of return. If DSL growth is a significant factor in the high accounting special access rates of return, rather than growth in traditional DS1 or DS3 services, for example, how should we interpret these rates of return?

We seek comment on the need for a comprehensive review of detailed cost studies to establish initial rate levels for each special access service. Alternatively, is there a simpler, less burdensome method of setting initial rate levels without having to rely on cost studies? To develop initial rates based on an 11.25 percent rate of return, we would: (1) Calculate, for the most recent calendar year, a price cap LEC's special access rate of return, based on ARMIS data; (2) calculate the percentage by which revenues would have had to have been lower to earn an 11.25 percent rate of return; (3) reduce that price cap LEC's current special access rates across the board by that percentage; and (4) use these reduced rates as the initial rates under a new price cap plan. We seek comment on this approach to establishing just and reasonable initial rates, on variants of this approach, and on other approaches that avoid use of cost studies.

Cost Studies. Parties commenting that we should use detailed cost studies to set initial special access rates under a new price cap plan should also

comment on whether such studies should be based on historical accounting costs, *i.e.*, embedded costs, or forward-looking economic costs. Generally, forward-looking costs are viewed as more relevant, and embedded costs as less relevant, to setting prices in a competitive market. Further, the Commission stated its goal in the Access Charge Reform Order, 62 FR 31868, June 11, 1997, that interstate access charges reflect forward-looking costs, and envisioned in the CALLS Order, 65 FR 38684, June 21, 2000, a proceeding near the expiration of the CALLS plan to determine whether and to what degree it could deregulate price cap LECs due to the existence of competition. We seek comment on whether setting rates based on forward-looking costs, as suggested in these orders, should guide us in selecting a method to set initial rates under a new special access price cap plan. Parties that support the use of historical costs rather than forward-looking costs should comment on and submit calculations showing the magnitude of any difference between the implied depreciation expense in LECs' special access actual realized revenues and regulatory accounting deprecation expense calculated pursuant to the Commission's rules during the price cap years. By implied depreciation, we mean total booked revenues less total booked expenses (excluding accounting depreciation expense) less an 11.25 percent rate of return on the rate base, expressed in dollars. If the implied depreciation expense significantly exceeds the regulatory accounting depreciation expense, in setting the initial rates would we need to adjust downward the rate base to avoid the eventual over-recovery of the original cost of the LECs' assets? Further, any party that supports the use of a cost study, forward-looking or historical, to set rates should submit such a study and support its use.

Use of Comparable Services. Some special access services are comparable to switched access transport services. For example, a special access channel termination service extending between an IXC POP and a LEC serving wire center is comparable to a switched access entrance facility. We therefore seek comment on whether setting initial special access prices under a new price cap plan at levels equal to current prices for comparable switched access transport would result in just and reasonable rates. Parties should address whether this approach is improperly circular, given that some transport rates, *e.g.*, direct trunked transport rates, were presumed reasonable by the Commission in the First Transport Order, 57 FR 54717, Nov. 20, 1992, if they were set based on rates for comparable special access services. Such an approach may be feasible for some services, *e.g.*, DS1 or DS3 special access services, but not necessarily for all special access services. Assuming that this approach is reasonable for some subset of special access services, we ask for comment on how to establish initial just and reasonable rates for the remaining special access services. For example, is it reasonable to establish rates for the remaining services by adding to the rate for the comparable switched access transport service the percentage difference or the dollar differences between the current rate for comparable special access service and the current rate for the non-comparable special access service? We request that parties that believe that initial rates, in whole or in part, should be based on rates for comparable switched access transport services submit such studies.

Incentives. We seek comment on whether, in determining whether special access rates will be just and reasonable, we should consider as a significant factor the risk of reducing price cap LECs' incentives to operate at minimum cost and to innovate under future price cap plans. Specifically, we question the effect of reallocating benefits resulting from price cap LEC efforts to minimize costs and innovate under the existing price cap plan on LEC expectations of future regulatory action. We seek comment on the potential effect of reducing current rates in the first year of a new price cap plan on price cap LEC incentives to operate efficiently and to innovate.

Periodic Adjustment. We further seek comment on whether a new price cap plan should include a requirement that rates be adjusted up or down at fixed intervals (*e.g.*, every three or five years) based on the prescribed rate of return, or some other measure of price cap LEC performance. For example, under one variant of such a price cap plan, LECs would not be required to share any earnings in excess of the prescribed rate of return, and generally the core elements of the plan (*e.g.*, the productivity factor) would remain constant throughout the specified interval. If a price cap LEC's achieved rate of return (or other performance measure) were greater or lesser than the prescribed rate of return (or other performance benchmark) by a predetermined amount during the interval, then rates would be adjusted down or up at the beginning of the next interval. At the beginning of the latter interval, the adjusted rates would reflect the prescribed rate of return or other performance benchmark. We seek comment on whether to adopt such an adjustment mechanism in a price cap plan. We also seek comment on how such a plan would affect price cap LEC incentives to operate efficiently and to innovate. How would price cap LEC incentives under such a plan differ from the incentive effects of a plan that included an earnings sharing requirement (*i.e.* required price cap LECs to share earnings in excess of the prescribed rate of return by adjusting rates downward in the year immediately following the year in which they over-earned)? Parties supporting this type of adjustment should provide the operational details of their proposed plan, including specifying the length of the interval that should be used under any such plan. We also seek comment on other variants of an approach that would require rate adjustments at fixed intervals to target the prescribed rate of return, or other performance benchmark.

Pricing Flexibility

In the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, the Commission essentially determined that irreversible, sunk investment by competitive carriers in the special access market, as evidenced by the satisfaction of certain collocation and competitive transport facilities deployment triggers, demonstrates sufficient competitive market entry in specific geographic markets to constrain monopoly behavior, including exclusionary conduct, by incumbent price cap LECs. The Commission acknowledged that incumbent price cap LECs might enjoy high market shares at the time pricing flexibility was granted, but concluded that they could not exercise market power where they faced competition from entrants using their own facilities. It relied on the collocation-based triggers rather than performing an unduly burdensome market power analysis. Pricing flexibility provided incumbent price cap LECs with the ability to lower rates in specific markets (MSAs) in response to competitive pressure.

In this proceeding, parties have introduced evidence that, in MSAs where incumbent price cap LECs have received Phase II pricing flexibility, they have not lowered special access rates, but instead have either maintained or raised them. Therefore, as part of our examination of the proper price cap special access regulatory regime to adopt post-CALLS, we also examine whether the Commission's pricing flexibility rules have worked as

intended and, if not, whether they should be modified or repealed. This inquiry is consistent with our ongoing commitment to ensure that our rules, particularly those based on predictive judgments, remain consistent with the public interest, as evidenced by empirical data. Our questions below are focused on Phase II, not Phase I, pricing flexibility because, once Phase II flexibility is granted, incumbent price cap LECs no longer need to offer their generally available price cap tariffs.

As a threshold matter, parties providing information regarding the rates they are charging or paying for special access services should identify whether the rates they identify are from the LEC's price cap tariff, a contract tariff, or a Phase II pricing flexibility tariff. Parties also should identify the percentage of special access services (by market) that are provided or obtained, as the case may be, from each of these three types of tariffs. We further request that parties identify whether the rates are the month-to-month rates or volume and term rates from the relevant tariff. Finally, we note that the Pricing Flexibility Order treats dedicated transport services (*i.e.*, entrance facilities, direct-trunked transport, and the flat-rated portion of tandem-switched transport) in the same manner as non-channel termination special access services. We, therefore, tentatively conclude that any changes we make to the pricing flexibility rules for non-channel termination special access services shall apply equally to the pricing flexibility rules for dedicated transport. We seek comment on this tentative conclusion.

Assessing Competition in the Marketplace

Whether or not we perform a full market power analysis, two issues are relevant to assessing the state of competition in a market. First, if a market is or is presumed to be competitive, the level of competition can be assessed by determining whether there have been substantial and sustained price increases. Second, because the characteristics of different markets vary, an analysis of the level of competition should also include an examination of the cost functions of the industry at issue. In analyzing each issue, both the product or service market (*e.g.*, interstate special access services) and the relevant geographic market (*e.g.*, MSAs) should be well-defined.

Substantial and Sustained Price Increases. To measure competition, we first must determine whether there are substantial and sustained price increases for interstate special access services in well-defined markets. A substantial price increase need not be a large increase. For example, the United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (DOJ Merger Guidelines) are designed to determine if a merger will result in a small but significant non-transitory price increase in the relevant produce market. AT&T claims in its petition that price cap LECs have increased interstate special access rates in some of the MSAs in which they have obtained Phase II pricing flexibility. We ask parties to provide data more recent data than the 2001 data in AT&T's petition that demonstrate whether or not substantial and sustained special access price increases have occurred in MSAs where price cap LECs have received Phase II pricing flexibility. Parties submitting such data should show the price changes that occurred after Phase II pricing flexibility and whether the changes were substantial (*i.e.*, did or did not result in rates above just and reasonable levels). We ask parties to establish an objective benchmark against which to measure the most recent rate levels, and to justify and explain, not merely assert, the usefulness of that benchmark. Parties that critique data purporting to show substantial rate increases (for example, in reply comments) should explain in detail why the rate increases should not be considered substantial. Parties that critique the benchmark proposed by other parties should propose an alternative benchmark.

If a price cap LEC is unable to maintain a substantial rate increase, *i.e.*, if another entity enters the market and offers the service at a lower rate, then the rate increase is not sustainable, and the original price cap LEC does not possess market power. Parties should therefore provide a measurement of the sustainability of any rate increases.

The BOCs claim that recent special access revenue increases result from high special access demand growth, rather than high and sustained special access rates, and that special access revenues per line are declining. We seek information to validate these claims, including: (1) Calculations of an Average Price Index (API) for all special access services (both those under price caps and those under pricing flexibility), (2) an SBI for each special access service category and subcategory, and (3) the revenues associated with the API and SBIs. In the Commission's annual access tariff review process, price cap LECs file an API, SBIs, and associated revenues for the special access basket. The LECs exclude from their calculations revenues for special access services provided in MSAs where they exercise pricing flexibility. In providing the information we request here, price cap LECs should recalculate the API, SBIs, and associated revenues for all special access services, including the services removed from price caps due to pricing flexibility, beginning in the year 2000, using the Tariff Review Plan RTE–1 and IND–1 electronic formats.

We invite parties to proffer evidence regarding whether the predictive judgments on which Phase II pricing flexibility was granted are supported by subsequent marketplace developments. We also invite parties to support claims of substantial and sustained price increases by identifying the product market (*e.g.*, channel terminations between LEC end offices and customer premises), the customer segment (*e.g.*, businesses in large or medium-sized buildings; large companies or small companies), or any other more detailed demarcation of the special access market in which these price increases occur.

Determination of Level of Market Competitiveness. Next, our analysis of the existence of substantial competition must analyze the cost functions in the industry. This analysis may include evaluation of the relevant product market, geographic market, demand responsiveness, supply responsiveness, market share, entry barriers, and other pricing behavior in well-specified markets. In the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, for example, the Commission relied on entry barrier and supply responsiveness analyses to develop the competitive triggers. The Commission determined that, if price cap LECs receive pricing flexibility and raise rates excessively, competitors will enter the market, thus providing additional supply of special access services at (presumably) lower prices than the incumbent. The Commission also determined that, if competitors make a significant amount of irreversible, sunk investment (specifically in collocation and transport facilities), this investment would signify that entry barriers in that market have been overcome. The Commission found it unnecessary to perform additional forms of market competitive analysis, concluding generally that such analyses would be unduly burdensome.

We seek comment on whether our pricing flexibility rules reflect a sufficiently robust assessment of the level of interstate special access competition. Parties should address whether actual market place developments have validated the supply

responsiveness and entry barrier predictive judgments made in the Pricing Flexibility Order, and, if not, whether different supply responsiveness and entry barrier assessments are necessary. Parties should also address whether, in assessing our pricing flexibility regime, we should consider additional measures of competition, such as demand responsiveness and the other analytic methods discussed below.

Relevant Product Market. In the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, the Commission identified three categories of product markets for special access services: (1) Special access channel terminations between a LEC end office and the customer premises, (2) special access channel terminations between an IXC POP and a LEC serving wire center, and (3) other special access facilities. We seek comment on whether these are the relevant product markets. In the Pricing Flexibility Order, the Commission acknowledged the greater cost of entry into the product market for channel terminations between the LEC end office and the customer premises, and, therefore, adopted higher triggers that incumbent price cap LECs must satisfy in order to obtain Phase II pricing flexibility for this product market. Commenters should specifically address, therefore, whether channel terminations from the LEC end office to the customer premises constitute a separate and distinct product market.

Parties argue that a price cap LEC that has obtained Phase II pricing flexibility in an MSA may, in fact, be the only provider of special access channel terminations in that MSA, but can theoretically be free from all rate regulation of these channel terminations. We ask parties to refresh the record and address whether there have been substantial and sustained rate increases for channel terminations between LEC end offices and customer premises since the Commission began granting Phase II pricing flexibility. We also ask parties to address the degree of existing competition for special access channel termination services, including any available quantifications of market developments after the grant of Phase II pricing flexibility. Because Phase II pricing flexibility is a statistically significant variable in explaining any substantial and sustained special access rate increases, parties should show that pricing behavior changed significantly when and where price cap LECs obtained Phase II pricing flexibility.

We seek comment on whether product markets should be further subdivided by transmission capacity. For example, parties should comment (and provide data supporting their positions) on whether DS–1 special access channel terminations between the LEC end office and the customer premises are in the same product market(s) as DS–3 and OCn channel terminations.

Although we have not previously classified special access customers by factors such as annual revenue per building or required capacity, such differentiation may be important for a thorough analysis of the level of competition. Is the question of whether CMRS providers, IXCs, or enterprise business customers, for example, constitute one or multiple customer classes relevant to this analysis? Parties should support any proposed customer classes with reliable empirical data, including econometric estimates of cross elasticity of demand or marketing studies showing consumer substitutability of demand for competing services.

In discussing the relevant product markets, we ask parties to consider not only special access services provided over incumbent price cap LEC networks, but also whether services provided over other platforms, *e.g.*, cable, wireless, and satellite, as well as over competitive LEC, self-provisioned wireline facilities, could provide the equivalent of price cap LEC special access services. We seek comment on the willingness and ability of users to purchase equivalent special access services as substitutes for an incumbent price cap LEC's special access services. We ask parties to discuss whether significant, intermodal special access service price and quality differentials exist and, if so, whether the presence of such differentials implies that equivalent special access services and special access services provided by incumbent price cap LECs are in different product markets.

Geographic Market. To define the relevant market, we typically determine not only the relevant product market, but also the relevant geographic market(s). We ask parties to provide their analyses consistent with their proposed geographic market. In the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, the Commission identified the relevant geographic market for granting pricing flexibility for special access services as the MSA. We seek comment on whether the MSA remains the appropriate geographic market for each of the special access product markets identified above or by commenting parties.

Some parties claim that competition is concentrated in a small number of areas within MSAs and that, therefore, the MSA is too large to be the relevant geographic market. They allege that a pricing flexibility trigger based on collocation coupled with competitive transport does not consider the ubiquity of competitive transport facilities throughout an MSA. The collocation trigger, they contend, may demonstrate that numerous carriers have provisioned transport from their switches to collocation arrangements in a single wire center, such as a LEC serving wire center, but does not demonstrate the existence of competitive transport to interconnect the collocation arrangements to similar arrangements in any other price cap LEC wire centers. If, for example, a collocated competitor uses its own transport to carry traffic from a price cap LEC serving wire center to an IXC POP, this alternative transport may establish competition for this facility, but it is not sufficient to establish competition for other special access services. These parties conclude that the collocation trigger does not reveal the geographic extent of "irreversible sunk investments" by competitors throughout the MSA for which the incumbent price cap LEC has obtained pricing flexibility. Thus, they argue, incumbent price cap LECs may be able to exercise monopoly power through the use of exclusionary pricing strategies in some portions of the MSA. We seek comment on these contentions.

In the Pricing Flexibility Order , 64 FR 51258, Sept. 22, 1999, the Commission established two alternative collocation triggers: percentage of revenue associated with wire center collocation, or percentage of wire centers with collocation. We note that all price cap LEC pricing flexibility petitions to date have relied on the percentage of revenue trigger rather than the percentage of wire centers with collocation trigger. Because the percentage of revenue trigger requires collocation, and hence facilities deployment, in fewer wire centers in the MSA, we invite commenters to address whether the MSA remains a reasonable geographic market in which to measure irreversible sunk investment in the relevant special access product markets, particularly for channel terminations between the LEC end office and the customer premises.

One reason that competition may not develop throughout an entire MSA is that the difference between the expected per unit costs of any potential competitor versus that of an incumbent price cap LEC may be considerably greater in some areas of an MSA than others. Any such cost disadvantages may be smaller in areas of relatively high special access line density, *e.g.*, downtown Boston, than in areas of

relatively low density, *e.g.*, suburban Boston. We seek comment on the degree to which special access line density affects the cost disadvantage a potential entrant would face relative to an incumbent price cap LEC, and the reasons for any such disadvantage. We also seek comment on whether special access line density should be used to re-define the relevant geographic market, and, specifically, whether line density might be used to subdivide, not supplant, the MSA as the relevant geographic market, or whether line density might replace the MSA.

We request comment on how to establish line density zones, were we to use line density to define the relevant geographic market. We note that Commission rules generally require states to de-average state-wide UNE rates into at least three zones to reflect cost differences within the state. 47 CFR 51.507(f). Most states set rate zones for voice grade loops and DS1 loops, and some states also set rate zones for UNE loops with capacities higher than DS1 and for dedicated transport and entrance facility UNEs with various capacities. Would it be appropriate to use the rate zones already established by the states for comparable UNEs as the density zones for interstate special access services? Are UNEs and special access services comparable? For example, if a state does not de-average the rate for DS3 UNE loops, should the Commission use zones that the state established for DS1 loops for DS3 special access services? If a state does not de-average rates for dedicated transport or entrance facility UNEs, should the Commission use the zones that the state established for DS1 loops as the density zones for interoffice special access services? More generally, is it necessary to establish different sets of density zones for special access channel termination services extending between the LEC end office and the customer premises, for channel termination service extending between the LEC serving wire center and the IXC POP, and for interoffice facilities?

We also seek comment on alternative methods to develop line density zones for special access rates. What is the appropriate measure of special access line density? Should we measure line density based on incumbent price cap LEC DS0-equivalent special access lines per square mile, DS1 lines per square mile, DS3 lines per square mile, or on some other basis? How should we group line densities: (1) 10,000 DS0-equivalent special access lines and above? (2) 1,000 DS0-equivalent lines and below? We ask parties to propose line density zones for special access services, and to demonstrate why these zones would reflect varying degrees of special access competition.

If we adopt line density zones to define geographic markets for special access services, how should we apply any triggers that we adopt for pricing flexibility? If we retain collocation as a trigger, is there some special access line density level that is so high, *e.g.*, 10,000 lines or greater per square mile, that we can conclude that examination of the presence of collocation facilities is unnecessary? If we use density zones to define geographic markets and presence of collocation as a trigger, should the amount of collocation required vary inversely with special access line density within a zone? For example, could we grant pricing flexibility where there is a relatively low amount of collocation in a relatively high density zone or where there is a relatively high amount of collocation in a relatively low density zone?

Demand Responsiveness. Economists traditionally measure demand responsiveness by identifying other special access service options, relevant to a particular market, that are close substitutes, and determining whether consumers are impeded from switching to these substitutes. Although the Pricing Flexibility Order did not address demand responsiveness, it may be an important factor in assessing the level of competition for an incumbent price cap LEC's special access services. Parties may demonstrate that the market for a particular special access service is not competitive by showing that a significant number of an incumbent price cap LEC's customers cannot purchase a comparable special access service from another carrier. Parties are invited to provide a demand responsiveness analysis that shows whether demand responsiveness before grant of pricing flexibility differed significantly from demand responsiveness after grant of pricing flexibility. Parties should also show whether this response is significantly different between an MSA in which Phase II pricing flexibility has not been granted and an MSA in which it has. Because an MSA-by-MSA, service-by-service, customer-class-by-customer-class demand responsiveness analysis may be unduly burdensome, parties may aggregate demand responsiveness data, statistics, and analyses. Too much aggregation, however, may lead to inconclusive results. Because we have emphasized distinctions between product markets, (*e.g.*, special access channel terminations between the LEC end office and the customer premises, special access channel terminations between the IXC POP and the LEC serving wire center, and other special access services), we ask parties not to aggregate data from these markets. Also, we ask parties to provide disaggregated customer class data, regardless of how they choose to identify the relevant customer class(es) (*e.g.*, the occupancy of buildings, the distribution of revenues either by building or enterprise).

Supply Responsiveness. Supply responsiveness measures the ability of carriers, other than the incumbent price cap LEC, to supply enough capacity to respond to demand migrating from the incumbent price cap LEC's network if it increases prices for its special access services. Supply elasticities of a LEC's competitors may be important in assessing the level of competition for an incumbent price cap LEC's special access services after Phase II pricing flexibility is granted. Parties may demonstrate that the market for a particular special access service is not competitive by showing that, for each product market, competitors do not have enough readily-available supply capacity to constrain the incumbent price cap LEC's market behavior.

In the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, the Commission predicted that unreasonably high incumbent price cap LEC rates for special access to an area that lacked a competitive alternative would induce competitive entry that would in turn drive rates down. The Commission reasoned that substantial rate increases would not be sustainable because they would attract entry, increase competition, and ultimately result in lower rates. We seek comment on whether these predictions and the collocation triggers adopted in 1999 in the Pricing Flexibility Order remain reasonable in light of marketplace data generated since the grant and exercise of Phase II pricing flexibility.

We invite parties to provide detailed analyses of supply responsiveness, including the data necessary to determine whether an incumbent price cap LEC's competitors are supply-responsive. Parties providing this data should demonstrate the presence or lack of entry and/or increased competitive supply so that we may assess whether it is reasonable to continue to rely on our prior conclusions. We also ask commenters to show whether there is a statistically significant relationship between higher special access rates and high levels of competitive LEC entry, and to quantify the relationship. One way to quantify the relationship is to demonstrate a statistically significant relationship between increased

competitive LEC entry and investment and the relative levels of special access rates and/or special access profit margins in MSAs where Phase II pricing flexibility has been granted. We are particularly interested in data that would show whether the incumbent price cap LEC responded to the competitive threat on a narrowly targeted basis (*e.g.*, by offering new lower contract tariff rates to the customer or customer location or specific building served by the competitor) or on a broader basis (*e.g.*, MSA-wide).

We ask parties to provide detailed information about their existing supply of special access facilities, including their ability or inability to self-deploy transport facilities, and/or to gain access to third-party alternatives. In providing such information, parties should disaggregate data among, at least, special access channel terminations between the LEC end office and the customer premises, and special access channel terminations between the IXC POP and the LEC serving wire center, and other special access facilities. We invite each commenter, for its company, to provide information about the supply of special access facilities at the MSA level for each MSA in which that company is present. If a party contends that the relevant geographic market is something other than the MSA, it should also provide information about the supply of special access facilities for that level of geographic market, for each market. We seek data for the following time periods: deployment before and up to the grant of Phase II pricing flexibility, deployment from the time pricing flexibility was granted until the present, and planned future deployment. Further, now that price cap LECs have obtained Phase II pricing flexibility in many MSAs, we ask parties to demonstrate the strength of any correlation between collocation and the provision of competitive transport facilities.

We encourage competitive LECs and other parties that have deployed their own special access transport facilities to provide their actual deployment cost information instead of relying on theoretical, estimated, or modeled costs of price cap LEC special access transport facilities. We note that some deployment costs are location specific, and ask that parties compare their costs to the costs of price cap LEC transport facilities across facilities that are as similar as possible. Finally, we note that, in certain industries, a short-term supply response may be ameliorated by other long-term supply responsiveness factors. For example, in an industry where assets can be deployed only in large increments, fixed costs are high, and there are substantial transaction costs to adding supply, we expect lags between changes in prices and a supply response. We therefore ask parties to demonstrate that supply responsiveness trends are stable by providing evidence of long-term trends.

Market Share. According to the DOJ Merger Guidelines, a high market share does not necessarily confer market power, but it is generally a condition precedent to a finding of market power. Although, in the Pricing Flexibility Order, the Commission did not rely on a market share analysis, we now invite parties to provide data and analysis of price cap LECs' market shares for special access services, by MSA where the LEC has obtained Phase II pricing flexibility, before and after the LEC implemented that pricing flexibility. Parties should supply market share data and analysis based on revenues and/or volumes on an annualized basis. If parties choose one measure of market share over others, they should identify their proposed measure with specificity and provide a thorough justification of their choice of that measure over other possible measures. We note that there are many ways of defining market share, such as volume of traffic, revenues, or network capacity. We ask parties to be specific in defining both the numerator and the denominator in the ratio that determines market share. For example, while parties should identify the size of the actual and potential market, they should not assume, without providing supporting evidence, that every building in an MSA is a potential customer for special access services. We also ask parties to disaggregate, as much as possible, any market share data provided by the special access product market (*e.g.*, special access channel terminations between the LEC end office and customer premises), and by customer classes. We invite parties to provide market share information at the MSA level and any other geographic market level they deem appropriate.

A company that enjoys a very high market share will be constrained from raising its prices substantially above cost if the market has high supply and demand elasticities. Thus, an analysis of the level of competition for special access services based solely on a price cap LEC's market share at a given time may not provide sufficient evidence for us to determine whether or not substantial competition exists. Therefore, we propose to consider market share in conjunction with other factors, including, but not limited to, supply and demand responsiveness, growth in demand, market shares before implementation of Phase II flexibility, and pricing trends. Parties providing market share analyses should take these factors into consideration, in particular, using market share analysis and supply responsiveness jointly to assess market power. Parties should ensure that the data and analyses they provide on supply responsiveness are consistent with their market share analyses and data. Parties need not provide estimates of supply elasticities separately from the data and analyses they include in their analyses of supply responsiveness. We expect that parties submitting this information will submit market share data and analyses that can be used in conjunction with supply responsiveness data and analyses.

Where price cap LECs provide wholesale special access services to intermediate customers (*e.g.*, IXCs, CMRS providers) that ultimately supply the retail market, we invite parties to provide wholesale market share analyses and data, excluding retail market analyses and data. If parties would like to include market share analysis and data for the special access retail market, they may do so. Finally, we ask parties to identify whether and, if so, how UNEs are included in their analysis.

Barriers to Entry. An entry barrier may be defined as a cost of production that must be borne by competitors entering a market that is not borne by an incumbent already operating in the market. Cost advantages derived solely from the efficiency of the incumbent are not considered a barrier to entry. Access to important assets or resources that are not accessible to the potential entrant bestows an absolute advantage on the incumbent. The ease with which competitors can enter the special access market influences the level of competition in that market. For example, an incumbent price cap LEC might have a market share of over 50 percent, but no market power, if there are no significant barriers impeding entry into that market. In such a situation, the threat that an increase in price could eventually attract new entrants might be real enough to discourage the incumbent price cap LEC from increasing its price. Similarly, high rates of return may attract competitors to that market if entry barriers are relatively low.

In the Pricing Flexibility Order, 64 FR 51258, Sept. 22, 1999, the Commission predicted that substantial, irreversible or sunk investment in facilities used to provide competitive services would be sufficient to constrain the incumbent price cap LECs' pricing behavior. The

Commission reasoned that collocation represented a financial investment by a competitor to establish facilities within a wire center and that the investment in transmission facilities associated with collocation arrangements was largely location-specific, *e.g.*, the competitive LEC's facilities could not easily be removed and used elsewhere if entry failed. Because investment was location-specific, the entrant incurred sunk costs, making exclusionary strategies by the incumbent to drive the entrant from the market less likely to succeed. Parties in this proceeding contend that the economic reasoning in the Pricing Flexibility Order is incomplete. They claim that market entry by some carriers does not fully ameliorate the effect of sunk costs as a continuing and substantial barrier to entry. We seek comment on whether the assessment in the Pricing Flexibility Order of the relationship between entry barriers and irreversible, sunk investment by competitive carriers remains sufficiently robust. We also seek comment on whether this assessment has been validated by actual marketplace developments since adoption of the Pricing Flexibility Order in 1999.

We seek comment on the effect of the exit of numerous competitors from the market on the Pricing Flexibility Order's predictive judgment that collocation is evidence of irreversible market entry. Specifically, the Pricing Flexibility Order predicted that collocation equipment would remain available and capable of providing service in competition with the incumbent, even if the incumbent succeeded in driving a competitor from the market. In light of the numerous competitors that have exited the market (in whole or in part) since 1999, we seek comment on whether their collocation facilities (space and equipment) continue to be used by other competitive LECs or are available for use by competitive LECs without their first having to incur significant additional sunk costs. We note that incumbent price cap LECs retain data on which competitive carriers are collocated in their offices (and on the equipment located in the collocation spaces), and believe such information is particularly relevant here. We invite these incumbent price cap LECs to provide data (disaggregated on an MSA basis) that identifies whether and how the collocation spaces and equipment of competitive carriers that have exited the market are used by, or available to, other competitive carriers. We seek comment on what changes, if any, we should make to our pricing flexibility rules if the data show that collocation has not proven to be as accurate a proxy for irreversible competitive market entry as we expected.

Other Factors. We invite interested parties to provide discussion, supply data, and present analysis of other factors in addition to those discussed above that would be helpful in evaluating the level of competition for special access services in the MSAs where price cap LECs have obtained Phase II pricing flexibility. The discussion and analysis of these additional factors should include an assessment of the importance of these factors in making a final determination regarding the level of competition in the special access market.

Relationship Between Market Power and Impairment Standards

At the same time that the Commission established its pricing flexibility rules for special access services, it was implementing section 251 of the 1996 Act that require incumbent LECs to offer unbundled network elements. In implementing unbundling, the Commission repeatedly confronted the issue of whether to unbundle network elements or combinations of network elements comprising essentially the same facilities as those used to provide special access services. For example, at one time, the Commission imposed temporary use restrictions on combinations of unbundled loops and unbundled dedicated transport (known as enhanced extended links, or EELs) to prevent the unbundling requirements from causing a significant reduction of the incumbent LECs' special access revenues due to the possibility of mass migration of special access services to cost-based UNEs. More recently, in the Triennial Review Order, 68 FR 52307, Sept. 2, 2003, however, the Commission adopted new EELs eligibility criteria that were not based on the preservation of special access revenues. Some parties in these unbundling proceedings advocated variations on the pricing flexibility standard for determining when certain network elements should be unbundled. Further, the Commission recently modified its unbundling analysis in the Triennial Remand Order, 70 FR 8940, Feb. 24, 2005, in response to the *USTA II* decision, in which the Court of Appeals for the District of Columbia Circuit instructed the Commission to consider tariffed special access services when conducting an impairment analysis to determine what network elements should be unbundled. Therefore, we seek comment on the relationship, if any, between the market power threshold that underscores the pricing flexibility rules and the impairment standard for unbundling.

Tariff Terms and Conditions

Background. Although traditional market power analysis focuses on whether a firm can impose a substantial and sustained price increase within, and examines the cost characteristics of, the relevant geographic and product/service market, market power can also be exercised through exclusionary conduct. Evidence of such conduct may be found in the terms and conditions in a carrier's tariff. The Commission has long been concerned that dominant carriers could offer their services on terms and conditions that weaken or harm the competitive process sufficiently to reduce consumer welfare. With regard to special access services, the Commission has taken care to prevent exclusionary conduct while the market transitions from monopoly to competition. For example, in the Expanded Interconnection Order, 57 FR 54205, Nov. 17, 1992, the Commission permitted price cap LECs to offer volume and term discounts for special access services without any competitive showing, but it found that some large discounts might be anticompetitive or raise questions of discrimination. Moreover, in the Transport Rate Structure and Pricing Order, 60 FR 50120, Sept. 28, 1995, the Commission prohibited price cap LECs from including growth discounts in their tariffs, and, in the Expanded Interconnection Order, it limited the termination liabilities that they may tariff.

In this proceeding, parties complain that the terms and conditions for special access services in the tariff offerings of price cap LECs represent exclusionary conduct designed to deter market entry or induce market exit. They claim that, as dominant firms, price cap LECs can and have tariffed pricing structures through terms and conditions that negate the price breaks a competitor can offer a customer because the customer would then lose its discounts from the incumbent on other services or in other markets. They contend that dominant firms are likely to engage in this form of exclusionary conduct because, unlike classic exclusionary pricing, this conduct does not require the dominant firm to set any price below cost.

The BOCs respond that they have not engaged in exclusionary conduct, and that such allegations of strategic anticompetitive pricing are mere theoretical arguments. They point out that special deals to attract or retain customers may injure individual competitors but result in a net increase

in overall consumer welfare. They also claim that a general prohibition on any discriminatory conduct would restrict competitive behavior, reduce competition, and harm consumers by denying them the direct benefit of any tariff terms, including volume and term price reductions. The BOCs contend that the pricing flexibility triggers, which serve as a proxy for irreversible market entry, ensure that any anticompetitive strategy to frustrate entry through the use of pricing flexibility tariffs or contract tariffs will be too late to be effective. The BOCs further claim that precluding volume and term discounts would place them at a competitive disadvantage, arguing that long-term contracts assure recovery of direct facility costs and allow amortization of up-front sunk costs. The BOCs argue that all carriers offer volume and term discounts and that customers willingly agree to them to obtain discounts. They contend that the parties complaining about such terms and conditions have extensive networks of their own and can self-provision any service they choose not to purchase from a BOC.

Discussion. A provider dominant in the market for one product may seek to influence the purchase of other products by imposing terms and conditions that bundle the products together. In this proceeding we are concerned with the question of whether a firm bundles the purchase of one product with the purchase of another product that the customer might not have bought. As with the market power analysis described above, in evaluating the terms and conditions associated with a price cap LEC tariff, parties should identify the special access product and geographic markets. Special access services involve facilities dedicated to connecting two locations. We seek comment on whether this connection is a single product or whether it represents several products. As stated above, we also ask whether the three categories of product markets for special access services identified in the Pricing Flexibility Order—(1) special access channel terminations between a price cap LEC's end office and the customer premises, (2) special access channel terminations between an IXC POP and a LEC serving wire center, and (3) other special access facilities—continue to be the relevant product markets. Also as stated above, we seek comment on whether the MSA remains the logical geographical market.

In conjunction with these product and geographic market analyses for special access services, we seek comment on the reasonableness of various levels of aggregation that a carrier may require of a customer to qualify for a discount. For example, are there cost justifications for bundling discounts with aggregations of services (*e.g.*, DS–1, DS–3, OCn) and/or geographic regions (*e.g.*, routes, wire centers, zones, LATAs, LEC footprints)? Is it reasonable for LECs to require that customers aggregate purchases across equivalent transport and special access products (*e.g.*, channel terminations and entrance facilities)? When price cap LECs base discounts on aggregations of products, do they offer equivalent non-bundled, product-by-product discounts?

Where a customer must make a volume commitment to obtain a discount, is it reasonable to condition the discount to the customer's previous purchase level? Does the manner of specifying volume levels affect the quality of competition? Do the discounts offered in price cap LEC tariffs vary with the volume of service purchased, and, if so, how? Is there a trade-off between the amount of aggregation allowed and the restrictiveness of the discount terms? Finally, parties should comment on whether they believe that conditioning discounts on prior volumes and future volume commitments violates the prohibition on growth discounts established in the Pricing Flexibility Order.

Where discounts are based on the length of the term commitment, we seek comment on the relationship between up-front, non-recurring charges and termination penalties. Prior to the advent of competition, the trade-off between an up-front charge and amortization over the lease period, or term of the agreement, was the cost of money. With competition, non-recurring charges and termination penalties raise issues concerning barriers to entry, risk bearing, and retail versus wholesale churn. We seek comment on whether we should allow or require up-front, non-recurring charges to recover the costs associated with initiating service for a specific customer. Should we require amortization over the life of the facility of the cost of activities that benefit all customers using the facility? Additionally, we seek comment on whether it is reasonable for a price cap LEC to bundle a tariff discount with the condition that the customer terminate service with a competitor. Is such bundling for the same service on the same route reasonable? Finally, is it reasonable for a price cap LEC to bundle a tariff discount with restrictions on the use or reuse of a facility?

Relationship Between New Pricing Flexibility Rules and New Special Access Price Cap Rules

If we modify the pricing flexibility rules, we seek comment on whether and how to adjust the price cap rules to incorporate the effects of changes in the pricing flexibility rules. In the event that a price cap LEC currently has pricing flexibility for services for which it will not have flexibility under any new rules we adopt, we tentatively conclude that rates for these services should be regulated no differently from rates for services for which a LEC never had pricing flexibility and for which it would have none under any new criteria. We may, for example, adopt a single price cap special access basket that includes separate service categories for special access DS1 channel terminations extending between a price cap LEC end office and a customer premises, for DS1 channel termination services extending between a price cap LEC serving wire center and an IXC POP, and for DS1 interoffice facilities. If a price cap LEC either never had pricing flexibility for DS1 special access services, or currently has pricing flexibility but will no longer have it for these services under any new criteria, it would have to establish separate rates in a tariff and categories within the basket for each of the three service categories. Going forward, under the new price cap rules, the rate levels for the DS1 channel termination and interoffice facility services would be subject to the upper SBI limit for each category. These rate levels also would be constrained, as would those for any other special access service subject to price caps, because they are reflected in the API for the special access services basket that, in turn, must not exceed the PCI for the basket. We tentatively conclude that services subject to a new price cap plan going forward should be treated the same regardless of whether they never had or currently have pricing flexibility because, under the new criteria, there presumably is no distinction between the two services. We seek comment on this tentative conclusion. We also invite comment on other options under a new price cap plan for regulating rates for services that currently have pricing flexibility, but would have none under any new rules we might adopt.

We tentatively conclude that we should use the same approach to establish initial rates under a new price cap plan for services for which a LEC currently has pricing flexibility, but will have none going forward under any new criteria we adopt in this proceeding, and for services for which a LEC never had

pricing flexibility and for which it would have none under any new pricing flexibility criteria. For example, if we find that initial rates should be based on a forward-looking cost study, rates for both of these categories of services would be set based on a forward-looking cost study, even though previously they were regulated differently. Again, there presumably is no distinction between the two services under any new pricing flexibility criteria that we adopt. There is therefore no obvious reason to establish initial rates for these services using different methods. We seek comment on this tentative conclusion. We also invite comment on other options under a new price cap plan for setting initial rates for services that currently have pricing flexibility, but would have none under any new criteria we adopt.

Procedural Matters

Initial Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA) the Commission has prepared this present Initial Regulatory Flexibility Analysis (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 requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided in paragraph 62 of the item. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

In this NPRM, the Commission explores the appropriate regulatory regime to establish for price cap LEC interstate special access services after June 30, 2005. The Commission tentatively concludes that a price cap regime should continue to apply and seeks comment on this tentative conclusion. The Commission also seeks comment on the appropriate rate structure and levels under any such price cap regime, including seeking comment on: a productivity factor, a growth factor, earnings sharing, a low-end adjustment, rate baskets and bands, and the initial rates. As part of our examination, we also seek comment on whether to maintain, modify, or repeal the pricing flexibility rules.

Legal Basis

This rulemaking action is supported by sections 1, 2, 4(i), 4(j), 201–205, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), (j), 201–205, and 303.

Description and Estimate of the Number of Small Entities to Which the Notice Will Apply

The Regulatory Flexibility Act (RFA), 5 U.S.C. 603, 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. 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).

In this section, we further describe and estimate the number of small entity licensees and regulatees that may also be directly affected by rules adopted in this proceeding. 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 (TRS) 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.

We have included small incumbent LECs 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 wired telecommunications carrier 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 LECs are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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 1,000 employees or more. Thus, under this size standard, the majority of firms can be considered small.

Incumbent Local Exchange Carriers (LECs). Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange 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 Commission data, 1,337 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.

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," all of which are discrete categories under which TRS data are collected. 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 Service Providers." Of the 35 "Other Local Service Providers," 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.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The NPRM explores the appropriate post-June 30, 2005 interstate special access regime for price cap carriers. The NPRM considers the varying options on setting rate structures and rate levels, as well as whether to maintain, modify, or repeal the pricing flexibility rules. If we determine to retain without modification the pricing flexibility rules and permit the existing price cap interstate special access regime to continue unchanged, there will be no additional reporting or recordkeeping burden on price cap LECs with respect to interstate special access rate structures or rate levels. If we adopt new or modified interstate special access charge rules, including without limitation the pricing flexibility rules, such rule changes may require additional or modified recordkeeping. For example, price cap LECs may have to file amendments to certain aspects of their interstate special access tariffs.

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed 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 or reporting requirements under the rule for 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 small entities. *See* 5 U.S.C. 603.

The overall objective of this proceeding is to determine the appropriate interstate access charge regime for price cap LECs. As part of our examination, we seek comment on the appropriate price cap interstate special access rate structures and levels, including seeking comment on: a productivity factor, a growth factor, earnings sharing, a low-end adjustment, rate baskets and bands, and the initial rates. We also seek comment on whether to maintain, modify, or repeal the pricing flexibility rules. We have invited commenters to provide economic analysis and data. We will consider any proposals made to minimize significant economic impact on small entities.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

Ex Parte Presentations

This proceeding will continue to be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 CFR 1.1206. Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one-or two-sentence description of the views and arguments presented generally is required. Other rules pertaining to oral and written presentations are set forth at 47 CFR 1.1206(b). Interested parties are to file any written *ex parte* presentations in this proceeding with the Commission's Secretary, Marlene H. Dortch, 445 12th Street, SW., TW–B204, Washington, DC 20554, and serve with one copy: Pricing Policy Division, Wireline Competition Bureau, 445 12th Street, SW., Room 5–A452, Washington, DC 20554, Attn: Margaret Dailey. Parties shall also serve with one copy: Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone (202) 488–5300, facsimile (202) 488–5563, e-mail *fcc@bcpiweb.com*, or via its Web site *http://www.bcpiweb.com*.

Comment Filing Procedures

Pursuant to the Commission's rules, interested parties may file comments on or before June 13, 2005 and reply comments on or before July 12, 2005. 47 CFR 1.415, 1.419. All pleadings must reference WC Docket No. 05–25 and RM–10593. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs*. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. 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 *ecfs@fcc.gov*, and should include the following words in the body of the message: "get form your e-mail address." A sample form and directions will be sent in reply. Commenters also may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at *http://www.fcc.gov/e-file/email.html*.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

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. 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. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563, e-mail *fcc@bcpiweb.com*, or via its Web site at *http://www.bcpiweb.com*. In addition, one copy of each submission must be filed with the Chief, Pricing Policy Division, 445 12th Street, SW., Washington, DC 20554. Documents filed

in this proceeding will be available for public inspection during regular business hours in the Commission's Reference Information Center, 445 12th Street, SW., Washington, DC 20554, and will be placed on the Commission's Internet site. For further information, contact Margaret Dailey at (202) 418–1520.

Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting the Consumer & Governmental Affairs Bureau at (202) 418–0531, TTY (202) 418–7365, or at *fcc504@fcc.gov*.

Ordering Clauses

Accordingly, *it is ordered that,* pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 201–205, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 201–205, and 303, *Notice is hereby given* of the rulemaking described above and *Comment is sought* on those issues.

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7350 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–753; MB Docket No. 05–147; RM–10823

Radio Broadcasting Services; Fort Lauderdale and Lake Park, Florida

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by by Charles Crawford, requesting the allotment of Channel 262A at Lake Park, Florida, as its first local aural broadcast service. This proposal requires the reclassification of Station WHYI–FM, Channel 264C, Fort Lauderdale, Florida to specify operation on Channel 264C0. *See Second Report and Order* in MM Docket 98–93, *1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 65 FR 79773 (2000). An Order to Show Cause was issued to Clear Channel Broadcasting Licenses, Inc., licensee of Station WHYI–FM to which no response was received. Channel 262A can be allotted to Lake Park in compliance with the Commission's minimum distance separation requirements with a site restriction of site 4.7 kilometers (2.9 miles) south of the community at coordinates 26–45–29 NL and 80–03–28 WL.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005. Any counterproposal filed in this proceeding need only protect Station WHYI–FM, Fort Lauderdale, as a Class C0 allotment.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Charles Crawford, 4553 Bordeaux Avenue, Dallas, Texas 75205.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MB Docket No. 05–147, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC. 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*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Florida is amended by removing Channel 264C and by adding Channel 264C0 at Fort Lauderdale and by adding Lake Park, Channel 262A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7050 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–750; MB Docket No.05–135; RM–11215]

Radio Broadcasting Services; Jackson and Madison, Mississippi

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by New South Communications, Inc., proposing the reallotment of Channel 242C0 from Jackson to Madison, Mississippi, and the modification of the license for Station WUSJ(FM) to reflect the new community. The coordinates for Channel 242C0 at Madison, Mississippi are 32–11–29 NL and 90–24–22 WL. There is a site restriction 24.0 kilometers (14.9 miles) southwest of the community.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: David D. Burns, Esq., Latham and Watkins, LLP, 555 Eleventh Street, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making,* MB Docket No. 05–135, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 800–378–3160 or *http://www.BCPIWEB.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Mississippi, is amended by removing Channel 242C0 at Jackson and by adding, Madison, Channel 242C0.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7077 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–748; MB Docket No. 05–136, RM–11163; MB Docket No. 05–137, RM–11161; MB Docket No. 05–138, RM–11162]

Radio Broadcasting Services; Arapaho, OK; Big Spring, TX; Cameron, LA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes three new FM broadcast allotments in Arapaho, Oklahoma; Big Spring, Texas; and Cameron, Louisiana. The Audio Division, Media Bureau, requests comment on three separate petitions filed by Charles Crawford. Each proposal has its own docket and rulemaking number. The first petition, MB Docket No. 05–136, RM–11163, proposes the allotment of Channel 251C3 at Arapaho, Oklahoma, as the community's first local service. Channel 251C3 can be allotted to Arapaho in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.1 miles) south of the community. The reference coordinates for Channel 251C3 at Arapaho are 35–28–00 NL and 98–55–00 WL. The second petition, MB Docket No. 137, RM–11161, proposes the allotment of Channel 265C3 at Big Spring, Texas, as the community's sixth local service. Channel 265C3 can be allotted to Big Spring in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.7 kilometers (11.0 miles) east of the community. The reference coordinates for Channel 265C3 at Big Spring are 32–12–00 NL and 101–18–00 WL. Because this site is within 320 kilometers (200 miles) of the Mexican border, concurrence of the Mexican government has been requested for the allotment. The third petition, MB Docket No. 05–138, RM–11162, proposes the allotment of Channel 296C3 at Cameron, Louisiana, as the community's first local service. Channel 296C3 can be allotted to Cameron in compliance with the Commission's minimum distance separation requirements at the center of city coordinates of 29–47–48 NL and 93–19–30 WL.

DATES: Comments, with reference to the appropriate docket and rulemaking number, must be filed on or before May 10, 2005, and reply comments, with reference to the appropriate docket and rulemaking number, must be filed on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Charles Crawford, 4553 Bordeaux Avenue, Dallas, Texas 75205.

FOR FURTHER INFORMATION CONTACT: Helen McLean, Media Bureau, (202) 418–2738.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket Nos. 05–136, 05–137, 05–138, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission document is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth 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.*

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a *Notice of Proposed Rule Making* is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Louisiana is amended by adding Cameron, Channel 296C3.

3. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Arapaho, Channel 251C3.

4. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 265C3 at Big Spring.

Federal Communications Commission

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7076 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–756; MB Docket No. 05–139, RM–11218]

Radio Broadcasting Services; Americus and Emporia, KS

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR 73.202(b). The Audio Division requests comment on a petition filed by Dana J. Puopolo. Petitioner proposes the allotment of Channel 240A at Americus, Kansas, as that community's first local service. In order to accommodate the allotment of Channel 240A at Americus, Puopolo further proposes the substitution of Channel 244A for Channel 241A, Emporia, Kansas, at the existing reference coordinates, and he commits to compensate the licensee for expenses incurred in moving from Channel 241A to Channel 244A. The proposed coordinates for Channel 240A at Americus, Kansas, are 38–25–13 NL and 96–21–12 WL. The allotment will require a site restriction of 12.5 km (7.8 miles) southwest of Americus. The proposed coordinates for Channel 244A at Emporia, Kansas, are 38–24–21 NL and 96–14–13 WL. The allotment will require a site restriction of 4.9 km (3.0 miles) west of Emporia (current licensed site).

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the petitioner as follows: Dana J. Puopolo, 2134 Oak Street, Unit C, Santa Monica, California 90495.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–139; adopted March 21, 2005, and released March 23, 2005. The full text of this Commission document is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings; such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Kansas, is amended by adding Americus, Channel 240A, and removing Channel 241A and adding Channel 244A at Emporia.

Federal Communications Commission

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7075 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–752; MB Docket No. 05–132, RM–11217]

Radio Broadcasting Services; Junction, Melvin, and Menard, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division requests comment on a petition filed by Charles Crawford, requesting the allotment of Channel 242A at Melvin, Texas, as a first local aural service. To accommodate this allotment, the Audio Division proposes the substitution of Channel 292A for vacant Channel 242A at Menard, Texas, and the substitution of Channel 224A for vacant Channel 292A at Junction ,Texas. *See* **SUPPLEMENTARY INFORMATION**, *infra*.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Charles Crawford, 4553 Bordeaux Ave., Dallas, Texas 75205; and Gene A. Bechtel, Esq., Law Office of Gene Bechtel, Suite 600, 1050 17th Street, NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 02–132, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth 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*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The reference coordinates for Channel 242A at Melvin, TX, are 31–07–55 and 99–39–27. The reference coordinates for Channel 292A at Menard, TX, are 30–49–16 and 99–43–02. The reference coordinates for Channel 244A at Junction, TX are 30–29–24 and 99–42–44.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Melvin, Channel 242A, by removing Channel 242A and adding Channel 292A at Menard, and by removing Chanel 292A and adding Channel 224A at Junction.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7074 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–747; MB Docket No. 05–131, RM–11208, RM–11209]

Radio Broadcasting Services; Redding, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division requests comment on two petitions filed by Linda A. Davidson and Paul Barth, requesting the allotment of Channel 221A at Redding, California, as a fourth commercial FM service. The proposed reference coordinates for Channel 221A at Redding are 40–34–35 and 122–22–12.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Linda A. Davidson, 2134 Oak Street, Unit C, Santa Monica, CA 90405; and Paul Barth, PO Box 494430, Redding, CA 96049.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–131, adopted March 21, 2005 and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth 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*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Channel 221A at Redding.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7073 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–746; MB Docket No. 05–134; RM–11207]

Radio Broadcasting Services; Naples and Sanibel, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division seeks comment on a petition filed by Meridian Broadcasting Inc., licensee of Station WTLT(FM), Channel 229C3, Naples, Florida, requesting the substitution of Channel 229C2 for Channel 229C3 at Naples, Florida, reallotment of Channel 229C2 from Naples to Sanibel, Florida, as its first local service, and modification of the Station WTLT(FM) license to reflect the change. Channel 229C2 can be allotted to Sanibel in conformity with the Commission's rules, provided there is a site restriction of 8.3 kilometers (5.2 miles) northwest at coordinates 26–30–00 NL and 82–05–00 WL. In accordance with the provisions of Section 1.420(i) of the Commission's rules, we shall not accept competing expressions of interest pertaining to the use of Channel 229C2 at Sanibel.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Joseph A. Belisle, Counsel for Meridian Broadcasting Inc., Leibowitz & Associates, P.A., One SE Third Avenue—Suite 1450, Miami, Florida 33131.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–134, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., 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*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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). The FM Table of Allotments currently reflects Channel 228A at Naples, Florida. Station WTLT(FM) was granted a license to specify operation on Channel 229C3 in lieu of Channel 228A at Naples, Florida. See BLH–20030407AAL.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by removing Channel 228A at Naples and by adding Sanibel, Channel 229C2.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7053 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–769; MB Docket No. 05–155; RM–11226]

Radio Broadcasting Services; Denver City, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Ramar Communications II, Ltd., licensee of Station KSTQ–FM, Plainview, Texas, proposing to delete vacant and unapplied for Channel *248C2 at Denver City, Texas, or, in the alternative, modify the site restriction for Channel *248C2 to accommodate Petitioner's pending application to modify Station KSTQ–FM's operation. The proposed site for Channel *248C2, at coordinates 32–55–57 NL and 102–58–10 WL is 13.6 kilometers (8.5 miles) west of Denver City.

DATES: Comments must be filed on or before, May 12, 2005, and reply comments on or before, May 27, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Dennis P. Corbett, Esq., John D. Poutasse, Esq., Leventhal, Senter and Lerman, PLLC, 2000 K Street, NW., Suite 600, Washington, DC 20006–1809.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MB Docket No. 05–155 adopted March 23, 2005, and released March 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 800–378–3160 or *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Denver City, Channel *248C2.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7059 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–749; MB Docket No. 05–140, RM–11225]

Radio Broadcasting Services; Arlington and Memphis, Tennessee and Saint Florian, AL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR 73.202(b). The Audio Division requests comment on a petition filed by Clear Channel Broadcasting Licenses, Inc. pursuant to Sections 1.420(g) and (i) of the Commission's rules. Petitioner proposes to change the community of license for Station WEGR from Memphis to Arlington, Tennessee, where Channel 274C1 would provide a first local service. In order to accommodate the proposed change of community, Clear Channel further proposes to change the reference coordinates for vacant Channel 274A at Saint Florian, Alabama. The proposed coordinates for Channel 274C1 at Arlington, Tennessee are 35–16–33 NL and 89–46–38 WL. The allotment will require a site restriction of 10.8 km (6.7 miles) west of Arlington. The proposed new coordinates for Channel 274C1 at Saint Florian, Alabama are 34–50–12 NL and 87–37–27 WL. The allotment will require a site restriction of 4.1 km (2.5 miles) south of Saint Florian.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the petitioner as follows: Mark N. Lipp, Esq., Scott Woodworth, Esq., Vinson & Elkins L.L.P., 1455 Pennsylvania Avenue, NW., Suite 600, Washington, DC 20004–1008.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–140; adopted March 21, 2005, and released March 23, 2005. The full text of this Commission document is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Tennessee, is amended by adding Arlington, Channel 274C1, and removing Channel 274C1 at Memphis.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7054 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–765; MB Docket No. 05–152; RM–11204]

Radio Broadcasting Services; Clinton and Mayfield, KY

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by Bristol Broadcasting Company, Inc. ("Petitioner"), licensee of Station WWLE(FM), Channel 271C3, Clinton, Kentucky; Station WQQR(FM), Channel 234C2, Mayfield, Kentucky; and Station WLIE–FM, Channel 232A, Golconda, Illinois. Petitioner requests that the Commission (1) reallot Channel 271C3,

Station WWLE(FM), from Clinton to Mayfield, Kentucky, and upgrade the allotment of Channel 271C3 to Channel 271C2; (2) reallot Channel 234C2, Station WQQR(FM), from Mayfield to Clinton, Kentucky; and (3) allow Petitioner to relocate the transmitter site of Station WLIE–FM, Channel 232A, to avoid short spacing to proposed Channel 234C2 at Clinton, Kentucky. The coordinates for Channel 271C2 at Mayfield, Kentucky, are 36–40–36 North Latitude and 88–29–29 West Longitude, with a site restriction of 14.9 kilometers (9.2 miles) southeast of Mayfield. The coordinates for Channel 234C2 at Clinton, Kentucky, are 36–45–51 North Latitude and 88–39–55 West Longitude, with a site restriction of 31.2 kilometers (19.4 miles) east of Clinton. The coordinates for Channel 232A, Station WLIE–FM, at Golconda, Illinois, are 37–14–18 North Latitude and 88–29–40 West Longitude, with a site restriction of 14.3 kilometers (8.9 miles) south of Golconda, Illinois.

DATES: Comments must be filed on or before May 12, 2005, and reply comments on or before May 27, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve Petitioner's counsel, as follows: Clifford M. Harrington, Esq. and Veronica D. McLaughlin Tippett, Esq., Shaw Pittman LLP; 2300 N. Street, NW.; Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–152, adopted March 23, 2005 and released March 25, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex parte contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible ex parte contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Kentucky, is amended by removing Channel 271C3 and adding Channel 234C2 at Clinton and by removing Channel 234C2 and adding Channel 271C2 at Mayfield.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7058 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–766; MB Docket No. 05–151; RM–11222]

Radio Broadcasting Services; Llano, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Linda Crawford, proposing the allotment of Channel 297A at Llano, Texas, as its fourth FM commercial broadcast transmission service. To accommodate the allotment at Llano, Petitioner has requested a site change for vacant Channel 297A at Junction, Texas. Channel 297A can be allotted to Llano consistent with the minimum distance separation requirements of the Commission's Rules with a site restriction 6.1 kilometers (3.8 miles) west of the community at coordinates 30–46–00 NL and 98–44–15 WL. The proposed new site for Channel 297A at Junction, 30–24–15 NL and 99–51–45 WL, is in compliance with the Commission's spacing requirements. This site is 12.8 kilometers (8.0 miles) southwest of the community, whereas the original site for Channel 297A at Junction was 3.5 kilometers (2.2 miles) south of the community. The existing coordinates for the vacant Channel 297A at Junction are 30–27–27 NL and 99–46–07 WL. We seek comment on the proposed site change for vacant Channel 297A at Junction from interested parties.

DATES: Comments must be filed on or before May 12, 2005, and reply comments on or before May 27, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Linda Crawford, 3500 Maple Avenue, #1320, Dallas, Texas 75219.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–151, adopted March 23, 2005, and released March 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC. 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*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 297A at Llano.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7057 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–754; MB Docket No. 05–130; RM–11216]

Radio Broadcasting Services; Thomas, OK

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a Petition for Rule Making filed by Charles Crawford requesting the allotment of Channel 247A at Thomas, Oklahoma. The coordinates for Channel 247A at Thomas are 35–44–00 and 98–42–00. There is a site restriction 4.4 kilometers (2.8 miles) east of the community.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Charles Crawford, 4553 Bordeaux Avenue, Dallas, Texas 75205 and Gene A. Bechtel, Law Offices of Gene Bechtel, 1050 17th Street, NW., Suite 600, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–130, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC. This document may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR § 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Channel 247A at Thomas.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7056 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–755; MB Docket No. 05–129; RM–11201]

Radio Broadcasting Services; Jacksonville, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by Linda Crawford ("Petitioner"). Petitioner requests that the Commission allot Channel 236A to Jacksonville, Texas as its fifth local aural transmission service. In order to implement this allotment, Petitioner requests that the allotment transmitter sites for vacant Channel 373C3, Teague, Texas and vacant Channel 237A, Meridian, Texas be relocated. The proposed coordinates for Channel 236A at Jacksonville, Texas are 31–54–15 North Latitude and 95–17–42 West Longitude, with a site restriction of 7.0 kilometers (4.3 miles) east of Jacksonville. The proposed coordinates for vacant Channel 237C3 at Teague, Texas are 31–48–30 North Latitude and 96–14–00 West Longitude, with a site restriction of 20.7 kilometers (12.8 miles) north of Teague, Texas. The proposed coordinates for vacant Channel 237A, Meridian, Texas, are 32–00–00 North Latitude and 97–43–00 West Longitude, with a site restriction of 10.3 kilometers (6.4 miles) northwest of Meridian, Texas.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve Petitioner and her counsel, as follows: Linda Crawford; 3500 Maple Ave., #1320; Dallas, Texas 75219 and Gene A. Bechtel, Esq. (counsel to Petitioner), Law Office of Gene Bechtel; 1050 Seventeenth Street, NW., Suite 600; Washington, DC.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–129, adopted March 21, 2005 and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 1–800–378–3160 or *www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 54, 303, 334, and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 236A at Jacksonville.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division Media Bureau.

[FR Doc. 05–7055 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–767; MB Docket No. 05–150; RM–11214]

Radio Broadcasting Services; Norfolk and Windsor, VA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Clear Channel Broadcasting Licenses, Inc., licensee of Stations WKUS(FM), Norfolk, Virginia and WJCD, Windsor, Virginia, proposing the reallotment of Channel 299A from Windsor to Norfolk, Virginia and the reallotment of Channel 287B from Norfolk to Windsor, Virginia, and the modification of the license for Station WKUS(FM) to reflect Windsor as its community of license and the modification of the license of Station WJCD(FM) to reflect Norfolk as its community of license. Channel 299A can be reallotted at Norfolk at a site 9.3 kilometers (5.8 miles) north of the community, at coordinates 36–55–26 NL and 76–15–05 WL. Channel 287B can be reallotted at Windsor at a site 12.7 kilometers (7.9 miles) east of the community at coordinates 36–48–47 NL and 76–35–57 WL.

DATES: Comments must be filed on or before May 12, 2005, and reply comments on or before, May 27, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Mark N. Lipp, Esq., Scott Woodworth, Esq., Vinson & Elkins, L.L.P., 1455 Pennsylvania Avenue, NW., Suite 600, Washington, DC 20004–1008.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MB Docket No. 05–150 adopted March 23, 2005, and released March 25, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 800–378–3160 or *www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Virginia, is amended by removing Channel 287B and adding Channel 299A at Norfolk, and by

removing Channel 299A and adding Channel 287B at Windsor.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7062 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–768; MB Docket No. 05–153, RM–11223; MB Docket No. 05–154, RM–11224]

Radio Broadcasting Services; Steamboat Springs, CO; and Refugio and Victoria, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division requests comment on two petitions proposing new allotments at Steamboat Springs, Colorado and Victoria, Texas. Dana J. Puopolo filed a petition proposing the allotment of Channel 289A at Steamboat Springs, Colorado, as its third FM commercial broadcast service. Channel 289A can be allotted to Steamboat Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.1 kilometers (3.8 miles) west to avoid a short-spacing to the application site of FM Station KJAC, Channel 288C1, Timnath, Colorado. The reference coordinates for Channel 289A at Steamboat Springs are 40–30–00 NL and 106–54–00 WL. The Audio Division requests comments on a petition filed by Katherine Pyeatt proposing the allotment of Channel 290A at Victoria, Texas, as the community's sixth FM commercial broadcast service. Channel 290A can be allotted to Victoria in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.1 kilometers (5.0 miles) north to avoid a short-spacing to the license site of FM Station KVIC, Channel 236C3, Victoria, Texas. *See* BLH–2000501ACB. The reference coordinates for Channel 290A at Victoria are 28–52–40 NL and 96–59–54 WL. *See* Supplementary Information, *supra*.

DATES: Comments must be filed on or before May 12, 2005, and reply comments on or before May 27, 2005

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Dana J. Puopolo, 2134 Oak Street, Unit C, Santa Monica, CA 90405 and Katherine Pyeatt, 6655 Aintree Circle, Dallas, Texas 75214.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket Nos. 05–153, 05–154, adopted March 23, 2005 and released March 25, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth 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*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

To accommodate the proposed Victoria allotment it is necessary to relocate the reference coordinates for vacant Channel 291A at Refugio, Texas. The proposed new site for Channel 291A at Refugio, 28–20–00 NL and 97–23–45 WL, is in compliance with the Commission's spacing requirements. This site is 12.3 kilometers (7.6 miles) west of the community, whereas the original site for Channel 291A at Refugio is 8.1 kilometers (5.0 miles) northwest of the community. The existing coordinates for the vacant Channel 291A at Refugio are 28–21–58 NL and 97–19–11 WL. Petitioner is required to provide the public interest benefits that could be derived from the site change of the vacant allotment at Refugio. We further seek any additional comments with regards to this proposal. Both allotments are located within 320 kilometers (199 miles) of the U.S.-Mexican border, Mexican concurrence has been requested for these allotments.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Colorado, is amended by adding Channel 289A at Steamboat Springs.

3. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 290A at Victoria.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7347 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–742; MB Docket No. 05–144, RM–11189]

Radio Broadcasting Services; Dalhart and Perryton, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division requests comment on a petition filed by Radio Dalhart, requesting the substitution of Channel 241C1 for Channel 242C1 at Dalhart,TX, and the modification of its license for Station KXIT–FM, Dalhart, TX, to specify operation on Channel 241C1 in lieu of Channel 242C1. To accommodate this channel change, Radio Dalhart also requests the substitution of Channel 248C3 for Channel 241C3 at Perryton, TX, and the

modification of the license for Station KEYE–FM, Perryton, TX, accordingly. *See* Supplementary Information, *infra*.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Peter Gutmann, Esq., Womble, Carlyle Sandridge & Rice, PLLC, 1401 I Street, NW., Seventh Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–144, adopted March 21, 2005 and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth 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 *www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Pursuant to 47 CFR 1.87, an Order to Show Cause is being sent to Perryton Radio, Inc., licensee of Station KEYE–FM, Channel 241C3, Perryton, Texas, to show cause why its license should not be modified to specify operation on Channel 248C3.

The reference coordinates for Channel 241C1 at Dalhart, Texas, are 35–48–23 and 102–17–16. The reference coordinates for Channel 248C3 at Perryton, Texas, are 36–21–54 and 100–46–48.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 242C1 and adding Channel 241C1 at Dalhart and by removing Channel 241C3 and adding Channel 248C3 at Perryton.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7079 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–751; MB Docket No. 05–133; RM–11206]

Radio Broadcasting Services; Abilene and Burlingame, KS

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division seeks comment on a petition filed by MCC Radio, LLC, licensee of Station KSAJ (FM), Channel 253C1, Abilene, Kansas, proposing the reallotment of Channel 253C1 from Abilene to Burlingame, Kansas, as its first local service and modification of the Station KSAJ (FM) license accordingly. Channel 253C1 can be allotted to Burlingame in conformity with the Commission's rules, provided there is a site restriction of 17.7 kilometers (11 miles) northwest at coordinates 38–52–29 NL and 95–58–05 WL. In accordance with the provisions of Section 1.420(i) of the Commission's rules, we shall not accept competing expressions of interest pertaining to the use of Channel 253C1 at Burlingame.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: James R. Bayes, Esq., Todd M. Stansbury, Esq., Krista L. Witanowski, Esq., Counsel, MCC Radio, LLC, Wiley, Rein & Fielding LLP, 1776 K Street, NW., Suite 1100, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–133, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., 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*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1.The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Kansas, is amended by removing Abilene, Channel 253C1 and by adding Burlingame, Channel 253C1.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7078 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–744; MB Docket No. 05–128; RM–11210]

Radio Broadcasting Services; Tipton, OK

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by Charles Crawford ("Petitioner"). Petitioner requests that the Commission allot Channel 233C3 to Tipton, Oklahoma, as its first local aural transmission service. The proposed coordinates for Channel 233C3 at Tipton, Oklahoma are 34–32–30 North Latitude and 99–14–10 West Longitude, with a site restriction of 9.8 kilometers (6.1 miles) northwest of Tipton.

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve Petitioner and his counsel, as follows: Charles Crawford, 4553 Bordeaux Ave., Dallas, Texas 75206; and Gene A. Bechtel, Esq., (counsel to Petitioner), 1050 Seventeenth Street, NW., Suite 600, Washington, DC.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–128, adopted March 21, 2005 and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR § 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Tipton, Channel 233C3.

Federal Communications Commission

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7067 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–743; MB Docket No. 05–141, RM–11219; MB Docket No. 05–142; RM–11220; and MB Docket No. 05–143, RM–11221]

Radio Broadcasting Services; Roma, TX; Romney, WV; and Strong, AR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth three proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR § 73.202(b). The Commission requests comment on a petition filed by Charles Crawford. Petitioner proposes the allotment of Channel 296C3 at Strong, Arkansas, as a first local FM service. Channel 296C3 can be allotted at Strong in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.3 km (8.9 miles) north of Strona. The proposed coordinates for Channel 296C3 at Strong are 33–14–00 North Latitude and 92–18–00 West Longitude. *See* **SUPPLEMENTARY INFORMATION** *infra.*

DATES: Comments must be filed on or before May 10, 2005, and reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the designated petitioner as follows: Charles Crawford, 4553 Bordeaux Avenue, Dallas, Texas 75205; Charles E. See, President, Cornwell & Ailes, Inc., Hampshire Review, Post Office Box 1036, 25 South Grafton Street, Romney, West Virginia 26757.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket Nos. 05–141, 05–142, and 05–143, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission document is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th

Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The Commission further requests comment on a petition filed by Charles Crawford. Petitioner proposes the allotment of channel 278A at Roma, Texas, as a first local FM service. Channel 278A can be allotted at Roma in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.0 km (6.2 miles) east of Roma. The proposed coordinates for Channel 278A at Roma are 26–26–05 North Latitude and 98–55–16 West Longitude.

The Commission further requests comment on a petition filed by Charles E. See. Petitioner proposes the allotment of Channel 239A at Romney, West Virginia, as a first local FM service. Channel 239A can be allotted at Romney in compliance with the Commission's minimum distance separation requirements at center city reference coordinates without a site restriction. The proposed coordinates for Channel 239A at Romney are 39–20–31 North Latitude and 78–45–24 West Longitude.

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by adding Strong, Channel 296C3.

3. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 278A at Roma.

4. Section 73.202(b), the Table of FM Allotments under West Virginia, is amended by adding Channel 239A at Romney.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7080 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–757; MB Docket No. 05–145, RM–11212; MB Docket No. 05–146, RM–11213]

Radio Broadcasting Services; Caliente and Moapa, NV; and Hermitage and Mercer, PA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes two change of community reallotments for Caliente and Moapa, Nevada; and Mercer and Hermitage, Pennsylvania.

The Audio Division requests comments on a petition filed by Cumulus Licensing LLC, proposing the reallotment of Channel 233C from Caliente to Moapa, Nevada, and the modification of the new FM station's construction permit (File No. BNH–20050103AFD) accordingly. Channel 233C can be reallotted to Moapa in compliance with the Commission's minimum distance separation requirements with a site restriction of 63.0 kilometers (39.2 miles) north at Petitioner's authorized construction permit site. The coordinates for Channel 233C at Moapa are 37–14–37 NL and 114–36–01 WL. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 233C at Moapa, Nevada, or require Petitioner to demonstrate the existence of an equivalent class channel for the use of other interested parties. *See* **SUPPLEMENTARY INFORMATION**, *infra*.

DATES: Comments must be filed on or before May 10, 2005, reply comments on or before May 25, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Marnie K. Sarver, Esq., Wiley, Rein & Fielding LLP, 1776 K Street, NW., Washington, DC 10006 (Counsel for Aurora Media, LLC) and Mark N. Lipp, Esq., Vinson and Elkins, L.L.P., 1455 Pennsylvania Ave., NW., Suite 600, Washington, DC 20004–1008 (Counsel for Cumulus Licensing LLC).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MB Docket No. 05-145 and MB Docket No. 05–146, adopted March 21, 2005, and released March 23, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. This document may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, 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).

The Audio Division requests comments on a petition filed by Cumulus Licensing, LLC, proposing the reallotment of Channel 280A from Mercer to Hermitage, Pennsylvania, and the modification of Station WWIZ(FM)'s license accordingly. Channel 280A can be reallotted to Hermitage in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.8 kilometers (4.9 miles) southeast to avoid a short-spacing to the licensed and construction permit site for Station WOGF(FM), Channel 282B, East Liverpool, Ohio. The reference coordinates for Channel 280A at Hermitage are 41–12–16 NL and 80–21–

49 WL. Since Hermitage is located within 320 kilometers (200 miles) of the U.S-Canadian border, concurrence of the Canadian government has been requested. In addition, this allotment is short-spaced to vacant Channel 280C1 in Woodstock, Ontario, and we have requested Canadian concurrence of Channel 280A at Hermitage, Pennsylvania, as a specially-negotiated, short-spaced allotment. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will accept competing expressions of interest for the use of Channel 280A at Hermitage, Pennsylvania, or require Petitioner to demonstrate the existence of an equivalent class channel for the use of other interested parties.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts. For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Nevada, is amended by removing Channel 233C1 at Caliente, and adding Moapa, Channel 233C.

3. Section 73.202(b), the Table of FM Allotments under Pennsylvania, is amended by removing Channel 280A at Mercer, and adding Hermitage, Channel 280A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7081 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 050325082–5082–01; I.D. 031705E]

RIN 0648–AS90

Fisheries of the Exclusive Economic Zone Off Alaska; License Limitation Program for the Scallop Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 10 to the Fishery Management Plan for the Scallop Fishery off Alaska (FMP), which would modify the gear endorsements under the license limitation program (LLP) for the scallop fishery. This action is necessary to allow increased participation by LLP license holders in the scallop fisheries off Alaska. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the FMP, and other applicable laws.

DATES: Written comments on the proposed rule must be received on or before May 31, 2005.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- E-mail: *Scallop10–PR–0648–AS90@noaa.gov*. Include in the subject line of the e-mail the following document identifier: Scallop 10 PR. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Hand Delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.
- Facsimile: 907–586–7557.
- Webform at the Federal eRulemaking Portal: *www.regulations.gov*. Follow the instructions at that site for submitting comments.

Copies of Amendment 10 to the Scallop FMP, and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for the amendment are available from NMFS at the mailing address specified above.

FOR FURTHER INFORMATION CONTACT: Gretchen Harrington, phone: 907–586–7228 or e-mail: *gretchen.harrington@noaa.gov*.

SUPPLEMENTARY INFORMATION: The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Act. Under the FMP, management of all aspects of the scallop fishery, except limited access, is delegated to the State of Alaska (State). Federal regulations governing the scallop fishery appear at 50 CFR parts 600 and 679. State regulations governing the scallop fishery appear in the Alaska Administrative Code (AAC) at 5 AAC Chapter 38--Miscellaneous Shellfish.

State regulations establish guideline harvest levels (GHL) for different scallop registration areas, fishing seasons, open and closed fishing areas, observer coverage requirements, bycatch limits, gear restrictions, and measures to limit processing efficiency (including a ban on the use of mechanical shucking machines and a limitation on crew size). The gear regulations limit vessels to using no more than two 15 ft (4.5 m) dredges, except in State Scallop Registration Area H (Cook Inlet) where vessels are limited to using a single 6 ft (1.8 m) scallop dredge.

The Council has submitted Amendment 10 for Secretarial review, and a Notice of Availability of the amendment was published on March 24, 2005, with comments on the FMP amendment invited through May 23, 2005 (70 FR 15063). Comments may address the FMP amendment, this proposed rule, or both, but must be received by May 23, 2005, to be considered in the approval/disapproval decision on the FMP amendment.

Beginning in 2001, NMFS has required a Federal scallop LLP license on board any vessel deployed in the scallop fisheries in Federal waters off Alaska. The LLP was implemented through approval of Amendment 4 to the FMP by the Secretary on June 8, 2000, and the final rule implementing Amendment 4 was published December 14, 2000 (65 FR 78110). The LLP was established to limit harvesting capacity in the Federal scallop fishery off Alaska. NMFS issued a total of nine LLP licenses. Licenses were issued to holders of either Federal or State moratorium permits who used their permits to make legal landings of scallops in each of any two calendar years during the period beginning January 1, 1996, through October 9, 1998. The licenses authorize their holders to catch and retain scallops in

all waters off Alaska that are open for scallop fishing.

Two licenses were based on the legal landings of scallops harvested only from Cook Inlet during the qualifying period and therefore have a gear restriction endorsement that limits allowable gear to a single 6 ft (1.8 m) dredge when fishing for scallops in any area. The other seven licenses, based on the legal landings of scallops harvested from areas outside Cook Inlet during the qualifying period, have no gear restriction endorsement, but are limited to two 15–ft (4.5 m) dredges under existing state regulations. The purpose of the gear restriction endorsement was to prevent expansion in overall fishing capacity by not allowing relatively small operations in Cook Inlet to increase their fishing capacity.

Subsequent to LLP implementation, the Council has found that the gear restriction endorsement may create a disproportionate economic hardship for those LLP license holders restricted to 6 ft (1.8 m) dredges when they fish in Federal waters, especially in light of the State's observer requirements and their associated costs. In February 2004, the Council developed a problem statement and four alternatives for analysis of modifying or eliminating the gear restriction for the two licenses affected by the gear restriction.

In October 2004, the Council voted unanimously to recommend to the Secretary Amendment 10 to change the single 6 ft (1.8 m) dredge restriction endorsement in the scallop LLP to two dredges with a combined width of no more than 20 ft (6.1 m) restriction endorsement. This change would allow the two LLP license holders with the current gear endorsement to fish in Federal waters outside Cook Inlet with larger dredges. The Council recommended this change because it found that it is not economically viable for vessels to operate outside Cook Inlet with the existing gear restrictions.

The Council also recognized that economic conditions of the scallop fleet had changed since the LLP was approved. The change resulted from the formation of a harvesting cooperative by a majority of the LLP holders. The harvesting cooperative provides harvesting efficiency to participants without an increase in fishing capacity. Efficiency gains are realized when harvesting cooperative participants retire excess fishing capacity while being assured that the entry of additional capacity is prevented by the LLP. Without the LLP, a harvesting cooperative was unlikely because any efficiency gains through cooperation could be easily eroded by unrestricted entry of new vessels to the fishery. Hence, concern about the expansion of overall fishing capacity no longer exists with the combined effects of the LLP and harvesting cooperatives.

In discussing the difference among the alternatives, the Council noted that allowing two vessels the ability to use two 10–ft dredges would give them a much greater ability to cover the costs of carrying an observer in Federal waters outside Cook Inlet. Public testimony by a vessel owner with a restricted license indicated that the use of larger dredges would allow the vessel to adequately cover its operational costs with the additional costs for an observer in statewide waters. The Council discussed the issue of increasing capacity in the fishery by this proposed action, but acknowledged that licenses already are limited by vessel length, and the two vessels impacted by this proposed action are among the smallest in the fishery. The Council acknowledged that these vessels, by their size, are precluded from fishing in inclement weather and thus are limited in their harvesting ability. The fishery currently is prosecuted in a slower manner than before 2000, due to the combination of the LLP and the harvesting cooperative in the fishery. The Council discussed the relative impacts of increasing harvesting ability on the two licences which are not part of this harvesting cooperative. Due to the small size of the vessels used by the license holders, however, this change is not expected to impact the operation of the harvesting cooperative.

Therefore, the Council concluded that while these two vessels could increase their capacity, they would not increase overall fishing effort to the extent that it would interfere with the total fleet's ability to operate at a sustainable and economically viable level. Amendment 10 would provide the two vessels with a larger share of the total catch which would offset their observer costs and enhance their economic viability.

Classification

At this time, NMFS has not determined that this proposed rule is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making that determination, NMFS will take into account the data, views, and comments received during the comment period (see **DATES**).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared an EA/RIR/IRFA for Amendment 10, which describes the management background, the purpose and need for action, the management alternatives, and the socio-economic impacts of the alternatives. It estimates the total number of small entities affected by this action, and analyzes the economic impact on those small entities as required by the Regulatory Flexibility Act. The IRFA describes the economic impacts this proposed rule, if adopted, would have on small entities. A summary of the IRFA follows.

For purposes of the IRFA, the two LLP license holders, which currently are subject to the single 6 ft (1.8 m) dredge gear restriction, are the only small entities (i.e., each having annual gross receipts of less than $3.5 million) directly regulated by the proposed rule.

The LLP impacted the two small entities that fished exclusively inside of Cook Inlet during the qualifying period by limiting the size of dredge either vessel could operate to a single 6 ft (1.8 m) dredge. The remaining seven LLP license holders may operate up to the State-authorized gear limit of two 15 ft dredges (4.5 m). The Council recommended Amendment 10 because it found that it is not economically viable for the two LLP license holders to operate outside Cook Inlet (as authorized by authority of the LLP license) with the existing 6 ft (1.8 m) dredge gear restrictions. The Council determined that, given existing observer requirements and their associated costs, the single 6 ft (1.8 m) dredge restriction created a disproportionate economic hardship when fishing in Federal waters outside Cook Inlet.

The Council considered the following four alternatives that could reduce impacts on small entities.

Alternative 1: This alternative would retain status quo and maintain the current 6 ft. (1.8 m) dredge restriction endorsement on two LLP licenses. This alternative was rejected because it would not solve the problem of disproportionate hardship being experienced by two LLP license holders that are restricted to using a single 6 ft. (1.8 m) dredge when fishing in Federal waters outside of Cook Inlet while other LLP license holders are limited to two 15 ft. (4.5 m) dredges.

Alternative 2: This alternative would modify the 6 ft. (1.8 m) dredge restriction endorsement to allow vessels with the current endorsement to fish in Federal waters outside Cook Inlet with two dredges with a combined width of no more than 16 ft. This alternative was rejected because it did not provide enough relief to the two LLP license holders currently limited to using a single 6 ft. (1.8 m) dredge in Federal waters outside of Cook Inlet. This

alternative would allow slightly more than half of the fishing capacity of other scallop fishing operations outside of Cook Inlet.

Alternative 3: This alternative is the preferred alternative. It would modify the current 6 ft. (1.8 m) dredge restriction to allow vessels with the current endorsement to fish in Federal waters outside Cook Inlet with two dredges with a combined width of no more than 20 ft (6.1 m). This alternative appeared to ideally balance the Council's original concern of limiting fishing capacity for scallops while allowing the two LLP license holders that are restricted to using a single 6 ft. (1.8 m) dredge to expand their production of scallops sufficiently to cover their costs and allow them to become competitive with other scallop fishing operations.

Alternative 4: This alternative would eliminate the current 6–ft. (1.8 m) dredge restriction endorsement on the two LLP licenses. This alternative would allow the two LLP license holders that are restricted to using a single 6 ft. (1.8 m) dredge to expand their capacity to be equal to the current limit of two 15 ft. (4.5 m) dredges. This alternative was rejected because it is unnecessarily liberal.

As proposed, Amendment 10 would change the single 6 ft (1.8 m) dredge restriction endorsement in the LLP to a restriction endorsement of two dredges with a combined width of no more than 20 feet (6.1 m). This change would allow the two LLP license holders with the current gear restriction endorsement the opportunity to fish in Federal waters, outside Cook Inlet, with larger gear. The Council also concluded that, because of changes to the fleet after the LLP was implemented, these two vessels could increase their capacity by using larger dredges without increasing fishing overall effort to the extent that it would interfere with the total fleet's ability to operate at a sustainable and economically viable level. Amendment 10 has the potential to provide these two vessels with an opportunity to capture a larger share of the total catch, thus allowing them to offset observer costs and enhance their income. Because of the maximum vessel length imposed on these vessels by the LLP license, neither operation has the potential to significantly impact the catch shares of the other operations in the fishery, so instability in the sector is not a serious concern associated with the proposed action. The most probable outcomes of implementing the preferred alternative would be some relatively modest redistribution of earnings to the two LLP license holders currently affected by the single 6 ft (1.8 m) dredge restriction.

No known Federal rules duplicate, overlap, or conflict with the proposed rule.

This proposed rule would impose no recordkeeping and reporting requirements on affected vessels.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: April 7, 2005.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

2. In § 679.4, paragraph (g)(3)(ii) is revised to read as follows:

§ 679.4 Permits.

* * * * *

(g) * * *

(3) * * *

(ii) The gear specified on a scallop license will be restricted to two dredges with a combined width of no more than 20 feet (6.1 m) in all areas if the eligible applicant was a moratorium permit holder with a Scallop Registration Area H (Cook Inlet) endorsement and did not make a legal landing of scallops caught outside Area H during the qualification period specified in paragraph (g)(2)(iii) of this section.

* * * * *

[FR Doc. 05–7448 Filed 4–12–05; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 70, No. 70
Wednesday, April 13, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

April 7, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Regulations Governing the Voluntary Grading of Shell Eggs.

OMB Control Number: 0581–0128.

Summary of Collection: The Agricultural Marketing Act of 1946 (60 Stat. 1087–1091, as amended; 7 U.S.C. 1621–1627) (AMA) directs and authorizes the Department to develop standards of quality, grades, grading programs, and services to enable a more orderly marketing of agricultural products so trading may be facilitated and so consumers may be able to obtain products graded and identified under USDA programs. The Agricultural Marketing Service (AMS) carries out regulations, which provide a voluntary program for grading shell eggs on the basis of U.S. standards, grades, and weight classes. In addition, the shell egg industry and users of the products have requested that other types of voluntary services be developed and provided under these regulations. This program is voluntary where respondents would need to request or apply for the specific service they wish.

Need and Use of the Information: Only authorized representatives of the USDA used the information collected. The information is used to administer, conduct and carry out the grading services requested by the respondents. If the information were not collected, the agency would not be able to provide the voluntary grading service authorized and requested by congress, provide the types of services requested by industry, administer the program, ensure properly grade-labeled products, calculate the cost of the service or collect for the cost furnishing service.

Description of Respondents: Business or other for profit; Federal Government; State, Local or Tribal Government.

Number of Respondents: 623.

Frequency of Responses: Reporting: On occasion; semi-annually; monthly; annually; other (daily).

Total Burden Hours: 5,630.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–7339 Filed 4–12–05; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request: Uniform Grant Application Package for Discretionary Grant Programs (Form FNS 728)

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on proposed information collections. The proposed collection is a revision of a currently approved collection.

The purpose of the Uniform Grant Application Package for Discretionary Grant Programs is to provide a standardized format for the development of all Requests for Applications released by the Food and Nutrition Service (FNS) Agency and to allow for a more expeditious OMB clearance process.

DATES: Written comments must be submitted on or before June 13, 2005.

ADDRESSES: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency?s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used: (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Lael J. Lubing, Director, Grants Management Division, U.S. Department of Agriculture, Food and Nutrition Service, 3101 Park Center Drive, Room 732, Alexandria, VA 22302.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection form and instruction should be directed to Lael J. Lubing on 703–305–2048.

SUPPLEMENTARY INFORMATION:

Title: Uniform Grant Application Package for Discretionary Grant Programs.

OMB Number: 0584–0512.

Expiration Date: May 31, 2005.

Type of Request: Revision of a currently approved collection of information.

Abstract: FNS has a number of discretionary grant programs which have increased over the last several years, resulting in an increase in the number of respondents. (Consistent with the definition in 7 CFR part 3016, the term "grant" as used in this notice includes cooperative agreements.) The authorities for these grants vary and will be cited as part of each grant application solicitation. The purpose of the revision to the currently approved collection for the Uniform Grant Application Package for Discretionary Grant Programs is to continue the authority for the established uniform grant application package and to update the number of collection hours. The uniform collection package is usable for all of FNS' discretionary grant programs to collect information from grant applicants that are needed to evaluate and rank applicants and protect the integrity of the grantee selection process. All FNS discretionary grant programs will be eligible, but not required, to use the uniform grant application package. Before soliciting applications for a discretionary grant program, FNS will decide whether the uniform grant application package will meet the needs of that grant program. If FNS decides to use the uniform grant application package, FNS will note in the grant solicitation that applicants must use the uniform grant application package and that the information collection has already been approved by OMB. If FNS decides not to use the uniform grant application package or determines that it needs grant applicants to provide additional information not contained in the uniform package, then FNS will publish a notice soliciting comments on its proposal to collect different/additional information before making the grant solicitation.

The uniform grant application package will include general information and instructions; a checklist; a requirement for the program narrative statement describing how the grant objectives will be reached; the Standard Form (SF) 424 series that requests basic information, budget information, assurances regarding Nonprocurement Debarment and Suspension, the Drug-Free Workplace rule, general assurances, a lobbying certification, and an optional survey form to ensure equal opportunity for applicants. The proposed information collection covered by this notice is related to the requirements for the program narrative statement. The requirements for the program narrative statement are based on the requirements for program narrative statements described in section 1.c(5) of the OMB Circular A–102, and will apply to all types of grantees—State and local governments, non-profit organizations, institutions of higher education, hospitals, and for-profit organizations. The information collection burden related to the SF–424 series, assurances, certification, and optional survey form for all applicants, has been separately approved by OMB. (For availability of the OMB Circular mentioned in this paragraph, please refer to 5 CFR 1310.3.)

Affected Public: State and local governments, non-profit organizations, institutions of higher education, hospitals, and for-profit organizations.

Estimated Number of Respondents: 353.

Number of responses per respondent: 1.47.

Estimated Total annual responses: 520.

Hours per response: 62.27.

Number of record keepers: 353.

Estimated Annual hours per record keepers: 62.27.

Total record keeping hours: 32,380.

Total annual reporting hours: 32,380.

Dated: April 7, 2005.

Roberto Salazar,

Administrator.

[FR Doc. 05–7453 Filed 4–12–05; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Monongahela National Forest, WV, Allegheny Wood Products Easement EIS

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA Forest Service, Monongahela National Forest intends to prepare an Environmental Impact Statement (EIS) to disclose the environmental consequences of authorizing an easement on National Forest System lands. In the EIS, the USDA Forest Service will address the potential environmental impacts of authorizing the use of an existing abandoned railroad grade to provide reasonable access to a landowner to private lands in the Blackwater Canyon area of Tucker County, West Virginia. See the **SUPPLEMENTARY INFORMATION** section for the Purpose and Need for this action.

DATES: Comments concerning the scope of the analysis must be received by May 31, 2005. The draft environmental impact statement is expected August, 2005 and the final environmental impact statement is expected November, 2005.

ADDRESSES: Send written comments to Bill Shields, NEPA Coordinator, Monogahela National Forest, 200 Sycamore Street, Elkins, West Virginia 26241. Send electronic comments to *comments-eastern-monogahela@fs.fed.fus. See* **SUPPLEMENTARY INFORMATION** section for information on how to send electronic comments.

FOR FURTHER INFORMATION CONTACT: Bill Shields, Forest NEPA Coordinator, Monongahela National Forest, USDA, Forest Service; telephone: (304) 636–1800 extension 287. *See* address above under **ADDRESSES.** Copies of the documents may be requested at the same address. Another means of obtaining information is to visit the Forest Web page at *www.fs.fed.us/r9/monongahela*—click on "Forest Planning" then scroll down to Proposed Actions, then AWP Easement EIS.

SUPPLEMENTARY INFORMATION

Purpose and Need for Action

The Alaska National Interest Lands Conservation Act (ANILCA) states that the Secretary of Agriculture "shall provide such access to non-federally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof * * *" (§ 1323) The responsibility and authority to grant access has been delegated from the Secretary to the Forest Supervisor. Allegheny Wood Products (AWP) has requested access consistent with the ANILCA and the Federal Land Policy and Management Act of 1976 (FLPMA) to manage the timber resources on their land between the Blackwater River and the railroad grade through Blackwater Canyon. Management activities on the private land would include timber stand improvement, commercial thinnings, and forest protection from insects, disease, and wildfire. There is no deeded access to the AWP property. The

land is steep, and is bounded on the south by the Blackwater River. The only reasonable access to the AWP property is via the railroad grade through the Canyon, a portion of which AWP is a half owner. The Federal government owns the other half of the grade, which is administered by the Forest Service as part of the Monongahela National Forest.

Goal XIV of the Monongahela National Forest Land and Resource Management Plan (Forest Plan) states "Permit use of National Forest land by others, under special use or lease authorities, that is compatible with National Forest goals and objectives and will contribute to the improved quality of life for local residents."

This authorization is needed to move towards goal XIV of the Forest Plan.

Proposed Action

The Forest Service is proposing to authorize an easement for the railroad grade in Blackwater Canyon to Alleghany Wood Products for the management of their timbered property. This authorization would include the need for additional improvement of sections of the road to allow motorized vehicle use.

Responsible Official

Clyde Thompson, Forest Supervisor; Monongahela National Forest; 200 Sycamore Street; Elkins, West Virginia 26241.

Nature of Decision To Be Made

The decision to be made is how to provide access for Alleghany Wood Products to their property adjacent to National Forest System lands. While the No Action alternative will be considered in the analysis, selection of this alternative is precluded by the requirements of the ANILCA.

Scoping Process

Scoping will be initiated by the posting of this notice in the **Federal Register**. Scoping letters will be mailed to interested parties requesting input from members of the public. Upon completion of the Draft Environmental Impact Statement (DEIS), comments will be solicited through a Notice of Availability in the **Federal Register** and a mailing of the DEIS to those members of the public who have responded to our scoping efforts and other interested parties.

Preliminary Issues

There are several historic properties along the railroad grade which are eligible for inclusion in the National Register of Historic Places. Repeated use of this road by motorized equipment has the potential to damage to these historic properties. In addition, the railroad grade may be eligible for inclusion in the National Historic Register.

Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact statement. In November, 2002 a scoping letter was sent to members of the public regarding this project. At that point in time, it was believed that an Environmental Assessment may be appropriate. As a result of scoping and further analysis, it has been determined that an Environmental Impact Statement is more appropriate due to the presence of, and potential impacts to, heritage resources.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CRF 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: April 4, 2005.

Michele H. Jones,

Acting Forest Supervisor.

[FR Doc. 05–7363 Filed 4–12–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Ochoco National Forest, Lookout Mountain Ranger District; Oregon; Maury Mountains Allotment Management Plan EIS

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Ochoco National Forest is preparing an environmental impact statement (EIS) to analyze the effects of changing grazing management in six allotments in the Maury Mountains. These six allotments are: Double Cabin, East Maury, West Maury, Klootchman, Sherwood, and Shotgun. The proposed action will alter livestock management to improve stream shade, bank stability, and livestock distribution. These actions are needed to promote the recovery of riparian vegetation which will provide stream shade and contribute to stream bank stability.

DATES: Comments concerning the scope of the analysis must be received by May 1, 2005. The draft environmental impact statement is expected to be completed and available for public comment in August 2005. The final environmental impact statement is expected to be completed in December 2005.

ADDRESSES: Send written comments to Art Currier, District Ranger, Lookout Mountain District, Ochoco National Forest, 3160 NE Third Street, Prineville,

Oregon 97754. Alternatively, electronic comments can be sent to *comments-pacificnorthwest-ochoco@fs.fed.us*. Electronic comments must be submitted as part of the actual e-mail message, or as an attachment in plain text (.txt), Microsoft Word (.doc), rich text format (.rtf), or portable document format (.pdf).

FOR FURTHER INFORMATION CONTACT: Kevin Keown, Project Leader, at the address listed above.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of this proposal is to reauthorize livestock consistent with Forest Plan standards and guidelines. There is a need to change livestock management to move towards desired conditions for stream shade and bank stability. Based on surveys many of the streams do not meet the desired condition for shade or bank stability. Livestock grazing is one of the factors that contribute to low levels of shade and unstable stream banks.

Proposed Action

The Lookout Mountain Ranger District is proposing to reauthorize livestock grazing on the Double Cabin, East Maury, Klootchman, Sherwood, and Shotgun allotments. The 2-pasture West Maury allotment would be eliminated; the Gibson pasture would be added to the Sherwood allotment and the Hamer pasture would be added to the Klootchman allotment. The reauthorized grazing permits will contain terms and conditions to better distribute livestock and allow recovery of riparian vegetation. The grazing systems would change for most of these allotments. The number of animal unit months (AUMs) would be reduced on the Double Cabin, Klootchman, and Shotgun allotments. The season of use would be adjusted and cattle grazing would not occur before May 1 or be allowed after August 15 each year. This early on/early off schedule would reduce livestock grazing in riparian areas. New structural range improvements including fencing and spring developments would be authorized. Several existing water troughs would be relocated outside of riparian areas. These activities are designed to improve livestock distribution.

Possible Alternatives

At this time, the Forest Service intends to analyze a minimum of three alternatives. The no action alternative will analyze the effects of no grazing. The proposed action will analyze the effects of continued livestock grazing with a modified season of use, change in grazing systems, new structural range improvements, and relocating troughs outside riparian areas. The third alternative being considered at this time would analyze the effects of continued livestock grazing under the same terms and conditions as the existing term grazing permits.

Responsible Official

The Responsible Official is Art Currier, District Ranger, Lookout Mountain Ranger District, at the address listed above.

Nature of Decision To Be Made

The District Ranger will decide whether to reauthorize livestock grazing on the Double Cabin, East Maury, Klootchman, Sherwood, and Shotgun allotments. If livestock grazing is authorized, the District Ranger will decide what terms and conditions are needed to move the existing condition of resources affected by livestock grazing toward the desired condition described in the Ochoco National Forest Land and Resource Management Plan.

Scoping Process

Scoping for this proposal began on March 14, 2005, when letters were mailed to interested and potentially affected persons and organizations. Scoping letters were also sent to state and local government agencies, as well as Tribal Governments.

Comment Requested

This notice of intent continues the scoping process which guides the development of the environmental impact statement. The Forest Service is seeking information and comments from other agencies, organizations, Native Americans, and individuals who may be interested in or affected by the Proposed Action. Comments will be used to determine key issues and develop alternatives to the proposed action. Comments would be most helpful if they are specific to the proposed changes; provide new information specific to the proposed action; identify a different way to meet the purpose and need (*e.g.*, a new alternative); or identify possible mitigation measures.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The draft EIS will be filed with the Environmental Protection Agency (EPA) and available for public review by August 2005. The comment period on the draft EIS will begin when the EPA publishes the notice in the **Federal Register**. The comment period will last for 45 days.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statements or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

Dated: April 1, 2005.

Arthur J. Currier,

District Ranger.

[FR Doc. 05–7395 Filed 4–12–05; 8:45 am]

BILLING CODE 3410–11–M

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Courthouse Access Advisory Committee; Meeting

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) has established an advisory committee to advise the Board on issues related to the accessibility of courthouses covered by the Americans with Disabilities Act of 1990 and the Architectural Barriers Act of 1968. The Courthouse Access Advisory Committee (Committee) includes organizations with an interest in courthouse accessibility. This notice announces the date, times and location of the next Committee meeting, which will be open to the public.

DATES: The meeting of the Committee is scheduled for May 5, 2005 (beginning at 9 a.m. and ending at 5 p.m.) and May 6, 2005 (beginning at 9 a.m. and ending at 3 p.m.).

ADDRESSES: The meeting will be held at the Education and Training Division, The District of Columbia Courts, The Offices at Gallery Place, 616 H Street, NW., Sixth Floor, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Elizabeth Stewart, Office of General Counsel, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., Suite 1000, Washington, DC 20004–1111. Telephone number (202) 272–0042 (Voice); (202) 272–0082 (TTY). E-mail *stewart@access-board.gov*. This document is available in alternate formats (cassette tape, Braille, large print, or computer disk). This document is also available on the Board's Internet site (*http://www.access-board.gov/caac/meeting.htm*).

SUPPLEMENTARY INFORMATION: In 2004, as part of the outreach efforts on courthouse accessibility, the Access Board established a Federal advisory committee to advise the Access Board on issues related to the accessibility of courthouses, particularly courtrooms, including best practices, design solutions, promotion of accessible features, educational opportunities, and the gathering of information on existing barriers, practices, recommendations, and guidelines. On October 12, 2004, the Access Board published a notice appointing 31 members to the Courthouse Access Advisory Committee. 69 FR 60608 (October 12, 2004). Members of the Committee include designers and architects, disability groups, members of the judiciary, court administrators, representatives of the codes community and standard-setting entities, government agencies, and others with an interest in the issues to be explored. The Committee held its initial meeting on November 4 and 5, 2004. Members discussed the current requirements for accessibility, committee goals and objectives and the establishment of subcommittees. The second meeting of the Committee was held in February, 2005. The Committee toured two courthouses and established three subcommittees: Education, Courtrooms and Courthouses (areas unique to courthouses other than courtrooms). Minutes of the meetings may be found on the Access Board Web site at *http://www.access-board.gov*. At the May meeting of the Committee, members will tour a courthouse and continue to address issues both as a full Committee and in subcommittees.

Committee meetings are open to the public and interested persons can attend the meetings and communicate their views. Members of the public will have an opportunity to address the Committee on issues of interest to them and the Committee during public comment periods scheduled on each day of the meeting. Members of groups or individuals who are not members of the Committee are invited to participate on the subcommittees. The Access Board believes that participation of this kind can be very valuable for the advisory committee process.

The meeting will be held at a site accessible to individuals with disabilities. Real-time captioning will be provided. Individuals who require sign language interpreters should contact Elizabeth Stewart by April 25, 2005. Notices of future meetings will be published in the **Federal Register**.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 05–7402 Filed 4–12–05; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–351–605)

Revocation of Antidumping Duty Order: Frozen Concentrated Orange Juice from Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: Pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), the United States International Trade Commission (the ITC) determined that revocation of the antidumping order on frozen concentrated orange juice (FCOJ) from Brazil would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time (70 FR 15884 (Mar. 29, 2005)). Therefore, pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(1)(iii), the Department of Commerce (the Department) is revoking the antidumping order on FCOJ from Brazil. Pursuant to section 751(c)(6)(A)(iv) of the Act and 19 CFR 351.222(i)(2)(i), the effective date of revocation of the antidumping duty order is August 5, 2004.

EFFECTIVE DATE: August 5, 2004.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or Jill Pollack, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–3874 or (202) 482–4593, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 2004, the Department initiated (69 FR 17129), and the ITC instituted (69 FR 17230), a sunset review of the antidumping duty order on FCOJ from Brazil pursuant to section 751(c) of the Act. As a result of this review, the Department found that revocation of the antidumping duty order on FCOJ from Brazil would likely lead to continuation or recurrence of dumping, and notified the ITC of the magnitude of the margin likely to prevail were the antidumping duty order revoked. *See Frozen Concentrated Orange Juice from Brazil; Final Results of the Expedited Sunset Review of the Antidumping Duty Order*, 69 FR 54117 (Sept. 7, 2004).

On March 29, 2005, the ITC determined, pursuant to section 751(c) of the Act, that revocation of the

antidumping duty order on FCOJ from Brazil would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Frozen Concentrated Orange Juice from Brazil*, 70 FR 15884 (Mar. 29, 2005), and USITC Publication 3760, March 2005.

Scope of the Order

The merchandise covered by this order is FCOJ from Brazil, and is currently classifiable under item 2009.11.00 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS item number is provided for convenience and customs purposes. The Department's written description of the scope of the order is dispositive.

Determination

As a result of the determination by the ITC that revocation of the antidumping duty order would not be likely to lead to continuation or recurrence of material injury to an industry in the United States, the Department, pursuant to section 751(d)(2) of the Act, is revoking the antidumping duty order on FCOJ from Brazil.

Pursuant to section 751(c)(6)(A)(iv) of the Act and 19 CFR 351.222(i)(2)(i), revocation is effective August 5, 2004, the fifth anniversary of the date of the determination to continue the order. The Department will instruct Customs and Border Protection (CBP) to discontinue the suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after August 5, 2004. The Department will instruct CBP to continue to suspend liquidation of entries of the subject merchandise entered or withdrawn from warehouse, for consumption prior to August 5, 2004, and will complete any pending administrative reviews of this order and will conduct administrative reviews of these entries in response to appropriately filed requests for review.

The five-year ("sunset") review and notice are in accordance with sections 751(c) and 777(i)(1) of the Act.

Dated: April 5, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–1710 Filed 4–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–351–605

Notice of Rescission of Changed Circumstances Antidumping Duty Administrative Review: Frozen Concentrated Orange Juice from Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: April 13, 2005.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or Jill Pollack, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–3874 and (202) 482–4593, respectively.

SUPPLEMENTARY INFORMATION:

Background:

On May 5, 1987, the Department published in the **Federal Register** an antidumping duty order on frozen concentrated orange juice (FCOJ) from Brazil covering all Brazilian producers except Sucocitrico Cultrale, S.A. *See Antidumping Duty Order of Sales at Less than Fair Value: Frozen Concentrated Orange Juice from Brazil*, 52 FR 16426 (May 5, 1987).

On January 19, 2005, the Department initiated a changed circumstances administrative review of the antidumping duty order on FCOJ from Brazil at the request of Louis Dreyfus Citrus Inc., (Louis Dreyfus). *See Frozen Concentrated Orange Juice from Brazil; Initiation of Changed Circumstances Antidumping Duty Administrative Review*, 70 FR 3904 (Jan 27, 2005). On March 18, 2005, Louis Dreyfus withdrew its request for a changed circumstances review.

Rescission of Changed Circumstances Review

Section 351.213(d)(1) of the Department's regulations provides that the Department will rescind an administrative review if a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. (19 CFR 351.213(d)(1) (2004)) The Department's rules regarding review withdrawals do not specifically reference changed circumstances administrative reviews. In this case, Louis Dreyfus requested withdrawal of its changed circumstances review within ninety days of the review being initiated, the time period the Department generally considers reasonable for requesting the withdrawal of administrative reviews. Therefore, the Department has accepted Louis Dreyfus' withdrawal request in this case as timely.

The Department is now rescinding this changed circumstances antidumping duty administrative review. U.S. Customs and Border Protection will continue to suspend liquidation, as appropriate, of entries of subject merchandise at the appropriate cash deposit rate for entries of FCOJ from Brazil.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulation and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: April 5, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–1711 Filed 4–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–806]

Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review: Certain Hot–Rolled Carbon Steel Flat Products from Romania

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: April 13, 2005.

FOR FURTHER INFORMATION CONTACT: David Layton or Paul Stolz, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0371 and (202) 482–4474, respectively.

SUPPLEMENTARY INFORMATION: On December 7, 2005, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of the administrative review of

the antidumping duty order on certain hot–rolled carbon steel flat products from Romania. *See Certain Hot–Rolled Carbon Steel Flat Products from Romania: Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 70644 (December 7, 2004). Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), the final results are currently due on April 6, 2005.

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Act provides that the Department may extend the deadline for completion of the final results of an administrative review if it determines that it is not practicable to complete the final results within the statutory time limit of 120 days from the date on which the preliminary results were published. The Department has determined that due to the complexity of the issues arising from Romania's graduation to market economy status during the review period, it is not practicable to complete this review within the time limits mandated by section 751(a)(3)(A) of the Act and section 19 CFR 351.213(h)(1) of the Department's regulations. Therefore, the Department is extending the time limit for the completion of these final results by 30 days. Accordingly, the final results of this review will now be due no later than May 6, 2005.

This notice is published in accordance with section 751(a)(3)(A) of the Act and section 19 CFR 351.213(h)(2) of the Department's regulations.

Dated: April 5, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E5–1709 Filed 4–12–02; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–824]

Silicomanganese From Brazil: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 8, 2004, the Department of Commerce published the preliminary results of the administrative review of the antidumping duty order on silicomanganese from Brazil. The review covers exports of this merchandise to the United States by the collapsed parties, Rio Doce Manganes S.A. (RDM), Companhia Paulista de Ferro-Ligas (CPFL), and Urucum Mineraç o S.A. (Urucum) (collectively, RDM/CPFL), for the period December 1, 2002, through November 30, 2003. We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received, we did not revise our calculations for these final results. The final weighted-average margin is listed below in the "Final Results of Review" section of this notice.

EFFECTIVE DATE: April 13, 2005.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov at (202) 482–0665 or Minoo Hatten at (202) 482–1690, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 2004, we published the preliminary results of review (see *Silicomanganese from Brazil: Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 71011, (December 8, 2004) (*Preliminary Results*)), and invited parties to comment. On January 24, 2004, RDM/CPFL filed case briefs. Eramet Marietta (the petitioner) did not file case or rebuttal briefs.

The Department of Commerce (the Department) has conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of Order

The merchandise covered by this order is silicomanganese. Silicomanganese, which is sometimes called ferrosilicon manganese, is a ferroalloy composed principally of manganese, silicon and iron, and normally contains much smaller proportions of minor elements, such as carbon, phosphorous and sulfur. Silicomanganese generally contains by weight not less than 4 percent iron, more than 30 percent manganese, more than 8 percent silicon, and not more than 3 percent phosphorous. All compositions, forms, and sizes of silicomanganese are included within the scope of this review, including silicomanganese slag, fines, and briquettes. Silicomanganese is used primarily in steel production as a source of both silicon and manganese.

Silicomanganese is currently classifiable under subheading 7202.30.0000 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Some silicomanganese may also currently be classifiable under HTSUS subheading 7202.99.5040. This scope covers all silicomanganese, regardless of its tariff classification.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope remains dispositive.

Analysis of Comments Received

All issues raised in RDM/CPFL's case brief in the context of this administrative review are addressed in the "Issues and Decision Memorandum" from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, dated April 7, 2005 (Decision Memorandum), which is hereby adopted by this notice. Attached to this notice as an appendix is a list of the issues that RDM/CPFL has raised and to which we have responded in the Decision Memorandum. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, Room B–099 of the main Department of Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Sales Below Cost in the Home Market

As discussed in detail in the preliminary results, the Department disregarded certain home-market below-cost sales that failed the cost test. See *Preliminary Results*, 69 FR 71014. The Department also disregarded below-cost home-market sales for these final results.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we did not make changes in the margin calculation for the final results. See also "Final Results Analysis Memorandum of RDM/CPFL" from Dmitry Vladimirov to the File, dated April 7, 2005.

Final Results of Review

As a result of our review, we determined that a margin of 0.00 percent exists for RDM/CPFL for the period December 1, 2002, through November 30, 2003.

Duty Assessment and Cash-Deposit Requirements

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated an importer-specific assessment rate. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review. The following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of silicomanganese from Brazil entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided by section 751(a)(2)(C) of the Act: (1) The cash-deposit rate for RDM/CPFL is 0.00 percent; (2) for merchandise exported by producers or exporters that were previously reviewed or investigated, the cash deposit will continue to be the most recent rate published in the final determination or final results for which the producer or exporter received an individual rate; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the subject merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review, the cash-deposit rate shall be 17.60 percent, the all-others rate established in the LTFV investigation. See *Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese from Brazil,* 59 FR 55432, (November 7, 1994). These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Notification of Interested Parties

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the 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 notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO as explained in the administrative protective order itself. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

These final results of administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 7, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

Appendix—Issues in the Decision Memorandum

Comment 1. Affiliation with Certain Home-Market Customers
Comment 2. Purchases of Raw Materials From Affiliates' Subsidiaries
Comment 3. Presumed Tax Credit
Comment 4. Comparable Merchandise
Comment 5. Inventory Carrying Cost

[FR Doc. E5–1741 Filed 4–12–05; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–830]

Stainless Steel Bar From Germany: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 7, 2004, the Department of Commerce published the preliminary results of the administrative review of the antidumping duty order on stainless steel bar from Germany. The period of review is March 1, 2003, through February 29, 2004. Based on our analysis of the comments received and an examination of our calculations, we have made certain changes for the final results. Consequently, the final results differ from the preliminary results. The final weighted-average dumping margin is listed below in the section entitled "Final Results of the Review."

DATES: *Effective Date:* April 13, 2005.

FOR FURTHER INFORMATION CONTACT: Andrew Smith, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1276.

SUPPLEMENTARY INFORMATION:

Background

Since the December 7, 2004, publication of the preliminary results in this review (*see Stainless Steel Bar from Germany: Preliminary Results of Antidumping Duty Administrative Review,* 69 FR 70651 (December 7, 2004) ("*Preliminary Results*")), the following events have occurred:

We invited parties to comment on the *Preliminary Results* of the review. On January 6, 2005, the respondent BGH Edelstahl Freital GmbH, BGH Edelstahl Lippendorf GmbH, BGH Edelstahl Lugau GmbH, and BGH Edelstahl Siegen GmbH (collectively, "BGH") filed a case brief. The petitioners in this review (Carpenter Technology Corp., Crucible Specialty Metals Division of Crucible Materials Corp., Electralloy Corp., Slater Steels Corp., Empire Specialty Steel and the United Steelworkers of America (AFL-CIO/CLC)) did not file a case brief or a rebuttal brief in this case. On January 6, 2005, BGH requested a hearing by letter. On January 13, 2005, BGH withdrew its January 6, 2005, request for a hearing. Since BGH was the only party to request a hearing, no public hearing was held.

Scope of the Order

For the purposes of the order, the term "stainless steel bar" includes articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other convex polygons. Stainless steel bar includes cold-finished stainless steel bars that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (*i.e.*, cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), products that have been cut from stainless steel sheet, strip or plate, wire (*i.e.*, cold-formed products in coils, of any uniform solid cross section along

their whole length, which do not conform to the definition of flat-rolled products), angles, shapes and sections.

The stainless steel bar subject to this review is currently classifiable under subheadings 7222.11.00.05, 7222.11.00.50, 7222.19.00.05, 7222.19.00.50, 7222.20.00.05, 7222.20.00.45, 7222.20.00.75, and 7222.30.00.00 of the *Harmonized Tariff Schedule of the United States* ("*HTSUS*"). Although the *HTSUS* subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Period of Review

The period of review is March 1, 2003, through February 29, 2004.

Analysis of Comments Received

All issues raised in the case brief filed by parties to this review are addressed in the "Issues and Decision Memorandum for 2003–2004 Administrative Review of Stainless Steel Bar from Germany" from Barbara E. Tillman, Acting Deputy Assistant Secretary, Import Administration, to Joseph A. Spetrini, Acting Assistant Secretary for Operations, dated April 6, 2005 ("*Decision Memorandum*"), which is hereby adopted by this notice. Attached to this notice as an appendix is a list of the issues that parties have raised and to which we have responded in the *Decision Memorandum*. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Department of Commerce's ("the Department") Central Records Unit, located in Room B–099 of the main Department building ("CRU"). In addition, a complete version of the *Decision Memorandum* can be accessed directly on the Web at http://ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the *Decision Memorandum* are identical in content.

Fair Value Comparisons

To determine whether sales of stainless steel bar by BGH to the United States were made at less than normal value ("NV"), we compared export price ("EP") to NV. Our calculations followed the methodologies described in the *Preliminary Results*, except as noted below and in the final results calculation memorandum cited below, which is on file in the CRU.

Export Price

We calculated EP in accordance with section 772(a) of the Tariff Act of 1930, as amended ("the Act"), because the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter/producer outside the United States and because constructed export price methodology was not otherwise warranted. We calculated EP based on the same general methodology described in the *Preliminary Results*.

Normal Value

Except as noted below, we used the same methodology as that described in the *Preliminary Results* to determine the cost of production and the NV. As discussed in the *Decision Memorandum*, we used BGH's reported interest expense ratio in these final calculations.

Changes From the Preliminary Results

Based on our review of the comments received, we have made certain changes to the calculations for the final results. Specifically, we re-calculated the interest expense ratio for the final results. These changes are discussed in the *Decision Memorandum* and in the final results calculation memorandum. *See* "Final Results Calculation Memorandum for the BGH Group of Companies," dated April 6, 2005, which is on file in the CRU.

Final Results of the Review

We determine that the following percentage margin exists for the period March 1, 2003, through February 29, 2004:

Exporter/ manufacturer	Weighted-average margin percentage
BGH	0.01

Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated exporter/importer (or customer)-specific assessment rates for merchandise subject to this review. To determine whether the duty assessment rates were *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to that importer (or customer) and dividing this amount by the total value of the sales to that importer (or customer). Where an importer (or customer)-specific *ad valorem* rate was greater than *de minimis*, we calculated a per-unit assessment rate by aggregating the dumping margins calculated for all U.S. sales to that importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer).

The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review.

Cash Deposit Rates

The following antidumping duty deposits will be required on all shipments of stainless steel bar from Germany entered, or withdrawn from warehouse, for consumption, effective on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed company will be the rate listed above (except no cash deposit will be required if a company's weighted-average margin is *de minimis*, *i.e.*, less than 0.5 percent); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, the previous review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews, the cash deposit rate will be 16.96 percent, the "all others" rate established in *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany*, 67 FR 3159 (January 23, 2002) and *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Bar from Germany*, 67 FR 10382 (March 7, 2002).

These cash deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) 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 doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to Administrative Protective Order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing these results and this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 6, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

Appendix I

List of Comments in the Issues and Decision Memorandum

Comment 1: Interest Expense Ratio
Comment 2: Home Market Level of Trade

[FR Doc. E5–1713 Filed 4–12–05; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Notice of Amended Final Results Pursuant to Final Court Decision

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: On January 21, 2005, in *Luoyang Bearing Factory v. United States*, Slip Op. 05–3, the Court of International Trade affirmed the Department of Commerce's *Final Results of Redetermination Pursuant to Remand*, dated September 30, 2004, and entered a judgment order. This litigation related to the Department of Commerce's review of the antidumping order on tapered roller bearings and parts thereof, finished and unfinished, from the People's Republic of China, covering the period June 1, 1998, through May 31, 1999. As no further appeals have been filed and there is now a final and conclusive court decision in this action, we are amending the final results of review in this proceeding and we will instruct U.S. Customs and Border Protection to liquidate entries subject to this review.

EFFECTIVE DATE: April 13, 2005.

FOR FURTHER INFORMATION CONTACT: Andrew Smith AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1276.

SUPPLEMENTARY INFORMATION:

Background

Following publication of the *TRBs XII Final Results*[1], the Timken Company, the petitioner in this case, and the respondents, Luoyang Bearing Corporation ("Luoyang Bearing"), Zhejiang Machinery Import and Export Corporation ("ZMC"), China National Machinery I/E Corporation ("CMC"), and Wafangdian Bearing Factory ("Wafangdian") ("respondents"), filed a lawsuit with the Court of International Trade ("CIT") challenging the Department of Commerce's ("Department") findings in the *TRBs XII Final Results*. In *Luoyang Bearing Corp. (Group), Zhejiang Machinery Import & Export Corp., China National Machinery Import & Export Corporation, and Wafangdian Bearing Company, Ltd. v. United States*, Slip Op. 04–53 (CIT 2004) ("*Luoyang Bearing*"), the CIT instructed the Department to (1) further explain why the surrogate values it chose for wooden cases and the steel used to produce tapered roller bearings for Wafangdian constitute the "best available information," and address the aberrational data referenced by the respondents; and (2) conduct the "separate rates" analysis with respect to Premier Bearing & Equipment Limited ("Premier") and apply the People's Republic of China ("PRC")-wide rate to all of Premier's United States sales if it was determined that Premier is not independent of government control.

The Department complied with the CIT's remand instructions and issued its final results of redetermination pursuant to remand on September 30, 2004. *See Final Results of Redetermination Pursuant to Remand* ("*Remand Results*"). In its *Remand Results*, the Department revised the surrogate value used to value steel inputs used in the production of rollers by excluding aberrational data as well as data that the Department had reason to believe or suspect were distorted. The Department also corrected a clerical error in the programming used to calculate the margin for ZMC. As a result of the *Remand Results*, the antidumping duty rate for Luoyang was decreased from 4.37 to 3.85 percent. The antidumping duty rate for ZMC was decreased from 7.37 to 0.00. The antidumping duty rate for CMC was decreased from 0.82 to 0.78 percent. The antidumping duty rate for Wafangdian and the PRC–wide rate were unchanged from the *TRBs XII Final Results*.

On January 21, 2005, the CIT affirmed the Department's findings in the *Remand Results*. Specifically, the CIT upheld the Department's explanation of what constitutes the "best available information" with regard to the surrogate values the Department chose for wooden cases and for the steel used to produce rollers; the Department's application of the separate rates test; the Department's decision to not revoke the antidumping order for ZMC; and, the Department's practice of using other producers' factors data to calculate Premier's normal value. *See Luoyang Bearing Factory v. United States*, Slip Op. 05–3 (CIT January 21, 2005).

On February 16, 2005, consistent with the decision of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Timken Co. v. United States*, 893 F. 2d 337 (Fed. Cir. 1990) ("*Timken*"), the Department notified the public that the CIT's decision in *Luoyang Bearing* was "not in harmony" with the *TRBs XII Final Results*. *See Notice of Court Decision and Suspension of Liquidation: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 70 FR 7925 (February 16, 2005) ("*Timken Notice*"). No party appealed the CIT's decision. As there is now a final and conclusive court decision in this action, we are amending our final results of review and we will instruct the U.S. Customs and Border Protection ("CBP") to liquidate entries subject to this review.

Amendment to the Final Results

Pursuant to section 516A(e) of the Tariff Act of 1930, as amended ("the Act"), because no further appeals have been filed and there is now a final and

[1] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 FR 1953 (January 10, 2001) and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Amended Final Results of 1998-1999 Administrative Review and Determination To Revoke Order in Part*, 66 FR 11562 (February 26, 2001) (collectively, *"TRBs XII Final Results"*).

conclusive decision in the court proceeding, we are amending the final results of administrative review of the antidumping order on tapered roller bearings and parts thereof, finished and unfinished, from the PRC for the period June 1, 1998, through May 31, 1999. The revised weight–averaged dumping margins are as follows:

Company	Margin (percent)
ZHEJIANG MACHINERY IMPORT AND EXPORT CORP. ...	0.00
LUOYANG BEARING CORPORATION	3.85
CHINA NATIONAL MACHINERY I/E CORP.	0.78
PREMIER BEARING AND EQUIPMENT, LTD	7.36
WAFANGDIAN BEARING FACTORY	0.00

The Department will issue appraisement instructions directly to the CBP. The Department will instruct CBP to liquidate relevant entries covering the subject merchandise effective the date of publication of this notice.

This notice is issued and published in accordance with section 751(a)(1) of the Act.

Dated: April 7, 2005.

Joesph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–1740 Filed 4–12–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. 2005–T–060]

Notice of Unavailability of the Trademark Trial and Appeal Board's Electronic System for Trademark Trials and Appeals (ESTTA)

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of ESTTA unavailability.

SUMMARY: Notice is hereby given that ESTTA will be unavailable during certain time periods during the relocation of the United States Patent and Trademark Office data center to a site in Alexandria, Virginia.

DATES: The ESTTA unavailability dates are:

(1) From 6 p.m., Friday, April 29, 2005 until 5:30 a.m., Monday, May 2, 2005;

(2) from 6 p.m., Friday, May 6, 2005 until 5:30 a.m., Monday, May 9, 2005;

(3) from 6 p.m., Friday, May 13, 2005 until 5:30 a.m., Monday, May 16, 2005; and

(4) from 6 p.m., Friday, May 27, 2005 until 5:30 a.m., Tuesday, May 31, 2005.

SUPPLEMENTARY INFORMATION: The United States Patent and Trademark Office data center is moving to a new location in Alexandria, Virginia. It is expected that this move will commence on or about April 29, 2005, and will be completed on or about May 31, 2005. Due to the relocation of the data center, ESTTA will be unavailable during certain time periods. During the periods of ESTTA unavailability, oppositions to Extensions of Protection filed pursuant to Section 66 of the Trademark Act can only be filed in paper. Therefore, Patent and Trademark Rule 2.101(b)(2) (37 CFR § 2.101(b)(2)), which requires that an opposition to an application based on Section 66(a) be filed through ESTTA, is waived during the periods of ESTTA unavailability. Paper filings of oppositions to Extensions of Protection otherwise will not be accepted.

Paper filings should be directed to: The Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313–1451.

In addition, to insure that the Board can timely notify the International Bureau of the World Intellectual Property Organization of the provisional refusal based on the opposition, a copy of the opposition should be faxed to the Board at (571) 273–0059.

FOR FURTHER INFORMATION CONTACT: Ms. Bonita Royall, by telephone at (571) 272–4302, or by facsimile to (571) 273–0059, marked to the attention of Bonita Royall.

Dated: April 7, 2005.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 05–7433 Filed 4–12–05; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Advisory Committee Meeting

AGENCY: Department of Defense, DoD.

ACTION: Notice of advisory committee meeting; Defense Business Board.

SUMMARY: The Defense Business Board (DBB) will meet in open session on Friday, May 6, 2005, at the Pentagon, Washington, DC from 1015 until 1130. The mission of the DBB is to advise the Senior Executive Council (SEC) and the Secretary of Defense on effective strategies for implementation of best business practices of interest to the Department of Defense. At this meeting, the Board's Management and Human Resources related task groups will deliberate on their findings and recommendations related to tasks assigned earlier this year by the Under Secretary (Comptroller) and the Deputy Secretary.

DATES: Friday, May 6, 2005, 1015 to 1130 hrs.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to attend the meeting must contact the Defense Business Board no later than Friday, April 29th for further information about admission as seating is limited. Additionally, those who wish to make oral comments or deliver written comments should also request to be scheduled, and submit a written text of the comments by Friday, April 29th to allow time for distribution to the Board members prior to the meeting. Individual oral comments will be limited to five minutes, with the total oral comment period not exceeding thirty-minutes.

The DBB may be contacted at: Defense Business Board, 1100 Defense Pentagon, Room 2E314, Washington, DC 20301–1100, via e-mail at *stephan.smith@osd.mil*, or via phone at (703) 614–7085.

Dated: April 7, 2005.

Jeanette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–7362 Filed 4–12–05; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before May 13, 2005.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of

Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: April 8, 2005.

Angela C. Arrington,

Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.

Office of the Chief Financial Officer

Type of Review: Extension.

Title: Generic Application Package for Discretionary Grant Programs.

Frequency: Annually.

Affected Public: Individuals or household; Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 12,392.

Burden Hours: 271,274.

Abstract: This is a generic application package using ED standard forms and instructions, OMB Standard forms and Instructions and EDGAR and statutory criteria. The purpose is to provide a common and easily recognizable format for applicants when applying under discretionary grant programs.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2665. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address OCIO_RIMG@ed.gov or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Sheila Carey at *Sheila.Carey@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 05–7419 Filed 4–12–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA Nos. 84.007, 84.032, 84.033, 84.038, 84.063, 84.069, and 84.268]

Student Assistance General Provisions, Federal Supplemental Educational Opportunity Grant, Federal Family Education Loan, Federal Work-Study, Federal Perkins Loan, Federal Pell Grant, Leveraging Educational Assistance Partnership, and William D. Ford Federal Direct Loan Programs

ACTION: Notice of deadline dates for receipt of applications, reports, and other records for the 2004–2005 award year.

SUMMARY: The Secretary announces deadline dates for the receipt of documents and other information from institutions and applicants for the Federal student aid programs authorized under Title IV of the Higher Education Act of 1965, as amended, for the 2004–2005 award year. The Federal student aid programs include the Federal Perkins Loan, Federal Work-Study, Federal Supplemental Educational Opportunity Grant, Federal Family Education Loan, William D. Ford Federal Direct Loan, Federal Pell Grant, and Leveraging Educational Assistance Partnership programs.

These programs, administered by the U.S. Department of Education (Department), provide financial assistance to students attending eligible postsecondary educational institutions to help them pay their educational costs.

DATES: *Deadline and Submission Dates: See* Tables A and B at the end of this notice.

Table A—Deadline Dates for Application Processing and Receipt of Student Aid Reports (SARs) or Institutional Student Information Records (ISIRs) by Institutions

Table A provides deadline dates for application processing, including corrections and submission of signatures, submission of verification documents and, for purposes of the Federal Pell Grant Program, receipt by institutions of SARs or ISIRs. We simplified the deadline dates in Table A by using only three dates for the 2004–2005 award year. The single date for the submission of a Free Application for Federal Student Aid (FAFSA) is June 30, 2005, regardless of the method that the applicant uses to submit the FAFSA. September 15, 2005 is the deadline date for the submission and receipt of corrections, changes of addresses or schools, or requests for a duplicate SAR. September 23, 2005 is the deadline date for the submission and receipt of all other documents and materials that are specified in Table A.

Table B—Federal Pell Grant Program Submission Dates for Disbursement Information by Institutions

Table B provides the earliest submission and deadline dates for institutions to submit Federal Pell Grant disbursement records to the Department's Common Origination and Disbursement (COD) System.

In general, an institution must submit Federal Pell Grant disbursement records no later than 30 days after making a Federal Pell Grant disbursement or becoming aware of the need to adjust a student's previously reported Federal Pell Grant disbursement. In accordance with the regulations at 34 CFR 668.164, we consider that Federal Pell Grant funds are disbursed on the earlier of the date that the institution: (a) Credits those funds to a student's account in the institution's general ledger or any subledger of the general ledger, or (b) pays those funds to a student directly. We consider that Federal Pell Grant funds are disbursed even if an institution uses its own funds in

advance of receiving program funds from the Department. An institution's failure to submit disbursement records within the required 30-day timeframe may result in an audit or program review finding. In addition, the Secretary may initiate an adverse action, such as a fine or other penalty for such failure.

Other Sources for Detailed Information

We publish a detailed discussion of the Federal student aid application process in the following publications:

- *2004–2005 Student Guide.*
- *Funding Your Education.*
- *2004–2005 High School Counselor's Handbook.*
- *A Guide to 2004–2005 SARs and ISIRs.*
- *2004–2005 Federal Student Aid Handbook.*

Additional information on the institutional reporting requirements for the Federal Pell Grant Program is contained in the 2004–2005 *Common Origination and Disbursement (COD) Technical Reference*, which is available at the Information for Financial Aid Professionals Web site at: *http://www.ifap.ed.gov.*

Applicable Regulations: The following regulations apply: (1) Student Assistance General Provisions, 34 CFR part 668 and (2) Federal Pell Grant Program, 34 CFR part 690.

FOR FURTHER INFORMATION CONTACT: Harold McCullough, U.S. Department of Education, Federal Student Aid, 830 First Street, NE., Union Center Plaza, room 113E1, Washington, DC 20202–5345. Telephone: (202) 377–4030.

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 under **FOR FURTHER INFORMATION CONTACT.**

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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.

You may also view this document in PDF at the following site: *http://www.ifap.ed.gov.*

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.*

Program Authority: 20 U.S.C. 421–429, 1070a, 1070b–1070b–3, 1070c–1070c–4, 1071–1087–2, 1087a, and 1087aa–1087ii; 42 U.S.C. 2751–2756b.

Dated: April 7, 2005.

Theresa S. Shaw,

Chief Operating Officer, Federal Student Aid.

TABLE A.—DEADLINE DATES FOR APPLICATION PROCESSING AND RECEIPT OF STUDENT AID REPORTS (SARS) OR INSTITUTIONAL STUDENT INFORMATION RECORDS (ISIRS) BY INSTITUTIONS

Who submits?	What is submitted?	Where is it submitted?	What is the deadline date for receipt?
Student	Free Application for Federal Student Aid (FAFSA) on the Web or Renewal FAFSA on the Web.	Electronically to the Department's Central Processing System (CPS).	June 30, 2005.[1]
	Signature Page (if required)	To the address printed on the signature page.	September 15, 2005.
Student through an Institution.	An electronic original or Renewal FAFSA.	Electronically to the Department's CPS.	June 30, 2005.[1]
Student	A paper original FAFSA or paper Renewal FAFSA.	To the address printed on the FAFSA, Renewal FAFSA, or envelope provided with the form.	June 30, 2005.
Student	Corrections on the Web with all required electronic signatures.	Electronically to the Department's CPS.	September 15, 2005.[1]
Student	corrections on the Web needing paper signatures.	Electronically to the Department's CPS.	September 15, 2005.[1]
	Paper signatures for Corrections on the Web.	To the address printed on the signature.	September 15, 2005.
Student through an Institution.	Electronic corrections	Electronically to the Department's CPS.	September 15, 2005.[1]
Student	Paper corrections (including change of mailing and e-mail addresses or institutions) using a SAR.	To the address printed on the SAR ..	September 15, 2005.
Student	Change of mailing and e-mail addresses, change of institutions, or requests for a duplicate SAR.	To the Federal Student Aid Information Center by calling 1–800–433–3243.	September 15, 2005.
Student	SAR with an official expected family contribution (EFC) calculated by the Department's CPS (Pell Only).	To the institution	The earlier of: —the student's last date of enrollment; or —September 23, 2005.[2]
Student through CPS	ISIR with an official EFC calculated by the Department's CPS (Pell only).	To the institution from the Department's CPS.	The earlier of: —the student's last date of enrollment; or —September 23, 2005.[2]
Student	Valid SAR (Pell only)	To the institution	Except for late disbursements under 34 CFR 668.164(g), the earlier of: —The student's last date of enrollment; or

TABLE A.—DEADLINE DATES FOR APPLICATION PROCESSING AND RECEIPT OF STUDENT AID REPORTS (SARs) OR INSTITUTIONAL STUDENT INFORMATION RECORDS (ISIRs) BY INSTITUTIONS—Continued

Who submits?	What is submitted?	Where is it submitted?	What is the deadline date for receipt?
			—September 23, 2005.[2]
			For late disbursements, the earlier of:
			—the timeframes provided in the regulations at 34 CFR 668.164(g)(4)(i); or
			—September 23, 2005.[2]
Student through CPS	Valid ISIR (Pell only)	To the institution from the Department's CPS.	Except for late disbursements under 34 CFR 668.164(g), the earlier of:
			—the student's last date of enrollment; or
			—September 23, 2005.[2]
			For late disbursements, the earlier of:
			—the timeframes provided in the regulations at 34 CFR 668.164(g)(4)(i); or
			—September 23, 2005.[2]
Student	Verification documents	To the institution	The earlier of:[3]
			—120 days after the student's last date of enrollment; or
			—September 23, 2005.
Student	Valid SAR after verification (for Pell only).	To the institution	The earlier of:[4]
			—120 days after the student's last date of enrollment; or
			—September 23, 2005.[2]
Student through the Department's CPS.	Valid ISIR after verification (for Pell only).	To the institution from the Department's CPS.	The earlier of:[4]
			120 days after the student's last date of enrollment; or
			—September 23, 2005.[2]

[1] The deadline for electronic transactions is 11:59 p.m. (Central Time) on the deadline date. Transmissions must be completed and accepted by 12 midnight to meet the deadline. If transmissions are started before 12 midnight but are not completed until after 12 midnight, those transmissions will not meet the deadline. In addition, any transmission picked up on or just prior to the deadline date that is rejected may not be reprocessed because the deadline will have passed by the time the user gets the information notifying him/her of the rejection.

[2] The date the ISIR/SAR transaction was processed by CPS is considered to be the date the institution received the ISIR or SAR regardless of whether the institution has downloaded the ISIR from its SAIG mailbox.

[3] Although the Secretary has set this deadline date for the submission of verification documents, if corrections are required, deadline dates for submission of paper or electronic corrections and, for a Federal Pell Grant, the submission of a valid SAR or valid ISIR to the institution must still be met. An institution may establish an earlier deadline for the submission of verification documents for purposes of the campus-based programs, the FFEL Program, and the Federal Direct LoanProgram.

[4] Students completing verification while no longer enrolled will be paid based on the higher of the two EFCs.

TABLE B.—FEDERAL PELL GRANT PROGRAM SUBMISSION DATES FOR DISBURSEMENT INFORMATION BY INSTITUTIONS

Who submits?	What is submitted?	Where is it submitted?	What is the earliest submission and deadline date for receipt?
Institutions	At least one acceptable disbursement record must be submitted for each Federal Pell Grant recipient at the institution.	To the Common Origination and Disbursement (COD) System using either:.	Earliest Submission Dates:
		—the COD Web site at: *http://cod.ed.gov;* or.	An institution may submit disbursement information as early as June 21, 2004, but no earlier than:
		—the Student Aid Internet Gateway (SAIG).	(a) 30 calendar days prior to the disbursement date under the advance payment method:
			(b) 7 calendar days prior to the disbursement date under the Just-in-Time or Cash Monitoring #1 payment methods; or
			(c) the date of disbursement under the Reimbursement or Cash Monitoring #2 payment methods.
			Deadline Submission Dates:
			Except as provided below, an institution is required to submit disbursement information no later than the earlier of:
			(a) 30 calendar days after the institution makes a disbursement or becomes aware of the need to make an adjustment to previously reported disbursement data; or
			(b) September 30, 2005.[1]

TABLE B.—FEDERAL PELL GRANT PROGRAM SUBMISSION DATES FOR DISBURSEMENT INFORMATION BY INSTITUTIONS—Continued

Who submits?	What is submitted?	Where is it submitted?	What is the earliest submission and deadline date for receipt?
			An institution may submit disbursement information after September 30, 2005, only: (a) for a downward adjustment of a previously reported award; (b) based upon a program review or initial audit finding per 34 CFR 690.83; (c) for reporting a late disbursement under 34 CFR 668.164(g); or (d) for reporting disbursements previously blocked as a result of another institution failing to post a downward adjustment.
	Request for administrative relief based on a natural disaster or other unusual circumstances, or an administrative error made by the Department.	By e-mail to: *sfa.administrative.relief@ed.gov.*	The earlier of: —a date designated by the Secretary after consultation with the institution; or —January 30, 2006.
	Request for administrative relief for a student[2] who reenters the institution (1) within 180 days after initially withdrawing and (2) after September 15, 2005.	By e-mail to: *sfa.administrative.relief@ed.gov.*	The earlier of: —30 days after the student reenrolls; or —May 1, 2006.

[1] The deadline for electronic transactions is 11:59 p.m. on September 30, 2005. Transmissions must be completed and accepted by 12 midnight to meet the deadline. If transmissions are started before 12 midnight but are not completed until after 12 midnight, those transmissions will not meet the deadline. In addition, any transmission picked up on or just prior to the deadline date that is rejected may not be reprocessed because the deadline will have passed by the time the user gets the information notifying him/her of the rejection.

[2] Applies only to students enrolled in clock-hour and nonterm credit-hour educational programs.

Note: The COD System must accept origination data for a student from an institution before it accepts disbursement information from the institution for that student. Institutions may submit origination and disbursement data for a student in the same transmission. However, if the origination data is rejected, the disbursement data is rejected.

[FR Doc. 05–7438 Filed 4–12–05; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER05–638–000]

Illinois Power Company, d/b/a AmerenIP; Notice of Issuance of Order

April 5, 2005.

Illinois Power Company, d/b/a AmerenIP (Illinois Power) filed an application for market-based rate authority, with an accompanying tariff. The proposed tariff provides for wholesale sales of energy and capacity at market-based rates. Illinois Power also requested waiver of various Commission regulations. In particular, Illinois Power requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Illinois Power.

On March 31, 2005, the Commission granted the request for blanket approval under part 34, subject to the following:

Any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Illinois Power should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is May 2, 2005.

Absent a request to be heard in opposition by the deadline above, Illinois Power is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Illinois Power, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Illinois Power's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1715 Filed 4–12–05; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–252–000]

ANR Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

April 5, 2005.

Take notice that on March 31, 2005, ANR Pipeline Company (ANR) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets to be effective May 1, 2005:

Eleventh Revised Sheet No. 5
Ninth Revised Sheet No. 6
Eleventh Revised Sheet No. 7
Sixtieth Revised Sheet No. 8
Third Revised Sheet No. 8B
Sixtieth Revised Sheet No. 9
Ninth Revised Sheet No. 9A
Eleventh Revised Sheet No. 11
Third Revised Sheet No. 12A
Fortieth Revised Sheet No. 17
Twelfth Revised Sheet No. 17A
Original Sheet No. 17B
Second Revised Sheet No. 45C
Second Revised Sheet No. 45G

ANR states that the above referenced tariff sheets are being filed to implement a negative DTCA surcharge for the period May 1, 2005 through April 30, 2006 pursuant to the Deferred Transportation Cost Adjustment provision contained in section 29 of the General Terms & Conditions of its FERC Gas Tariff, Second Revised Volume No. 1.

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. E5–1729 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–248–000]

East Tennessee Natural Gas, LLC; Notice of Annual Cashout Report

April 5, 2005.

Take notice that on March 30, 2005, East Tennessee Natural Gas, LLC (East Tennessee) tendered for filing its annual cashout report for the November 2003 through October 2004 period in accordance with Rate Schedules LMS-MA and LMSPA.

East Tennessee states that copies of the filing were mailed to all affected customers of East Tennessee and interested 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 on or before the date as indicated below. 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.

Comment Date: 5 p.m. Eastern Time on April 12, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1725 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–246–000]

Gas Transmission Northwest Corporation; Notice of Proposed Changes In FERC Gas Tariff

April 5, 2005.

Take notice that on March 30, 2005, Gas Transmission Northwest Corporation (GTN) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1–A, First Revised Sheet No. 226, to become effective May 2, 2005.

GTN states that this tariff sheet is being submitted to remove tariff language related to shipper requests for discounts consistent with a recent Williston Basin Interstate Pipeline Co., Order.

GTN further states that a copy of this filing has been served on GTN's jurisdictional customers and interested state regulatory agencies.

Any person desiring to 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. E5–1723 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–254–000]

Kern River Gas Transmission Company; Notice of Report of Gas Compressor Fuel and Lost and Unaccounted-For Gas Factors for 2004

April 5, 2005.

Take notice that on March 31, 2005, Kern River Gas Transmission Company (Kern River) tendered a report supporting its gas compressor fuel and lost and unaccounted-for gas factors for 2004.

Kern River states that in conjunction with this filing, and in compliance with the Commission's "Order Issuing Certificate" dated July 26, 2001, pertaining to Kern River's 2002 expansion project, it is also submitting a work paper showing the 2004 net benefit to vintage shippers of rolling in Kern River's 2002 expansion project after actual fuel costs are considered.

Kern River states that it has served a copy of this filing upon its 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. E5–1730 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–251–000]

National Fuel Gas Supply Corporation; Notice of Tariff Filing

April 5, 2005.

Take notice that on March 31, 2005, National Fuel Gas Supply Corporation (National) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, Seventy Fifth Revised Sheet No. 9, to become effective April 1, 2005.

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. E5–1728 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–245–000]

Natural Gas Pipeline Company of America; Notice Of Refund Report

April 5, 2005.

Take notice that on March 28, 2005, Natural Gas Pipeline Company of America (Natural) filed its Refund Report regarding the penalty revenues for the period July 1, 2004 through December 31, 2004, that it refunded to its customers pursuant to section 12.8 of

the General Terms and Conditions (GT&C) of its FERC Gas Tariff, Sixth Revised Volume No. 1.

Natural states that copies of the filing are being mailed to its customers and interested 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 on or before the date as indicated below. 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.

Comment Date: 5 pm Eastern Time on April 12, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1722 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–247–000]

North Baja Pipeline, LLC; Notice of Proposed Changes in FERC Gas Tariff

April 5, 2005.

Take notice that on March 30, 2005, North Baja Pipeline, LLC (NBP) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, First Revised Sheet No. 200, to become effective May 2, 2005.

NBP states that this tariff sheet is being submitted to remove tariff language related to shipper requests for discounts consistent with a recent Williston Basin Interstate Pipeline Co., Order.

NBP further states that a copy of this filing has been served on NBP's jurisdictional customers and interested state regulatory agencies.

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. E5–1724 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–258–000]

Panhandle Eastern Pipe Line Company, LP; Notice of Report of Flow Through of Penalty Revenues

April 5, 2005.

Take notice that on March 31, 2005, Panhandle Eastern Pipe Line Company, LP (Panhandle) tendered for filing its Annual Report of Flow Through of Penalty Revenues.

Panhandle states that this filing is made in accordance with section 25.2(c)(i) of the General Terms and Conditions in Panhandle's FERC Gas Tariff, Third Revised Volume No. 1.

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 on or before the date as indicated below. 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.

Comment Date: April 12, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1714 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–256–000]

Panhandle Eastern Pipe Line Company, LP; Notice of Tariff Filing

April 5, 2005.

Take notice that on March 31, 2005, Panhandle Eastern Pipe Line Company, LP (Panhandle) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the revised tariff sheets listed in Appendix A attached to the filing, to become effective May 1, 2005.

Panhandle states that this filing is made in accordance with section 25.1 (Flow Through of Cash-Out Revenues in Excess of Costs) of the General Terms and Conditions in Panhandle's FERC Gas Tariff, Third Revised Volume No. 1.

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. E5–1732 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–257–000]

Pine Needle LNG Company, LLC; Notice of Proposed Changes in FERC Gas Tariff

April 5, 2005.

Take notice that on March 31, 2005, Pine Needle LNG Company, LLC (Pine Needle) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Eighth Revised Sheet No. 4, to become effective May 1, 2005.

Pine Needle states that the instant filing is being submitted pursuant to section 18 and section 19 of the General Terms and Conditions (GT&C) of Pine Needle's FERC Gas Tariff. Section 18 of the GT&C of Pine Needle's Tariff states that Pine Needle be effective each May 1, a redetermination of its fuel retention percentage applicable to storage services. Section 19 of the GT&C of Pine Needle's Tariff provides that Pine Needle will file, also to be effective each May 1, to reflect net changes in the Electric Power (EP) rates.

Pine Needle states that it is serving copies of the instant filing to its affected customers, interested State Commissions and other interested parties.

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. E5–1733 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–249–000]

Tennessee Gas Pipeline Company; Notice of Tariff Filing

April 5, 2005.

Take notice that on March 31, 2005 Tennessee Gas Pipeline Company (Tennessee) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the revised tariff sheets listed on Appendix A to the filing, requesting an effective date of May 1, 2005.

Tennessee states that the purpose for this filing is to update certain tariff provisions that are no longer used and useful under its open access service.

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. E5–1726 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–255–000]

Trailblazer Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

April 5, 2005.

Take notice that on March 31, 2005, Trailblazer Pipeline Company (Trailblazer) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Third Revised Sheet No. 8, to become effective May 1, 2005.

Trailblazer states that the purpose of this filing is to make a periodic adjustment which revises the level of the Expansion Fuel Adjustment Percentage, as required by section 41 of the General Terms and Conditions of Trailblazer's Tariff.

Trailblazer states that copies of this filing are being mailed to its customers and interested 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 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. E5–1731 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–250–000]

Transwestern Pipeline Company, LLC; Notice of Tariff Filing

April 5, 2005.

Take notice that on March 31, 2005, Transwestern Pipeline Company, LLC (Transwestern) submitted a compliance filing pursuant to the Commission's Order Issuing Certificate and Approving Abandonment issued August 5, 2004, in Docket No. CP04–104–000.

Transwestern states that it has caused a copy of the filing to be served on parties on the official service list in the above captioned docket.

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 email 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. E5–1727 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05–3–000]

CenterPoint Energy Gas Transmission Company; Notice of Availability of the Environmental Assessment for the Proposed Line Ad Expansion Project

April 5, 2005.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) on the natural gas pipeline facilities proposed by CenterPoint Energy Gas Transmission Company (CEGT) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act. The staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The EA assesses the potential environmental effects of the construction and operation of the proposed two new compressor stations, Hinton and Allen, in Caddo and Hughes counties, Oklahoma, respectively, and additional compression at an existing compressor station facility in Grady County, Oklahoma, including:

- A 10,310-horsepower (hp) Compressor Station in Caddo County, Oklahoma;
- A 13,220-hp Compressor Station in Hughes County, Oklahoma; and
- An additional 4,735-hp of compression and appurtenant facilities to the existing Amber Compressor Station in Grady County, Oklahoma.

The purpose of the proposed facilities would be to increase the transportation capacity on CEGT's Line AD by 112,900 Dth per day which would enable the Line AD capacity to receive Rocky Mountain gas supplies for transportation west to east across CEGT's system.

The EA has been placed in the public files of the Commission. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Copies of the EA have been mailed to everyone who responded to the November 1, 2004 Notice of Intent and parties to this proceeding.

Any person wishing to comment on the EA may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your comments to: Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;
- Label one copy of the comments for the attention of the Gas Branch 3, PJ11.3.
- Reference Docket No. CP05–03–000; and
- Mail your comments so that they will be received in Washington, DC on or before May 6, 2005.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. However, the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created by clicking on "Sign-up."

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Magalie R. Salas,

Secretary.

[FR Doc. E5–1734 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. PF05–9–000, PF05–5–000]

Bayou Casotte Energy LLC; Gulf LNG Energy LLC; Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Casotte Landing LNG Project, and Request for Comments on Environmental Issues, Notice of Public Scoping Meeting, and Site Visit for Both Casotte Landing LNG Project and LNG Clean Energy Project

April 7, 2005.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will discuss the environmental impacts of the Casotte Landing LNG Project proposed for construction in Jackson County, Mississippi, by Bayou Casotte Energy LLC (hereafter referred to as Bayou Casotte Energy). The proposed facilities would consist of a liquefied natural gas (LNG) import terminal and an interconnecting natural gas pipeline. The Commission will use this EIS in its decision-making process to determine whether the LNG terminal is in the public interest and the pipeline is in the public convenience and necessity. This notice explains the scoping process that we [1] will use to gather input from the public and interested agencies on the project. Your input will help us determine the issues that need to be evaluated in the EIS.

Comments on the project may be submitted in written form or verbally. Further details on how to submit written comments are provided in the public participation section of this notice. In lieu of sending written comments, we invite you to attend a public scoping meeting that we have scheduled as follows:

Wednesday, April 20, 2005, 7 p.m. (CDT); Casotte Landing LNG Project, and the LNG Clean Energy Project, Pascagoula High School, 1716 Tucker Avenue, Pascagoula, MS 39567.

At the public scoping meeting, you will also be provided with the opportunity to provide comments on the LNG Clean Energy Project, which is a similar project proposed for construction by Gulf LNG Energy LLC at the Port of Pascagoula, in Jackson County, Mississippi. The LNG Clean Energy Project is currently being reviewed by the FERC under Docket No. PF05–5–000. Our Notice of Intent to prepare an EIS for the LNG Clean Energy Project was issued on March 3, 2005.

The Commission staff will conduct a field trip for both projects which will include the proposed LNG terminal locations, and portions of the proposed send out pipeline routes. Anyone interested in participating in the field trip may attend, but they must provide their own transportation. We will meet on April 20, 2005 at 8:30 a.m. (CDT) at: Wal-Mart parking lot in Pascagoula at the intersection of Highways 90 and 63.

FERC will be the lead Federal agency in the preparation of the EIS. The document will satisfy the requirements of the National Environmental Policy Act (NEPA).

This notice is being sent to residents within 0.5 mile of the proposed LNG terminal site; Federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

Potentially affected landowners may be contacted by a project representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. If so, the company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the company could initiate condemnation proceedings in accordance with state law.

FERC prepared a fact sheet entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?". This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Casotte Landing LNG Project

Bayou Casotte Energy proposes to construct and operate an LNG import terminal and a natural gas pipeline to provide a new supply of competitively priced natural gas to U.S. domestic markets. The facility would be located on Bayou Casotte (East Harbor), Port of Pascagoula in Jackson County, Mississippi, and would be accessible from the Bayou Casotte ship channel. The Casotte Landing Project would receive LNG from carrier ships and transfer it to onshore LNG storage tanks. The LNG would then be vaporized and sent out to the existing interstate natural gas pipeline system at an average rate of approximately 1.3 billion cubic feet per day. Bayou Casotte Energy anticipates that it would send out natural gas through one or more of the four existing pipelines in the vicinity of the proposed terminal site. The project would consist of the following facilities:

- An LNG terminal consisting of a turning basin, berthing slip and pier, and unloading facilities for a single LNG carrier. The berthing slip and unloading facilities would be designed to accommodate LNG carriers ranging in capacity from 138,000 to 200,000 cubic meter (m^3) capacity. The terminal would receive approximately 166 LNG shipments per year;
- Three onshore, approximately 160,000 m^3 capacity, full containment LNG storage tanks;
- Vaporization facilities; and
- Pipeline facilities to transport natural gas from the terminal to interconnect with one or more of four existing pipelines located within five miles of the proposed LNG terminal facility.

A map depicting the proposed terminal site and nearby natural gas pipelines is provided in Appendix 1.[2]

Land Requirements

Bayou Casotte Energy is a wholly owned subsidiary of Chevron U.S.A., Inc. (CUSA). The LNG terminal would be located on a 95 acre lot within a former industrial site adjacent to the existing CUSA Pascagoula Refinery, on land that is either owned or controlled by CUSA. The nearest residence is located greater than 1 mile away from the proposed terminal site. Although the proposed terminal site is located near the mouth of the Bayou Casotte ship channel, the project would require dredging of a turning basin and berth to achieve the required size and depth to accommodate LNG carriers.

Several alternatives for send-out natural gas pipelines are under consideration. Pipelines would be located preferentially on land owned or controlled by CUSA and/or situated so

[1] "We," "us," and "our" refer to the environmental staff of the Office of Energy Projects.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than appendix 1 (maps), are available on the Commission's Internet Web site (*http://www.ferc.gov*) at the "eLibrary" link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

that their right-of-way overlaps that of existing pipelines.

The EIS Process

NEPA requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity, or an import authorization under section 3 of the Natural Gas Act. NEPA also requires us to discover and address issues and concerns the public may have about proposals submitted to the Commission. This process is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the EIS on the important environmental issues and reasonable alternatives. By this notice, we are requesting agency and public comments on the scope of the issues to be analyzed and presented in the EIS. All scoping comments received will be considered during the preparation of the EIS. To ensure your comments are considered, please carefully follow the instructions in the public participation section of this notice.

In the EIS, we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils.
- Water resources, fisheries, and wetlands.
- Vegetation and wildlife.
- Endangered and threatened species.
- Land use.
- Cultural resources.
- Air quality and noise.
- Public safety.
- Cumulative impacts.

Our independent analysis of the issues will be included in a draft EIS. The draft EIS will be mailed to Federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; affected landowners; other interested parties; local libraries and newspapers; and the Commission's official service list for this proceeding. A 45-day comment period will be allotted for review of the draft EIS. We will consider all comments on the draft EIS and revise the document, as necessary, before issuing a final EIS. In addition, we will consider all comments on the final EIS before making our recommendations to the Commission.

Although no formal application has been filed, the FERC staff has already initiated its NEPA review under its NEPA Pre-filing Process. The purpose of the Pre-filing Process is to encourage the early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. A docket number (PF05–9–000) has been established to place information filed by Bayou Casotte Energy and other interested entities, as well as related documents issued by the Commission, into the public record.[3] Once a formal application is filed with the FERC, a new docket number will be established.

With this notice, we are asking Federal, state, and local agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EIS. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating status should follow the instructions for filing comments provided under the Public Participation section of this Notice.

Currently Identified Environmental Issues

We have identified several issues that we think deserve attention based on a preliminary review of the project site and facility information provided by Bayou Casotte Energy. This preliminary list of issues may be changed based on your comments and our continuing analysis.

- Cumulative impacts including the LNG Clean Energy Project also proposed for construction at the Port of Pascagoula.
- Water Resources.
  - —Assessment of construction effects on water quality.
  - —Review of wetland areas impacted on the terminal site.
  - —Dredge material management and potential impacts to water quality associated with dredging and construction activities.
- Fish, Wildlife, and Vegetation.
  - —Effects on wildlife and fisheries including commercial and recreational fisheries.
  - —Potential impacts of water intake/discharge systems and their potential impact on marine species.
- Endangered and Threatened Species.
  - —Effects on federally-listed species.
  - —Effects on essential fish habitat.
- Reliability and Safety.
  - —Safety and security of the terminal and pipeline.
  - —LNG shipping.

Our evaluation will also include possible alternatives to the proposed project or portions of the project, and we will make recommendations on how to lessen or avoid impacts on the various resource areas of concern.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EIS and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative locations), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please carefully follow these instructions:

- Send an original and two copies of your letter to:Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;
- Label one copy of your comments for the attention of Gas Branch 2, DG2E;
- Reference Docket No. PF05–9–000 on the original and both copies; and
- Mail your comments so that they will be received in Washington, DC on or before May 6, 2005.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. However, the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at *http://www.ferc.gov* under the "e-Filing" link and the link to the User's Guide. Before you can file comments you will need to create a free account, which can be created on-line.

If you do not want to send comments at this time but still want to remain on our mailing list, please return the Mailing List Retention Form included in Appendix 2.

The public scoping meeting to be held on April 20, 2005, at the Pascagoula High School, is designed to provide another opportunity to offer comments on the proposed project. Interested groups and individuals are encouraged to attend the meeting and to present comments on the environmental issues they believe should be addressed in the EIS. A transcript of the meeting will be generated so that your comments will be accurately recorded.

Once Bayou Casotte Energy formally files its application with the Commission, you may want to become

[3] To view information in the docket, follow the instructions for using the eLibrary link at the end of this notice.

an official party to the proceeding known as an "intervenor." Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's Internet Web site. Please note that you may not request intervenor status at this time. You must wait until a formal application is filed with the Commission.

Availability of Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance with eLibrary, the eLibrary helpline can be reached at 1–866–208–3676, TTY (202) 502–8659, or at *FercOnlineSupport@ferc.gov*. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm*.

Further, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Finally, Bayou Casotte Energy has established an Internet web site for its project at *http://www.chevrontexaco.com/CasotteLanding*. The Web site includes a description of the proposed project, maps of the proposed terminal site, and a link for the public to submit comments on the proposed project. You can also request additional information on the project or provide comments directly to Bayou Casotte Energy by telephone at (877) 424–5495, by e-mail at *casotte@chevrontexaco.com*, or by U.S. Mail at ChevronTexaco Global Gas, Re: Casotte Landing LNG Project, P.O. Box 1404, Houston, TX 77351–1404.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–1735 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Applications Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

April 5, 2005.

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

a. *Type of Applications:* Preliminary Permit (Competing).

b. *Applicants, Project Numbers, and Dates Filed:*

CRD Hydroelectric, LLC filed the application for Project No. 12576–000 on March 1, 2005, at 8:33 a.m.

Red Rock Hydroelectric Development Company filed the application for Project No. 12577–000 on March 1, 2005, at 9:26 a.m.

c. *Name of the project:* Red Rock Project. The project would be located on the Des Moines River in Marion County, Iowa. It would use the U.S. Army Corps of Engineers' (Corp) existing Red Rock Lake Dam.

d. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

e. *Applicants Contacts:* For CRD Hydroelectric, LLC: Mr. Douglas Spalding, Spalding Consultants, 1433 Utica Avenue South, Suite 162, Minneapolis, MN 55416, (952) 544–8133. For Red Rock Hydroelectric Development Company: Mr. Thomas Wilkerson, Red Rock Hydroelectric Development Company, 200 1st Street SE., Suite 1910, Cedar Rapids, IA 52401, (319) 364–0171.

f. *FERC Contact:* Robert Bell, (202) 502–6062.

g. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

h. *Description of Projects:* The project proposed by CRD Hydroelectric, LLC would use the Corps' Red Rock Lake Dam and would consist of: (1) A proposed intake structure, (2) two proposed 21-foot-diameter steel penstocks, (3) a proposed powerhouse containing two generating units with a total installed capacity of 30 megawatts, (4) a proposed transmission line; and (5) appurtenant facilities. The CRD Hydroelectric, LLC's Red Rock Project would have an average annual generation of 110 gigawatt-hours and would be sold to a local utility.

The project proposed by Red Rock Hydroelectric Development Company would use the Corps' Red Rock Lake Dam and would consist of: (1) A proposed intake structure, (2) three proposed 16-foot-diameter steel penstocks, (3) a proposed powerhouse containing three generating units with a total installed capacity of 36 megawatts, (4) a proposed transmission line; and (5) appurtenant facilities. The Red Rock Hydroelectric Development Company's project would have an average annual generation of 110 gigawatt-hours.

i. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

j. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

k. Competing Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing

preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

l. Competing Development Application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

m. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

n. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

o. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under "e-filing" link. The Commission strongly encourages electronic filing.

p. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

q. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1717 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Non-Project Use of Project Lands and Waters and Soliciting Comments, Motions to Intervene, and Protests

April 5, 2005.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-project use of project lands and waters.

b. *Project No.:* 2165–021.

c. *Date Filed:* March 7, 2005.

d. *Applicant:* Alabama Power Company.

e. *Name of Project:* Warrior River Hydroelectric Project, which includes the Lewis Smith and Bankhead Developments.

f. *Location:* The proposed action will take place at the Lewis Smith development, located in northwestern Alabama in the headwaters of the Black Warrior River on the Sipsey Fork in Cullman, Walker, and Winston counties.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a) 825(r) and 799 and 801.

h. *Applicant Contact:* Mr. R.M. Akridge, Hydro General Manager; Alabama Power Company; P.O. Box 2641; Birmingham, AL; 35291–8180; (205) 257–1398.

i. *FERC Contact:* Any questions on this notice should be addressed to Isis Johnson at (202) 502–6346, or by e-mail: *Isis.Johnson@ferc.gov.*

j. *Deadline for Filing Comments and or Motions:* May 6, 2005.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2165–021) on any comments or motions filed. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages e-filings.

k. *Description of Request:* Alabama Power, licensee for the Warrior River Hydroelectric Project, has requested Commission approval to permit the Duncan Bridge Resort (applicant) to install three new boat docks for private use by the owners of 56 condominiums currently being built on non-project lands above the project boundary. The property is located on the west bank of the Sipsey Fork of Smith Lake in Winston County, Alabama. The applicant proposes three docks accommodating 20 boats each, for a total of 60 slips. The docks will occupy the same area as previous structures from the Huey Marina which closed in 1999; all existing facilities have been removed. The docks and walkways will be constructed of galvanized steel with floatation conforming to the licensee's floating requirements.

l. *Location of the Application:* This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should

so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described applications. A copy of the applications may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1718 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–164–000]

Equitrans, L.P.; Notice of Technical Conference

April 5, 2005.

Take a notice that the Commission will convene a technical conference on Tuesday, April 12, 2005, at 1 p.m., in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The purpose of the Commission is to discuss the issues raised by Equitrans' proposed Rate Schedule for Appalachian Gathering Service (AGS), and the deletion of Rate Schedules for Interruptible Gathering Service (IGS) and Appalachian Pooling Service (APS), Equitrans' proposal for compliance with Order Nos. 637 and 587, as well as any other non-rate issues the parties raised with respect to Rate Schedule AGS. In addition, the proposed Rate Schedule PS, filed on March 30, 2005, will be discussed. The Commission directed its staff to convene this technical conference in a February 28, 2005 Order.[1]

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or 202–208–01659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

All interested persons are permitted to attend. For further information please contact Christy Walsh at (202) 502–6523 or e-mail *christy.walsh@ferc.gov.*

Magalie R. Salas,

Secretary.

[FR Doc. E5–1721 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM01–10–006, EL01–118–005, and RM03–10–002]

Standards of Conduct for Transmission Providers; Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations; Amendments to Blanket Sales Certificate; Notice of Technical Conference and Workshop

April 5, 2005.

The Federal Energy Regulatory Commission (Commission) will hold a technical conference and workshop on Standards of Conduct for Transmission Providers and Market Behavior Rules on May 6, 2005, at the Millennium Knickerbocker Hotel in Chicago, Illinois. The meeting will begin at 10 a.m. (CST) and conclude late afternoon. All interested persons are invited to attend.

The purpose of the conference and workshop is to discuss: (1) Critical steps and best practices for complying with the Standards of Conduct for Transmission Providers under Order No. 2004 [1]; and (2) the impact of the market behavior rules [2] on wholesale energy markets and steps that must be taken by entities subject to the market behavior rules to ensure compliance. The conference and workshop will address, but not be limited to, the following general topics:

- The duties and responsibilities of a Chief Compliance Officer.
- Techniques for ensuring separation of transmission function employees from energy and marketing affiliate employees required by the Standards of Conduct.
- Best practices for complying with the information sharing prohibitions of the Standards of Conduct.
- Impact of the market behavior rules on energy markets.
- Best practices for implementing and ensuring compliance with the market behavior rules.

The Commission is hosting this conference and workshop to help provide guidance on complying with the Standards of Conduct that have been in effect since September 2004 and the market behavior rules that have been in effect since December 2003. Interested persons are invited to submit specific questions that they would like to be addressed at the conference and workshop or other suggestions for the content of the program. Prospective attendees and participants are urged to watch for further notices; a detailed agenda will be issued in advance of the conference and workshop.

Hotel rooms at the Millennium Knickerbocker Hotel, 163 East Walton Place, Chicago, Illinois, can be reserved by calling 1 (800) 621–8140 or 1 (312) 751–8100.

There is no registration fee to attend this conference. However, we request that those planning to attend the conference register online on the Commission's Web site at *http://www.ferc.gov/whats-new/registration/comp-05–06-form.asp*

Prospective participants and interested parties are encouraged to

[1] Equitrans, L.P., 110 FERC ¶ 61,194 (2005).

[1] *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), *order on reh'g*, Order No. 2004–A, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), *order on reh'g*, Order No. 2004–B, III FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), *order on reh'g*, Order No. 2004–C, 109 FERC ¶ 61,325 (2004), *order on reh'g*, Order No. 2004–D, 110 FERC ¶ 61,320 (2005).

[2] *Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004); Order No. 644, *Amendment to Blanket Sales Certificates*, FERC Stats. & Regs. ¶ 31,153 (2003), *reh'g denied*, 107 FERC ¶ 61,174 (2004).

submit questions, suggestions and requests to participate by Wednesday, April 13, 2005. Questions about the conference and workshop, including requests to participate, should be directed as follows:

Regarding Standards of Conduct: Demetra Anas, Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, 202–502–8178, *Demetra.Anas@ferc.gov*.

Regarding market behavior rules: Ted Gerarden, Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6187, *Ted.Gerarden@ferc.gov*.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1719 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Meeting, Notice of Vote, Explanation of Action Closing Meeting and List of Persons To Attend

April 6, 2005.

The following notice of meeting is published pursuant to section 3(a) of the Government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

Agency Holding Meeting: Federal Energy Regulatory Commission.

Date and Time: April 13, 2005. (Within a relatively short time after the Commission's open meeting on April 13, 2005.)

Place: Room 3M 4A/B, 888 First Street, NE., Washington, DC 20426.

Status: Closed.

Matters to be Considered: Non-Public, Investigations and Inquiries, Enforcement Related Matters, and Security of Regulated Facilities.

Contact Person for More Information: Magalie R. Salas, Secretary, telephone (202) 502–8400.

Chairman Wood and Commissioners Brownell, Kelliher, and Kelly voted to hold a closed meeting on April 13, 2005. The certification of the General Counsel explaining the action closed the meeting is available for public inspection in the Commission's Public Reference Room at 888 First Street, NW., Washington, DC 20426.

The Chairman and the Commissioners, their assistants, the Commission's Secretary and her assistant, the General Counsel and members of her staff, and a stenographer are expected to attend the meeting. Other staff members from the Commission's program offices who will advise the Commissioners in the matters discussed will also be present.

Linda Mitry,

Deputy Secretary.

[FR Doc. 05–7491 Filed 4–11–05; 11:12 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the Record Communications; Public Notice

April 5, 2005.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received in the Office of the Secretary. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary (FERRIS) link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

PROHIBITED

Docket No.	Date filed	Presenter or requester
1. CP04–36–000, CP04–41–000, CP04–42–000, and CP04–43–000.	3–22–05	Daniel W. O'Connell.[1]
2. CP04–36–000, CP04–41–000, CP04–42–000, and CP04–43–000.	3–24–05	Thomas J. McHenry.
3. CP04–36–000, CP04–41–000, CP04–42–000, and CP04–43–000.	3–28–05	Claudia A. Cloutier.[2]
4. ER02–1656–000	3–31–05	Sean H. Gallagher.
5. RP00–70–007, RP00–70–008, and RP00–70–009	3–29–05	Greg McBride.

[1] One of thirty-four form letters filed March 22, 2005, in this docket.
[2] One of seven form letters filed March 28, 2005, in this docket.

EXEMPT

Docket No.	Date filed	Presenter or requester
1. CP04–36–000, CP04–41–000, CP04–42–000, and CP04–43–000.	3–22–05	Hon. Edward M. Lambert, Jr.
2. CP04–366–000,	3–25–05	John Wisniewski.
3. CP04–386–000, and CP04–400–000	3–25–05	Jennifer Kerrigan.
4. CP05–49–000	3–25–05	Van T. Button.
5. Project No. 11858–002	3–25–05	Leroy Saunders.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1720 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of New System of Records

April 5, 2005.

SUMMARY: The Federal Energy Regulatory Commission (Commission or FERC), under the requirements of the Privacy Act of 1974, 5 U.S.C. 552a, is publishing a description of a new system of records.

DATES: Comments may be filed on or before 60 days after publication in the **Federal Register**.

ADDRESSES: Comments should be directed to the following address: Thomas R. Herlihy, Privacy Act Officer, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street, NE., Room 11J–1, Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Thomas R. Herlihy, Office of the Executive Director, Federal Regulatory Commission, 888 First Street, NE., Washington, DC 20426; 202–502–8300.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, 5 U.S.C. 552a, requires that each agency publish a notice of the existence and character of each new or altered "system of records." 5 U.S.C. 552a(a)(5). This Notice identifies and describes the Commission's new system of records. There are no altered systems to report. A copy of this report has been distributed to the Speaker of the House of Representatives and the President of the Senate, as the Act requires.

The new system of records does not duplicate any existing agency systems. In accordance with 5 U.S.C. 552a(e)(4), the Commission lists below the following information about this system: Name; location; categories of individuals on whom the records are maintained; categories of records in the system; authority for maintenance of the system; each routine use; the policies and practices governing storage, retrievability, access controls, retention, and disposal; the title and business address of the agency official responsible for the system of records; procedures for notification, access and contesting the records of each system; and the sources of the records in the system.

SYSTEM NAME:

National Finance Center Payroll Personnel System (NFC).

SYSTEM LOCATION:

Hard copies of personnel and timekeeping data, and payroll transactions and reports are located at the Federal Energy Regulatory Commission (FERC), Washington, DC 20426. Computerized data is located at the U.S. Department of Agriculture, National Finance Center, New Orleans, LA 70129.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All employees (Senior Executive Service and non-Senior Executive Service, bargaining unit and non-bargaining unit) employed by the Federal Energy Regulatory Commission.

CATEGORIES OF RECORDS IN THE SYSTEM:

All official personnel action and/or payroll transaction information on Commission employees.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 2302(b)(20)(B), 2302(b)(10), 7311, 7313; Executive Order 10450; 5 CFR 731.103.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

To the Merit Systems Protection Board, the Office of Special Counsel, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, in connection with functions vested in those agencies.

To a Congressional office in response to an inquiry made at the request of that individual.

To the Office of Management and Budget in connection with private relief legislation.

In litigation before a court or in an administrative proceeding being conducted by a Federal agency.

To the National Archives and Records Administration for records management inspections.

To Federal agencies as a data source for management information through the production of summary descriptive statistics and analytical studies in support of the functions for which the records are maintained for related studies.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

On paper in Official Folders located at FERC. Computerized on an IBM z900 mainframe with IBM Shark RAID DASD system for direct access storage, and STK 9840 tape silos for long term data storage which resides at the NFC.

RETRIEVABILITY:

Data can be retrieved by employee's social security number.

SAFEGUARDS:

The National Finance Center is located in a secured Federal complex. Within this secured building, the Computer Operations Center is located in a controlled access room. Specific employees have been identified as system and database administrators having specific responsibilities allowing access to FERC personnel and payroll data. Security is embedded within the software in both the operating system and at the application level. Individuals not granted access rights cannot view or change data. The database is monitored by software applications that provide audits of log-ins, both successful and failed.

Output documents from the system are maintained as hard copy documents by FERC's Human Resources Services Division and is safeguarded in secured cabinets located within a secured room.

SYSTEM MANAGER AND ADDRESS:

The Federal Energy Regulatory Commission and the USDA National Finance Center share responsibility for system management. The first point of

contact is the Director, Resource Integration Division, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

NOTIFICATION PROCEDURES:

Contact the Director, Resource Integration Division, Federal Energy Regulatory Commission.

RECORDS ACCESS PROCEDURES:

Same as notification procedures.

CONTESTING RECORD PROCEDURES:

Same as notification procedures. Involvement by the Office of Personnel Management may be necessary, as provided in the Federal Personnel Manual, Chapter 731.

RECORD SOURCE CATEGORIES:

USDA National Finance Center Payroll/Personnel System; the employee's supervisors; and the employee.

Magalie R. Salas,

Secretary.

[FR Doc. E5–1716 Filed 4–12–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0055; FRL–7700–8]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Written comments, identified by the docketidentification (ID) number OPP–2005–0055, must be received on or before May 13, 2005.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: The Product Manager, Antimicrobials Division (7510C), listed in the table in this unit:

File Symbol	Product Manager	Mailing Address	Telephone Number/E-mail Address
6836–GER	Emily Mitchell (PM 32)	Antimicrobials Division (7510C), Office of Pesticides Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001	(703) 308–8583 *mitchell.emily@epa.gov*
55735–RR 59441–A 59441–T	Marshall Swindell (PM 33)	Do.	(703) 308–6341 *swindell.marshall@epa.gov*
82076–R	Velma Noble (PM 31)	Do.	(703) 308–6233 *noble.velma@epa.gov*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2005–0055.The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected

from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2005–0055. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2005–0055. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the officialpublic docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2005–0055.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2005–0055. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the registration activity.

7. Make sure to submit your comments by the deadline in this notice.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

Products Containing Active Ingredients not Included in any Previously Registered Products

1. *File symbol*: 6836–GER. *Applicant*: Lewis and Harrison, Agent for Lonza, Inc., 17-17, Route 208, Fair Lawn, NJ 07410. *Product name*: MCDMH-RW. *Type of product*: End use product. *Active ingredient*: 1-Chloro-5,5-dimethylhydantoin. *Proposed use*: Industrial biocide for recirculating cooling water systems.

2. *File symbol*: 55735–RR. *Applicant*: King Technology, Inc., 530 11th Avenue South, Hopkins. MN 55343. *Product name*: Frog Mineral Reservoir. *Type of product*: End use product for swimming pools. *Active ingredient*: Silver chloride at 0.5%. *Proposed use*: Residential swimming pool sanitizer.

3. *File symbol*: 59441–A. *Applicant*: Eastman Kodak Company, Health and Environmental Laboratories, Kodak Park Building 320, Rochester, NY 14652. *Product name*: LOK-8008. *Type of product*: End use product. *Active ingredient*: Silver chloride at 4.0%. *Proposed use*: Treating textile materials with human uses, against microbial degradation.

4. *File symbol*: 59441–T. *Applicant*: Eastman Kodak Company, Health and Environmental Laboratories, Kodak Park Building 320, Rochester, NY 14652. *Product name*: Silver Chloride Technical. *Type of product*: Manufacturing use product. *Active ingredient*: Silver chloride at 99.6%. *Proposed use*: Formulating end use pesticides for treating textile materials with human uses, against microbial degradation.

5. *File symbol*: 82076–R. *Applicant*: Petro-Canada, Specialty Products and Fluids, 2489 North Sheridan Way, Mississauga, Ontario L5K 1A8 CANADA. *Product name*: MICROL Preservative. *Type of product*: End use product. *Active ingredient*: Benzoic acid at 99.93%. *Proposed use*: Add to mineral oil components of lubricants with incidental food contact use on machinery which contacts food, to prevent decomposition and odors in the lubricant caused by microorganisms.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: April 5, 2005.

Frank Sanders,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. 05–7310 Filed 4–12–05; 8:45am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0096; FRL–7707–9]

2,4-dichlorophenoxyacetic acid (2,4-D); Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical In or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID)number OPP–2005–0096, must be received on or before May 13, 2005.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Barbara Madden, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6463; e-mail address: *madden.barbara@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2005–0096. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although, a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

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For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also, include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2005–0096. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID number OPP–2005–0096. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2005–0096.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID number OPP–2005–0096. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 1, 2005.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by Interregional Research Project Number 4 (IR–4), and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Interregional Research Project Number 4 (IR–4)

PP 2E6352

EPA has received a pesticide petition PP 2E6352 from the Interregional Research Project Number 4 (IR–4)], 681 U.S. Highway #1 S. North Brunswick, NJ 08902–3390 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of 2,4-dichlorophenoxyacetic acid (2,4-D) in or on the raw agricultural commodity hop at 0.05 parts per million (ppm). EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant and animal metabolism.* The nature of the residue in plants is adequately understood. Acceptable wheat, lemon, and potato metabolism studies have been submitted. The nature of the residue in animals is adequately understood based upon acceptable ruminant and poultry metabolism studies submitted.

2. *Analytical method.* The residue field tests on hops used a gas chromatography (GC) method with electron capture detection (ECD), ENCAS Method ENC-2/93. This GC/ECD method is adequate for determining residues in or on hops with a lowest level of method validation of 0.05 ppm.

3. *Magnitude of residues.* In 3 tests on hops conducted in Washington, Oregon, and Idaho, residues of 2,4-D were nondetectable (<0.05 ppm) in/on all samples of dried hop cones from hops plots treated in Washington and Oregon with an application of 2,4-D (amine) directed to the hops yard floor at 0.5 lb active ingredient per acre three times at 27 to 33 day intervals, and following a 28 or 29–day preharvest interval. Under the same application schedule in Idaho, residues of 2, 4-D were 0.052-0.053 ppm in hops samples harvested 30 days after the last treatment. Based on the residue data for hops, a tolerance of 0.05 ppm in or on the raw agricultural commodity hop is appropriate.

B. Toxicological Profile

1. *Acute toxicity.* The oral LD_{50} of 2,4-D acid is 699 milligrams/kilogram (mg/kg) in the rat. The dermal LD_{50} in the rabbit is >2,000 mg/kg. The acute inhalation LC_{50} in the rat is > 1.8 (mg/liter). A primary eye irritation study in the rabbit showed severe irritation. A dermal irritation study in the rabbit showed moderate irritation. A dermal sensitization study in the guinea pig showed no skin sensitization. An acute neurotoxicity study in the rat produced a no observed adverse effect level (NOEL) of 227 mg/kg for systemic toxicity and a neurobehavioral NOEL of 67 mg/kg with a lowest observed adverse effect level (LOEL) of 227 mg/kg.

2. *Genotoxicity.* Mutagenicity studies including gene mutation, chromosomal aberrations, and direct DNA damage tests were negative for mutagenic effects.

3. *Reproductive and developmental toxicity.* A 2–generation reproduction study was conducted in rats with NOELs for parental and developmental toxicity of 5 mg/kg/day. The LOELs for this study are established at 20 mg/kg/day based on reductions in body weight gain in F0 and F2b pups, and reduction in pup weight at birth and during lactation. A teratology study in rabbits given gavage doses at 0, 10, 30, and 90 mg/kg on days 6–18 of gestation was negative for developmental toxicity at all doses tested. A teratology study in rats given gavage doses at 0, 8, 25, and 75 mg/kg on days 6–15 of gestation showed maternal toxicity only at 75 mg/kg. A NOEL for fetotoxicity was established at 25 mg/kg/day based on delayed ossification at the 75 mg/kg dose level. The effects on pups occurred in the presence of parental toxicity.

4. *Subchronic toxicity.* A subchronic dietary study was conducted with mice fed diets containing 0, 1, 15, 100, and 300 mg/kg/day with a NOEL of 15 mg/kg/day. The (LOEL) was established at 100 mg/kg/day based on decreased glucose and thyroxine levels, increases in absolute and relative kidney weights, and histopathological lesions in the liver and kidneys. A 90–day dietary study in rats fed diets containing 0, 1, 15, 100, or 300 mg/ kg/day resulted in a NOEL of 15 mg/kg/day and an LOEL of 100 mg/kg/day. The LOEL was based on decreases in body weight and food consumption, alteration in clinical pathology, changes in organ weights, and histopathological lesions in the kidney, liver, and adrenal glands of both sexes of rats. A 90–day feeding study was conducted in dogs fed diets containing 0, 0.3, 1, 3, and 10 mg/kg/

day with a NOEL of 1 mg/kg/day. The LOEL was established at 3 mg/kg/day based on histopathological changes in the kidneys of male dogs.

5. *Chronic toxicity.* A 1–year dietary study was conducted in the dog using doses of 0, 1, 5, and 7.5 mg/kg/day. The NOEL was 1 mg/kg/day and the LOEL was 5 mg/kg/day based on clinical chemistry changes and histopathological lesions in the liver and kidney. A 2–year feeding/carcinogenicity study was conducted in mice fed diets containing 0, 1, 15, and 45 mg/kg/day with a NOEL of 1 mg/kg/day. The systemic LOEL was established at 15 mg/kg/day based on increased kidney and adrenal weights and homogeneity of renal tubular epithelium due to cytoplasmic vacuoles. No carcinogenic effects were observed under the conditions of the study at any dosage level tested. A second 2–year oncogenicity study was conducted in mice fed diets containing 0, 5, 62.5, and 125 mg/kg/day (males) and 0, 5, 150, and 300 mg/kg/day (females). No treatment-related oncogenicity was observed. A 2–year feeding/carcinogenicity study was conducted in rats fed diets containing 0, 1, 15, and 45 mg/kg/day with a NOEL of 1 mg kg/day. Although there appeared to be a slight treatment-related incidence of benign brain tumors (astrocytomas) in male rats fed diets containing 45 mg/kg/ day, two different statistical evaluations found no strong statistical evidence of carcinogenicity in male rats. There were no carcinogenic effects observed in female rats. A second 2–year feeding/carcinogenicity study was conducted in rats fed diets containing 0, 5, 75, and 150 mg/kg/day. The NOEL was 5 mg/kg/day and the LOEL was 75 mg/kg/day based on decreased body weight, body weight gain and food consumption; clinical chemistry changes; organ weight changes and histopathological lesions. No treatment-related carcinogenic effects or increased incidences of astrocytomas were observed.

6. *Animal metabolism.* The metabolism of phenyl ring labeled 14C-2,4-D was studied in the rat following a single intravenous or oral dose of approximately 1 mg/kg/day. At 48 hours after treatment, recovery of radioactivity in urine was in excess of 98%. Parent 2,4-D was the major metabolite (72.9% to 90.5%) found in the urine.

7. *Metabolite toxicology.* Because 2,4-D is rapidly excreted without significant metabolism, the toxicology data on the parent compound adequately represents metabolite toxicology.

8. *Endocrine disruption.* Although, tests explicitly designed to evaluate the potential endocrine effects of 2,4-D have not been conducted, a large and diverse battery of toxicology studies is available including acute, subchronic, chronic, reproductive and developmental toxicity tests. The results of these studies do not provide a pattern of effects suggestive of endocrine modulated toxicity.

C. Aggregate Exposure

1. *Dietary exposure.* Residues are near or below the lowest level of method validation (LLMV = 0.05 ppm) in hops. Tolerances have been established (40 CFR 180.142) for residues of 2,4-D as the acid or various of its salts and esters, in or on a variety of raw agricultural commodities. In addition, there are also tolerances for 2,4-D for meat, milk, and eggs.

i. *Food.* As reflected in the 1994–1996 USDA CSFII data, hops are not consumed as part of the diet. Therefore, any increased exposure from the use of 2,4-D on hops would be negligible and would not significantly alter the acute and chronic dietary risk estimates provided.

ii. *Drinking water.* 2,4-D is soluble in water. The average field half-life is 10 days. The chemical is potentially mobile, but rapid degradation in soil and removal by plant uptake minimizes leaching. A Maximum Contaminant Level (MCL) of 0.07 mg/L has been established. In addition, the following Health Advisories have been established: for a 10-kg child, a range of 1 mg/L from 1–day exposure to 0.1 mg/L for longer-term exposure up to 7 years; for a 70 kg adult, a range of 0.4 mg/L for longer-term exposure to 0.07 mg/L for lifetime exposure.

2. *Non-dietary exposure.* 2,4-D is currently registered for use on the following residential non-food sites: ornamental turf, lawns, and grasses, golf course turf, recreational areas, and several other indoor and outdoor uses. 2,4-D is a commonly-used pesticide in non-agricultural settings. There are chemical-specific and site-specific data available to determine the potential risks associated with residential exposures from the registered uses of 2,4-D. Dislodgeable residues of 2,4-D taken during exposure sessions showed a rapid decline from 1 hour following application (8%) to 24 hours following applications (1%). No detectable residues were found in urine samples supplied by volunteers exposed to sprayed turf 24 hours following application. Intermediate-term postapplication exposure is thus not expected.

D. Cumulative Effects

There are no available data to determine whether 2,4-D has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, 2,4-D does not appear to produce a toxic metabolite produced by other substances.

E. Safety Determination

1. *U.S. population.* For chronic dietary exposure, EPA has established the RfD for 2,4-D at 0.01 milligrams/kilogram/day (mg/kg/day). This RfD is based on a 1–year oral toxicity study in dogs with a NOEL of 1 mg/kg/day and an uncertainty factor of 100. In the most recent final rule establishing tolerances for 2,4-D (time-limited tolerance in soybeans at 64 FR 11792 on March 10, 1999), EPA calculated aggregate risks for the existing uses of 2,4-D at that time (including soybeans and all other existing uses). Since those uses have not changed in the interim and hops are not consumed as part of the diet, it is appropriate to utilize the same calculations to support the proposed tolerance in or on hops. Chronic dietary exposure estimates (DEEM) used mean consumption (3 day average) and anticipated or tolerance-level residues for all commodities. Exposure estimates used 25.6% of the RfD for the general U.S. population (48 states) and 49.2% of the RfD for the most exposed population of non-nursing infants (less than one year old). Despite the potential for exposure to 2,4-D in drinking water and from non-dietary, non-occupational exposure, EPA did not expect the aggregate exposure to exceed 100% of the RfD.

For acute dietary exposure, the NOEL of 67 mg/kg/day from the rat acute neurotoxicity study should be used for risk assessment. As neurotoxicity is the effect of concern, the acute dietary risk assessment should evaluate acute dietary risk to all population subgroups. Again, relying upon the EPA calculations underlying the most recent final rule establishing tolerances for 2,4-D cited above, which included soybeans and all other existing uses, EPA calculated acute aggregate risk taking into account anticipated residues or tolerance level residues on all treated crops, which is a significant over estimation of dietary exposure. For the U.S. population, the acute dietary MOE is 321 and it is 399 for females 13+ years. These figures do not exceed

EPA's level of concern for acute dietary exposure.

Regarding dietary cancer risk assessment, EPA's Cancer Peer Review Committee has classified 2,4-D as a Group D chemical ("not classifiable as to human carcinogenicity") on the basis that, "the evidence is inadequate and cannot be interpreted as showing either the presence or absence of a carcinogenic effect."

2. *Infants and children.* The data base on 2,4-D relative to pre-and post-natal toxicity is complete with respect to current data requirements. Since the developmental NOELs for rats and rabbits are 25–fold greater and 90–fold greater, respectively, than the RfD NOEL of 1 mg/kg/day in the one–year oral toxicity study in dogs, an additional uncertainty factor to protect infants and children is not warranted.

Using conservative EPA calculations underlying the most recent final rule establishing tolerances for 2,4-D cited above, which included soybeans and all other existing uses, aggregate acute MOEs for exposure to 2,4-D from food are 214 for infants less than 1–year old and 399 for females 13 and older. The maximum estimated concentrations of 2,4-D in surface and ground water are less than EPA's Drinking Water Level of Comparison (DWLOC) figures for 2,4-D as a contribution to acute aggregate exposure. EPA concluded with reasonable certainty that residues of 2,4-D in drinking water do not contribute significantly to the aggregate acute human health risk.

Using the same conservative assumptions described earlier to estimate chronic risk from aggregate chronic exposure to 2,4-D from food, 11.4% of the reference dose (RfD) is utilized for nursing infants less than one year old up to 49.2% of the RfD for non-nursing infants less than one–year old. Further refinement using additional anticipated residue values in crops and percent crop-treated information would result in lower chronic dietary (food) exposure estimates, thus reducing the aggregate risk estimate. Despite the potential for exposure to 2,4-D in drinking water and from non-dietary, non-occupational exposure, EPA concluded that, it did not expect the aggregate exposure to exceed 100% of the RfD.

F. International Tolerances

There are no Codex, Canadian, or Mexican maximum residue limits (MRLs) for use of 2,4-D on hops.

[FR Doc. 05–7224 Filed 4–12–05; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0047; FRL–7699–9]

Etoxazole; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2005–0047, must be received on or before May 13, 2005.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kable Bo Davis, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 306–0415; e-mail address: *davis.kable@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2005–0047. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although, a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although, not all docket materials may

be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also, include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2005–0047. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID number OPP–2005–0047. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2005–0047.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID number OPP–2005–0047. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response.

You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 1, 2005.

Lois Rossi,

Director, Registration Division, Office of PesticidePrograms.

Summary of Petition

The petitioner's summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by Valent U.S.A. Corporation and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Valent U.S.A. Corporation

PP 3F6739

EPA has received a pesticide petition PP 3F6739 from Valent U.S.A. Corporation, 1333 North California Boulevard, Suite 600, Walnut Creek, CA 94596–8025 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180, by establishing a tolerance for residues of the chemical etoxazole, 2-(2,6-difluorophenyl)-4-[4-(1,1-dimethylethyl)-2-ethoxyphenyl]-4,5-dihydrooxazole, in or on the raw agricultural commodities nut, tree (Crop Group 14), including pistachios at 0.01 parts per million (ppm), almond, hulls at 2.0 ppm, grapes at 0.5 ppm, and raisins at 1.5 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism of etoxazole is adequately understood for the purpose of the proposed tolerances.

2. *Analytical methods.* Practical analytical methods for detecting and measuring levels of etoxazole have been developed and validated in/on all appropriate agricultural commodities and respective processing fractions. The extraction methodology has been validated using aged radiochemical residue samples from ^{14}C-metabolism studies. The enforcement methods have been validated in cottonseed, cotton gin trash, and in fresh mandarin oranges at independent laboratories. The LOQ of etoxazole in these methods is 0.01 ppm in grapes and nutmeats and 0.05 ppm in almond, hulls, which will allow monitoring of food with residues at the levels proposed for the tolerances.

3. *Magnitude of residues.* An extensive crop residue program has been conducted for etoxazole in all major growing regions of the United States for the following crops: Almond and pecans (representing nut, tree, Crop Group 14), and grapes. The results of these studies can be summarized as follows:

- For almonds, the maximum etoxazole residues from two applications at 0.135 pounds active ingredient/acre/treatment, was 0.005 ppm for nutmeats and 1.79 ppm for hulls harvested 28–days after application. Almond hulls were also analyzed for R–3, a metabolite of etoxazole. The maximum residue of R–3 was as 0.12 ppm.
- For pecans, no etoxazole residues were observed in nutmeats (LOD = 0.005 ppm) treated twice at 0.135 pounds active ingredient/acre/treatment and harvested 28–days after application.
- The maximum etoxazole residue in grapes harvested 28–days following the last of two treatments at 0.135 pounds active ingredient/acre/treatment was 0.33 ppm.
- The results of a grape processing study indicate that etoxazole residues concentrate in both grape juice and raisins. The concentration factor for grape juice was determined in this study to be 5.3X, which exceeds the theoretical concentration factor of 1.2X. Using this theoretical concentration factor to estimate the tolerance for juice, a tolerance of 0.32 ppm was calculated. Since this tolerance is less than the tolerance proposed for grapes, grape juice tolerances are not required. The concentration factor for raisins was determined in this study to be 3.5X. The theoretical concentration factor for raisins is, however, 4.7x. To be consistent with the grape juice calculations, this theoretical concentration factor was used to determine the proposed tolerance for raisins.

These field trial data are adequate to support proposed tolerances of 0.01 ppm for nut, tree (Crop Group 14); pistachios at 0.01 ppm; 2.0 ppm for almond, hull; 0.5 ppm for grapes; and 1.5 ppm for raisins.

Almond, hull is the only commodity under consideration that is a significant feed item for beef and dairy cattle. Tolerances of 0.03 ppm in the fat of animals and 0.04 ppm in milk fat, previously proposed and pending at the Agency, are adequate to support the use on almonds.

None of the commodities under consideration are used as poultry feed items. Additionally, the results of a hen metabolism study demonstrated very low potential for residues in feed to transfer to poultry tissues or eggs. Therefore, no hen residue feeding study was performed and tolerances are not proposed for secondary residues in poultry commodities.

B. Toxicological Profile

A full battery of toxicology testing, including studies of acute, chronic, oncogenicity, developmental, mutagenicity, and reproductive effects has been completed for etoxazole. The acute toxicity of etoxazole is low by all routes. Etoxazole is not a developmental or reproductive toxicant, and is not mutagenic or oncogenic. For the purpose of dietary risk analysis, Valent proposes 0.04 milligrams/kilogram body weight/day (mg/kg bwt/day) as the chronic Population Adjusted Dose (cPAD) and 2 mg/kg bwt/day as the acute Population Adjusted Dose (aPAD). The cPAD is based on a chronic endpoint of 4 mg/kg bwt/day no observed adverse effect level (NOAEL) for males from the rat chronic/oncogenicity feeding study and an uncertainty factor of 100. The aPAD is based on the 200 mg/kg bwt/day NOAEL from the rabbit developmental toxicity study and an uncertainty factor of 100. Valent is unable to identify toxicity endpoints of concern for acute, short-term or chronic human exposures by any route other than oral.

1. *Acute toxicity.* The acute toxicity of technical grade etoxazole is low by all routes. The battery of acute toxicity studies place etoxazole in Toxicity Category III. The oral LD_{50} in the rat was greater than 5 grams/kilogram (g/kg), the dermal LD_{50} was greater than 2.0 g/kg, and the inhalation LC_{50} in the rat was greater than 1.09 milligrams/liter (mg/L). Etoxazole technical was not an irritant to eyes or skin and was not a skin sensitizer.

2. *Genotoxicity.* Etoxazole was evaluated and found to be negative in an Ames reverse mutation assay, a chromosome aberration assay, a micronucleus assay, and an unscheduled DNA synthesis (UDS) assay. Etoxazole produced a positive result in the mouse lymphoma gene mutation assay but only in the presence of metabolic activation. Etoxazole does not present a genetic hazard.

3. *Reproductive and developmental toxicity*—i. *Rat developmental study.* Etoxazole did not produce developmental toxicity in rats. Etoxazole technical was administered by oral gavage to pregnant rats at dosage levels of 40, 200, and 1,000 mg/kg/day on days 6 through 15 of gestation. There were no mortalities or treatment-related adverse effects in any dose group. Food consumption was slightly decreased in dams during the dosing period for the 1,000 mg/kg/day group. On cesarean section evaluation there was no differences in number of corpora lutea, number of live and dead fetuses, percent resorption, placental weight, fetal weight or sex ratio in the dams and no treatment-related external, visceral or skeletal malformations noted in any of the fetuses. It was concluded that, the maternal no observed adverse effect Level (NOAEL) was 200 mg/kg/day, based on decreased food consumption at 1,000 mg/kg/day. The developmental NOAEL was 1,000 mg/kg/day, the highest dose tested (HDT).

ii. *Rabbit developmental study.* Etoxazole did not produce developmental toxicity in rabbits. Etoxazole technical was administered by oral gavage to pregnant rabbits at dosage levels of 40, 200, and 1,000 mg/kg/day on days 6 through 18 of gestation. No treatment-related adverse effects were found on maternal rabbits in the 40 and 200 mg/kg/day groups. One high dose rabbit died but it is unclear whether this death was attributed to treatment. Decreased body weight, body weight gain, food consumption and enlarged liver were noted at 1,000 mg/kg/day. Cesarean section findings showed that there was no differences in number of corpora lutea, number of live and dead fetuses, percent resorptions, placental weight, fetal weight and sex ratio in the dams and showed no treatment-related malformations (external, visceral, skeletal) in any of the fetuses. A statistically significant increased incidence of 27 presacral vertebrae with 13th ribs was observed in fetuses at 1,000 mg/kg/day compared with controls. This finding was within historical control range for fetal incidence but above the historical control range for litter incidence. No dose response was evident and the variation is considered to be equivocally treatment related. The NOAEL for maternal and developmental toxicity was 200 mg/kg/day based on decreased body weight and body weight gain, decreased food consumption, and liver enlargement at 1,000 mg/kg/day. The NOAEL for developmental toxicity was 200 mg/kg/day based on statistically significant increased incidence of 27 presacral vertebrae with 13th ribs in fetuses at 1,000 mg/kg/day.

iii. *Rat reproduction study.* Etoxazole showed no effects on reproduction in a two-generation rat study. Etoxazole technical was fed to two generations of male and female Sprague Dawley rats at dietary concentrations of 80, 400, and 2,000 ppm. No treatment-related adverse effects were observed in the 80 and 400 ppm groups for any parameter. In the 2,000 ppm group, relative liver weights were increased in the F0 and F1 parental males. No adverse reproductive effects were noted at any dose level in the incidence of normal estrous cycle, mating index, fertility and gestation indices, the number of implantation sites, and duration of gestation in F0 and F1 parental animals. For the offspring, it was noted that at 2,000 ppm, the viability index on lactation Day 4 was significantly lower in the F1 pups and body weights were lowered in pups during the latter half of the lactation period. For the F0 and F1 pups of the 80 and 400 ppm groups, there were no treatment-related adverse effects observed for any parameter, i.e. mean number of pups delivered, sex ratio, viability indices on lactation days 0, 4 and 21, clinical signs, body weights and gross pathological findings. The parental NOAEL was 400 ppm (17.0 mg/kg/day) based on the effects on relative liver weight in males at 2,000 ppm. The pup NOAEL was 400 ppm (37.9 mg/kg/day) based on decreased viability on lactation Day 4 and decreased body weight at 2,000 ppm in the F1 pups. The reproductive NOAEL was 2,000 ppm (86.4 mg/kg/day), the (HDT).

4. *Subchronic toxicity.* Subchronic toxicity studies conducted with etoxazole technical in the rat (oral and dermal), mouse and dog indicate a low level of toxicity. Effects observed at high dose levels consisted primarily of anemia and histological changes in the adrenal gland, liver and kidneys.

i. *Rat feeding study.* A 90–day subchronic toxicity study was conducted in rats, with dietary intake levels of 100, 300, 1,000 and 3,000 ppm etoxazole technical. The NOAEL was 100 ppm for males and 300 ppm for females based on increased incidence of hepatocellular swelling at 1,000 ppm and 3,000 ppm.

ii. *Mouse feeding study.* A 90–day subchronic toxicity study was conducted in mice, with dietary intake levels of 100, 400, 1,600, and 6,400 ppm etoxazole technical. The NOAEL was 400 ppm for males and 1,600 ppm for females based on increased alkaline phosphatase activity, increased liver weights, and increased incidence of hepatocellular swelling at 6,400 ppm (both sexes) and at 1,600 ppm in males and enlarged livers in females at 6,400 ppm.

iii. *Dog feeding study.* Etoxazole technical was fed to male and female Beagle dogs for 13 weeks at dietary concentrations of 200, 2,000, and 10,000 ppm. The NOAEL was 200 ppm (5.3 mg/kg/day) based on clinical signs, clinical pathology changes, liver weight effects and histopathological changes at 2,000 and 10,000 ppm.

iv. *Repeated dose dermal study.* A 28–day dermal toxicity study was conducted in rats at dose levels of 30, 100, and 1,000 mg/kg. There were no treatment related changes in any of the parameters monitored. The NOAEL was 1,000 mg/kg, the (HDT).

5. *Chronic toxicity.* Etoxazole technical has been tested in chronic studies with dogs, rats and mice. Valent proposes a chronic oral endpoint of 4 mg/kg bwt/day, based on the NOAEL for male rats in a 2–year chronic toxicity oncogenicity feeding study.

i. *Dog chronic feeding study.* Etoxazole technical was fed to male and female beagle dogs for one year at dietary concentrations of 200, 1,000, and 5,000 ppm. The NOAEL was 200 ppm (4.6 mg/kg/day for males and 4.79 mg/kg/day for females) based on increased absolute and relative liver weights with corresponding histopathological changes in the liver at 1,000 and 5,000 ppm.

ii. *Rat chronic feeding/oncogenicity study.* Etoxazole was not oncogenic in rats in either of two chronic feeding studies conducted. In the first study, etoxazole technical was fed to male and female Sprague Dawley rats for 2–years at dietary concentrations of 4, 16, and 64 mg/kg/day. A trend toward decreased

body weight gain for males at 64 mg/kg/day in the latter half of the study was observed. Hemotology and clinical chemistry changes, increased liver weights and hepatic enlargement at 16 mg/kg/day or above were observed. Testicular masses, centrilobular hepatocellular swelling and testicular interstitial (Leydig) cell tumors occurred at or above 16 mg/kg/day. The interstitial (Leydig) cell tumors were believed to be incidental. The NOAEL was 4 mg/kg/day for males and 16 mg/kg/day for females. Because an MTD level was not achieved in this study, a second study was conducted in which etoxazole technical was fed to male and female Sprague Dawley rats for 2–years at dietary concentrations of 50, 5,000, and 10,000 ppm. In this study, decreased mortality, body weight and food consumption/ efficiency (females) at 10,000 ppm was observed. Hematological, clinical, and histopathological changes of the incisors, and increased liver weights occurred in both sexes at 5,000 and 10,000 ppm. Centrilobular hepatocellular hypertrophy was observed in both sexes at 10,000 ppm. The interstitial (Leydig) cell tumors observed in the first study, were not observed in the repeat study. The NOAEL in the repeat study was 50 ppm (1.8 mg/kg/day).

iii. *Mouse oncogenicity study.* Etoxazole was not oncogenic in either of 2 mouse oncogenicity studies conducted. In the first study, etoxazole technical was fed to male and female CD–1 mice for 18–months at dietary concentrations of 15, 60, and 240 mg/kg/day. Increased liver weights occurred in females at the highest dose tested. Histopathology parameters were altered for males at 240 mg/kg/day. No neoplastic lesions were observed at any dose level. The NOAEL was 60 mg/kg/day. Since the toxicity in this study was minimal and did not meet the definition of MTD, a second study was conducted at dose levels of 2,250 and 4,500 ppm etoxazole. There were no effects in any group on clinical observations, mortality, body weight, food consumption or hematology. Females showed a significant elevation in relative liver weight after 52–weeks of treatment at 4,500 ppm. In histopathology, a significantly higher incidence of centrilobular hepatocellular fatty change was observed in males in the 4,500 ppm group necropsied after 78–weeks of treatment. There were no treatment-related changes in either sex in the 2,250 ppm dose group. No increase in neoplastic lesions were observed in any treated group of either sex. Therefore, it was concluded that, the NOAEL is 2,250 ppm (242 mg/kg/day for the males and 243 mg/kg/day for the females).

6. *Animal metabolism.* The absorption, tissue distribution, metabolism and excretion of etoxazole were studied in rats after single oral doses of 5 or 500 mg/kg, and after 14 daily oral doses at 5 mg/kg. Etoxazole, labeled in both the t-butylphenyl ring and the oxazole ring were used in this study. For both single dose groups, most (94–97%) of the administered radiolabel was excreted in the urine and feces within 7–days after dosing. Most of this excretion occurred in the first 48 hours after dosing. Maximum plasma concentrations occurred 2–4 hours after dosing, with half-lives ranging from 53–89 hours at the low dose and 7–44 hours at the high dose. Plasma levels were significantly lower in females. Concentrations of radioactivity were significantly higher in the tissues of male rats compared to females. The highest concentrations occurred at 3 hours after dosing and were greatest in the gastrointestinal tract and tissues such as liver and kidneys, which are responsible for metabolism and excretion. By 168 hours, the concentration in most tissues was below the concentration in the corresponding plasma, with only the liver and fat having significant levels of radioactivity. After multiple doses, peak concentrations of radioactivity in tissues occurred 2 hours after dosing and then declined. The distribution of radioactivity showed a similar profile to those found after single oral doses but were significantly higher, indicating some accumulation. Etoxazole was extensively metabolized by rats. The main metabolic reactions in rats were postulated to be hydroxylation of the 4,5-hydrooxazole ring followed by cleavage of the molecule and hydroxylation of the t-butyl side chain.

7. *Metabolite toxicology.* In an oral toxicity limit test in rats, the oral LD_{50} of metabolite R–3 was estimated to be greater than 5 g/kg for both male and female rats. No treatment related body weight changes and no treatment related macroscopic abnormalities were observed in this study. In another test, the oral toxicity of metabolite R–7 (as the HCl salt) was assessed. The oral LD_{50} of this metabolite was also estimated to be greater than 5 g/kg for both male and female rats. No treatment related macroscopic abnormalities were observed in this test, although, some clinical signs were observed within 6–minutes of dosing. Mutagenicity screens were performed with metabolite R–3 and metabolite R–7 (as the HCl salt). Neither metabolite was mutagenic when tested with multiple strains of two bacterial cultures (*salmonella typhimurium and e coli*).

8. *Endocrine disruption.* No special studies to investigate the potential for estrogenic or other endocrine effects of etoxazole have been performed. However, as summarized above, a large and detailed toxicology data base exists for the compound including studies in all required categories. These studies include acute, sub-chronic, chronic, developmental, and reproductive toxicology studies including detailed histology and histopathology of numerous tissues, including endocrine organs, following repeated or long term exposures. These studies are considered capable of revealing endocrine effects. The results of all of these studies show no evidence of any endocrine-mediated effects and no pathology of the endocrine organs. Consequently, it is concluded that etoxazole does not possess estrogenic or endocrine disrupting properties.

C. Aggregate Exposure

1. *Dietary exposure.* A full battery of toxicology testing including studies of acute, chronic, oncogenicity, developmental, mutagenicity, and reproductive effects is available for etoxazole. In these risk assessments, Valent proposes as the chronic oral toxic endpoint the NOAEL for males from the rat chronic/oncogenicity feeding study, 4 mg/kg/day. To assess the chronic risk to the U.S. population from exposure to etoxazole, the daily chronic exposures were compared against an estimated chronic population adjusted dose (cPAD) of 0.04 mg/kg bwt/day. This endpoint is derived from the NOAEL from the 2–year chronic rat study by applying an uncertainty factor of 100 to account for intraspecies and interspecies variations. There is no evidence that any additional safety factors are needed to further protect vulnerable subpopulations. The proposed acute oral toxic endpoint is the NOAEL from the rabbit oral developmental toxicity study, 200 mg/kg/day. To assess the acute risk to the U.S. population from exposure to etoxazole, acute exposures were compared against an estimated acute population adjusted dose (aPAD) of 2 mg/kg bwt/day. This endpoint is derived from the NOAEL from the rabbit oral developmental toxicity study by applying an uncertainty factor of 100 to account for intraspecies and interspecies variations. Based on dietary, drinking water, and non-occupational exposure assessments, there is reasonable certainty of no harm

to the U.S. population, any population subgroup, or infants and children from short-term or chronic exposure to etoxazole.

i. *Food.* Dietary exposure was estimated using the Cumulative and Aggregate Risk Evaluation System (CARES). Acute dietary exposure was estimated for the overall U.S. population and 16 population subgroups using proposed tolerances and conservative estimates of the percentages of crop treated. The results demonstrate that estimated exposure is less than 1% of the estimated aPAD (at the 99.9th percentile) for all population groups examined. Acute dietary exposure for the overall U.S. population was estimated to be 0.006 mg/kg bwt/day at the 99.9th percentile of exposure (0.29% of the aPAD). Chronic dietary exposure was estimated for the overall U.S. population and 16 population subgroups. Annual exposure for the overall U.S. population was estimated to be 0.00014 mg/kg bwt/day, representing 0.36% of the estimated cPAD. Annual exposure for the most highly exposed population subgroup, children 1–2 years of age, was estimated to be 0.00065 mg/kg bwt/day, or 1.62% of the estimated cPAD.

ii. *Drinking water.* Since etoxazole is applied outdoors to growing agricultural crops, the potential exists for the parent or its metabolites to reach ground water or surface water that may be used for drinking water. But, because of the physical properties of etoxazole, it is unlikely that etoxazole or its metabolites can leach to potable ground water. Although, relatively stable to hydrolysis, etoxazole undergoes fairly rapid photolysis, degrades fairly readily in soil and is immobile in all soil types examined. To quantify potential exposure from drinking water, FIRST and SCI-GROW models were used to estimate surface water and ground water residues. Estimated surface water residues were much higher than estimated ground water residues and therefore, the surface residues were used as the Drinking Water Environmental Concentration (DWEC). The peak (acute) concentration predicted in the simulated pond water was estimated to be 2.47 ppb and the annual average (chronic) concentration predicted in the simulated pond water was estimated to be 1.93 ppb. To assess the contribution to the dietary risk from exposure to drinking water containing residues of etoxazole, these DWEC's are compared to drinking water levels of comparison (DWLOC's), the maximum drinking water concentration allowed before combined water, dietary, and other exposures will exceed the population adjusted doses. If the DWLOC is greater than the DWEC, then overall exposure will not exceed the population adjusted doses and combined exposure from water and food is considered to be acceptable. Acute DWLOC's for etoxazole range from 19,900 to 69,910 ppb and chronic DWLOC's range from 377 to 1,380 ppb for all U.S. population subgroups examined. Since these DWLOC's exceed the modeled acute and chronic DWEC surface water residues by a wide margin, it can be concluded that, exposure to potential residues in drinking water is negligible and that aggregate (food and water) exposure to etoxazole residues will be acceptable.

2. *Non-dietary exposure.* Etoxazole is proposed only for agricultural uses and no homeowner or turf uses. Thus, no non-dietary risk assessment is needed.

D. Cumulative Effects

Section 408(b)(2)(D)(v) requires that the Agency must consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances" that have a common mechanism of toxicity. Available information in this context include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although, the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way.

In consideration of potential cumulative effects of etoxazole and other substances that may have a common mechanism of toxicity, there are currently no available data or other reliable information indicating that any toxic effects produced by etoxazole would be cumulative with those of other chemical compounds. Thus, only the potential risks of etoxazole have been considered in this assessment of aggregate exposure and effects.

Valent will submit information for EPA to consider concerning potential cumulative effects of etoxazole consistent with the schedule established by EPA at (62 FR 42020) (Aug. 4, 1997) and other subsequent EPA publications pursuant to the Food Quality Protection Act.

E. Safety Determination

1. *U.S. population*—i. *Acute risk.* The potential acute exposure from food to the U.S. population and various non-child/infant population subgroups are estimated to be 0.15 to 0.30% of the proposed aPAD. Exposure to potential acute residues in drinking water is expected to be negligible, as acute DWLOC's are substantially higher than modeled acute DWEC's. Based on this assessment, it can be concluded that, there is a reasonable certainty that no harm to the U.S. population or any population subgroup will result from acute exposure to etoxazole.

ii. *Chronic risk.* The potential chronic exposure from food to the U.S. population and various non-child/infant population subgroups are estimated to be 0.24 to 1.59% of the proposed cPAD. Chronic exposure to potential residues in drinking water is also expected to be negligible, as chronic DWLOC's are substantially higher than modeled chronic DWEC's. Based on this assessment, it can be concluded that there is a reasonable certainty that no harm to the U.S. population or any population subgroup will result from chronic exposure to etoxazole.

2. *Infants and children*—i. *Safety factor for infants and children.* In assessing the potential for additional sensitivity of infants and children to residues of etoxazole, FFDCA section 408 provides that EPA shall apply an additional margin of safety, up to ten–fold, for added protection for infants and children in the case of threshold effects unless EPA determines that a different margin of safety will be safe for infants and children. The toxicological data base for evaluating prenatal and postnatal toxicity for etoxazole is complete with respect to current data requirements. There are no special prenatal or postnatal toxicity concerns for infants and children, based on the results of the rat and rabbit developmental toxicity studies or the 2-generation reproductive toxicity study in rats. Valent has concluded, that reliable data support use of the standard 100–fold uncertainty factor and that an additional uncertainty factor is not needed for etoxazole to be further protective of infants and children.

ii. *Acute risk.* The potential acute exposure from food to infants and children are estimated to be 0.28 to 0.97% of the proposed aPAD. Exposure to potential acute residues in drinking water is expected to be negligible, as acute DWLOC's are substantially higher than modeled acute DWEC's. Based on this assessment, it can be concluded that, there is a reasonable certainty that

no harm to infants and children will result from acute exposure to etoxazole.

iii. *Chronic risk.* The potential chronic exposure from food to infants and children are estimated to be 0.64 to 1.62% of the proposed cPAD. Chronic exposure to potential residues in drinking water is expected to be negligible, as chronic DWLOC's are substantially higher than modeled DWEC's. Based on this assessment, it can be concluded that, there is a reasonable certainty that no harm to infants and children will result from chronic exposure to etoxazole.

3. *Safety determination summary.* Aggregate acute or chronic dietary exposure to various subpopulations of children and adults demonstrate acceptable risk. Acute and chronic dietary exposures to etoxazole occupy considerably less than 100% of the appropriate PAD. EPA generally has no concern for exposures below 100% of the acute and chronic PAD's because these represent levels at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Chronic and acute dietary risk to children from etoxazole should not be of concern. Further, etoxazole has only agricultural uses and no other uses, such as indoor pest control, homeowner or turf, that could lead to unique, enhanced exposures to vulnerable sub-groups of the population. It can be concluded that, there is a reasonable certainty that no harm will result to the U.S. population or to any sub-group of the U.S. population, including infants and children, from aggregate chronic or aggregate acute exposures to etoxazole residues resulting from the proposed uses.

F. International Tolerances

Etoxazole has not been evaluated by the JMPR and there are no codex maximum residue limits (MRL) for etoxazole. MRL values have been established for etoxazole in the following countries: Turkey, Israel, South Africa, Japan, France, Taiwan, and Korea. The use pattern and MRL's are similar to those proposed for the U.S.

[FR Doc. 05–7223 Filed 4–12–05; 8:45 am]

BILLING CODE 6560–50–S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Meeting, Sunshine Act

DATE AND TIME: Thursday, April 21, 2005, a.m. eastern time.

PLACE: Clarence M. Mitchell, Jr. Conference Room on the Ninth Floor of the EEOC Office Building, 1801 "L" Street, NW., Washington, DC 20507.

STATUS: Part of the meeting will be open to the public and part of the meeting will be closed.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes.
2. Renewal of LexisNexis Subscription Services.
3. Renewal of Westlaw and West Publishing Subscriptions.
4. Oracle License Maintenance Agreement.
5. Competitive Lease Contract for New Mail Machine Systems.

Closed Session

Litigation Authorization: General Counsel Recommendations.

Note: In accordance with the Sunshine Act, the open session of the meeting will be open to public observation of the Commission's deliberations and voting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.)

Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TTY) at any time for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Stephen Llewellyn, Acting Executive Officer on (202) 663–4070.

This notice issued April 11, 2005.

Stephen Llewellyn,

Acting Executive Officer, Executive Secretariat.

[FR Doc. 05–7537 Filed 4–11–05; 8:45 am]

BILLING CODE 6750–06–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

April 4, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction (PRA) comments should be submitted on or before June 13, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at 202–418–2918 or via the Internet at Cathy.Williams@fcc.gov.

SUPPLEMENTARY INFORMATION: OMB Control Number: 3060–0386.

Title: Section 73.1635, Special Temporary Authorizations (STA).

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents: 1,550.

Estimated Time per Response: 1–4 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 2,000 hours.

Total Annual Cost: $939,950.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 73.1635 allows licensees/permittees of broadcast stations to file for special temporary authority to operate broadcast stations at specified variances from station authorization not to exceed 180 days. Data is used by FCC staff to ensure that such operations will not cause interference to other stations.

Federal Communications Commission.
Marlene H. Dortch,
Secretary.
[FR Doc. 05–7060 Filed 4–12–05; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) being Reviewed by the Federal Communications Commission, Comments Requested

DATE: April 4, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before June 13, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918 or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–XXXX.

Title: Section 74.786, Digital Channel Assignments; Section 74.787, Digital Licensing; Section 74.790, Permissible Service of Digital TV Translator and Low Power TV (LPTV) Stations; Section 74.794, Digital Emissions.

Form Number: Not applicable.

Type of Review: New collection.

Respondents: Business or other for-profit entities; not-for-profit institutions; State, local or tribal government.

Number of Respondents: 9,000.

Estimated Time per Response: 51.5 hours.

Frequency of Response: One-time reporting requirement.

Total Annual Burden: 57,300 hours.

Total Annual Cost: $98,916,200.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The Commission adopted rules in a Report and Order (R&O) in MB Docket No. 03–185, FCC 04–220, adopted September 9, 2004, and released September 20, 2004. The Commission is establishing a new service, the new rules contain over 20 new one-time burdens. These burdens include the cost of equipment necessary to offer digital service. The Commission also imposes Paperwork Reduction Act (PRA) burdens aimed at minimizing the opportunity for interference and continuing to offer the public the highest quality viewing services possible during the transition to digital television. All of the burdens are one-time burdens and are the minimum needed to ensure a smooth, rapid transition to the myriad of opportunities offered by digital television technology.

Section 74.786 requires an applicant for a new low power television translator digital station or for changes in the facilitates of an authorized digital station shall endeavor to select a channel on which its operation is not likely to cause interference. The applications must be specific with regard to the channel requested. Only one channel will be assigned to each station. Stations proposed use of such channels shall notify all potentially affected 700 MHz wireless licenses not later than 30 days prior to the submission of their application (FCC Form 346).

Section 74.787 states applications for digital conversion channels may be filed at any time. Such applications shall be filed on FCC Form 346 and will be treated as a minor change application. Also, this rule section covers applications for companion digital channel. A public notice will specify a time period or "window" for filing applications for companion digital channels. During this window, only existing low power television or television translator stations or licensees or permittees of Class A TV stations may submit applications for companion digital channels. Construction permit applications for new stations, major changes to existing station in the low power television service are also covered under this rule section. A public notice will specify the date upon which interested parties may begin to file applications for new stations and major facilities changes to existing station in the low power television service. Such applications shall be accepted on a first-come, first served basis, and shall be filed on FCC Form 346. Displacement applications are also covered under this rule section and are filed when a digital low power television or television translator station which is causing or receiving interference or is predicted to cause or receive interference to or from an authorized TV broadcast station. Digital TV (DTV) station or allotment or other protected station service, may at any time file a displacement relief application for change in channel, together with technical station's protected service area, provided the proposed transmitter site is not located more than 30 miles from the reference coordinates of the existing station's community license. This can be done on FCC Form 346.

Section 74.790 states that DTV translator stations provide a means whereby the signals of DTV broadcast stations may be retransmitted to areas in which direct reception of such DTV stations is unsatisfactory due to distance or intervening terrain barriers.

Section 74.794 requires that an applicant for a digital Low Power TV (LPTV) or TV translator station construction permit shall specify that the station will be constructed to confine out-of-channel emissions within one of the following masks: simple or stringent.

Federal Communications Commission.
Marlene H. Dortch,
Secretary.
[FR Doc. 05–7061 Filed 4–12–05; 8:45 am]
BILLING CODE 6712–10–M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Approved by Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collection pursuant to the Paperwork Reduction Act of 1995, Pub. L. 104–13.

DATES: Written comments should be submitted on or before May 13, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Kristy L. LaLonde. Office of Management and Budget Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, (202) 395–3087, via the Internet to *Kristy_L. LaLonde@omb.eop.gov*, via fax at (202) 395–5167; or Les Smith, Federal Communications Commission, 445 12th Street, SW., Room 1–A804, Washington DC, 20554, (202) 418–0217 or *Leslie.Smith@fcc.gov*.

Paperwork Reduction

OMB Control No: 3060–0095.
Expiration Date: March 31, 2008.
Title: Multi-Channel Video Programming Distributor Annual Employment Report, FCC 395–A.
Form No: 395–A.
Respondents: Operators of cable/television units.
Number of Respondents: 2,500.
Total Annual Burden: 2,200 hours.
Total Annual Cost: 0.
Terms of Clearance: FCC Form 395–A, MCVPD Annual Employment Report, collects information on full-time paid employees. In order to reduce reporting and recordkeeping burdens, it is intentionally the same as the workforce profile collected by the U.S. Equal Employment Opportunity Commission, Employer Report Form (EEO–1). Any changes to this EEOC EEO–1 form should be reflected in changes to FCC form 395–A.

Federal Communications Commission.
Marlene H. Dortch,
Secretary.

[FR Doc. 05–7345 Filed 4–12–05; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Approved by Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collection pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13.

DATES: Written comments should be submitted on or before May 13, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Kristy L. LaLonde, Office of Management and Budget Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, (202) 395–3087, via the Internet to *Kristy_L. LaLonde@omb.eop.gov*, via fax at (202) 395–5167; or Les Smith, Federal Communications Commission, 445 12th Street, SW., Room 1–A804, Washington, DC 20554, (202) 418–0217 or *Leslie.Smith@fcc.gov*.

Paperwork Reduction

OMB Control No: 3060–0390.
Expiration Date: March 31, 2008.
Title: Broadcast Station Annual Employment Report, FCC 395–B.
Form No: 395–B.
Respondents: Licensees and permittees of broadcast stations.
Number of Respondents: 14,000.
Total Annual Burden: 12,320 hours.
Total Annual Cost: 0.
Terms of Clearance: FCC Form 395–B, Broadcast Station Annual Employment Report, collects information on full-time paid employees. In order to reduce reporting and recordkeeping burdens, it is intentionally the same as the workforce profile collected by the U.S. Equal Employment Opportunity Commission, Employer Report Form (EEO–1). Any changes to this EEOC EEO–1 form should be reflected in changes to FCC form 395–B.

Federal Communications Commission.
Marlene H. Dortch,
Secretary.

[FR Doc. 05–7348 Filed 4–12–05; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection Being Submitted to OMB for Review and Approval

April 4, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before June 13, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, 445 12th Street, SW., Room 1–A804, Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.
Title: Broadband Power Line Systems, ET Docket No. 04–37.
Form Number: N.A.
Type of Review: New collection.

Respondents: Business or other for-profit; not-for-profit institutions; and State, local or tribal government.

Number of Respondents: 100.

Estimated Time per Response: 0.5 hour (30 minutes); multiple responses annually.

Frequency of Response: On occasion reporting requirements, Third party disclosure.

Total Annual Burden: 2,600 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On October 14, 2004, the Commission adopted a Report and Order, Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems, ET Docket No. 04–37, FCC 04–245. The *Report and Order* requires that entities operating Access BPL systems shall supply to an industry-recognized entity, information on all existing Access BPL systems and all proposed Access BPL systems for inclusion into a publicly available data base, within 30 days prior to initiation of service. The following information should be provided to the database manager: The name of the Access BPL provider; the frequencies of the Access BPL operation; the postal zip codes served by the specific Access BPL operation; the manufacturer and type of Access BPL equipment and its associated FCC ID number, or in the case of Access BPL equipment that has been subject to verification, the Trade Name and Model Number, as specified on the equipment label; the contact information, including both phone number and e-mail address of a person at, or associated with, the BPL operator's company, to facilitate the resolution of any interference complaint; the proposed/or actual date of Access BPL operation. The Access BPL operator can begin operations once the 30-day advance notification timeframe is over, then the Access BPL operator must notify the database manager of the date of commencement of actual operations for inclusion in the database. The database manager shall be required to enter this information into the publicly accessible database within 3 business days of receipt.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7349 Filed 4–12–05; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

[DA 05–491]

Wireless Telecommunications Bureau Confirms Certain Licenses in the Paging and Radiotelephone Service and Certain Licenses Operating on 929–930 MHz Private Carrier Paging Exclusive Channels Terminated as a Result of Spectrum Audit

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, as a result of certain licensees' failure to respond to the Wireless Telecommunications Bureau (Bureau) audit inquiries, the Bureau announces that certain licenses have been presumed to have permanently discontinued service, as defined in the Commission's discontinuance of station operation rules, and therefore have cancelled automatically. Action has been taken in the Universal Licensing System to terminate the licenses that are set forth in the Attachment of this Public Notice.

FOR FURTHER INFORMATION CONTACT: Denise D. Walter, Mobility Division, at 202–418–0620.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice (*Public Notice*), DA 05–491, released on March 9, 2005. The full text of this document is available for inspection and copying during normal business hours in the Federal Communications Commission Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Federal Communications Commission's copy contractor, Best Copy and Printing, Inc, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at *http://wireless.fcc.gov*. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *bmillin@fcc.gov*.

1. On September 24, 2004, the Bureau mailed letters to all licensees operating in the Paging and Radiotelephone Service with a "CD" radio service code and certain licensees operating on 929–930 MHz private carrier paging exclusive channels with a "GS" radio service code inquiring into the operational status of each license held. Each licensee was required to respond and certify, by November 12, 2004, that its authorized station(s) had not permanently discontinued service as defined in § 22.317 of the Commission's rules. The audit letter, mailed to each licensee at its address of record, included the call signs of the licensee's authorizations involved in this audit. On December 7, 2004 the Bureau mailed a second letter and notice of termination to those who did not respond to the first letter directing them to respond to the audit by January 21, 2005. Due to an error, a few licensees did not receive this letter. Therefore, another letter was mailed on January 13, 2005, and the filing deadline to respond to the audit was extended to February 21, 2005. In addition, the Bureau released an initial *Public Notice*, 69 FR 54290, September 8, 2004 announcing the audit, and subsequent *Public Notices*, 69 FR 60626, October 12, 2004 and 69 FR 76469, December 20, 2004, announcing the mailing of the first and second audit letters.

2. In the audit letters mailed to the individual licensees, as well as in the Bureau's *Public Notices*, the Bureau expressly indicated that a response to the audit letter was mandatory. The Bureau also indicated that failure to provide a timely response may result in the Commission's presumption that station at issue has permanently discontinued service as defined in § 22.317 of the Commission's rules and may result in the loss of the licensee's authority to operate on the station(s) at issue in the audit letter. The Bureau has received no response to audit letters for the station licenses that are set forth in the Attachment of the *Public Notice*. The Bureau therefore presumes that the stations identified in the Attachment have permanently discontinued service as defined in § 22.317 of the Commission's rules and confirms that these station licenses have cancelled automatically. Action has been taken in the Universal Licensing System to reflect these licenses as terminated.

Federal Communications Commission.

Linda Chang,

Associate Chief, Mobility Division.

Attachment

Call sign	Radio service	Licensee
WPPG539	GS	(800) Page-USA, Inc.
WPFN852	GS	800 PAGE USA INC.
WPPG540	GS	800 PAGE USA INC.

Call sign	Radio service	Licensee
KNLT932	CD	Abu Fadel, Marwan.
KRS659	CD	ACTION PAGE, INC.
KNLM845	CD	ACUITY, Inc.
KNLP907	CD	Advanced Communication and Electronics, Inc.
KKB692	CD	ADVANCED COMMUNICATIONS & TOWER INC.
KWB377	CD	ADVANCED TELCOM
KNKG512	CD	ADVANCED TELCOM INC.
KNKJ255	CD	AIR PAGE, INC.
KNKM843	CD	AIR-PAGE, INC.
KNKC358	CD	AIRPHONE, INC.
KWT968	CD	AIRPHONE, INC.
KWT969	CD	AIRPHONE, INC.
KNLV702	CD	ALAN L. KENDALL.
KNLV375	CD	ALARRA K. HEWSTAN/MICHAEL WEINER.
KNLU428	CD	ALEX H. SCOVIL.
KIM907	CD	ALWAYS ANSWERING SERVICE, INC.
KIY597	CD	ALWAYS ANSWERING SERVICE, INC.
KNKI217	CD	ALWAYS ANSWERING SERVICE, INC.
KNKO631	CD	ALWAYS ANSWERING SERVICE, INC.
KNKI642	CD	ALWAYS ANSWERING SERVICES, INC.
KNKI646	CD	ALWAYS ANSWERING SERVICES, INC.
KNLR965	CD	AMERICAN DYNAMICS GROUP, INC.
WPJN873	GS	AMERICAN PAGING INC.
WPJX554	GS	AMERICAN PAGING INC.
KNLN920	CD	AMERICAN PAGING INC. OF FLORIDA.
KNKS237	CD	AMERICAN PAGING, INC. (OF LOUISIANA).
WRV225	CD	ANDERSON, CONRAD DBA: ONTARIO TEL-ANSWER SERVICE.
KNLT718	CD	ANDREW KIYOTO KUBOTA.
KNLT660	CD	ANNA K. DAVIS.
KNLU375	CD	ANNA K. DAVIS.
KNLV514	CD	ANNA K. DAVIS.
KNLV515	CD	ANNA K. DAVIS.
KNLT712	CD	ANNA M. BANNER.
KEC520	CD	Answer XAct New York, LLC.
KNLT753	CD	ANTHONY RADAICH.
KNLV339	CD	APURVA C. PATEL.
WRW291	CD	ARCHIE CONNER DBA: LIVINGSTON MOBILEPHONE.
KSV927	CD	ARGENTINA MOHR, PERSONAL REPRESENTATIVE.
WPGQ483	GS	ASHER, ALVIN B.
KNLR928	CD	ATLANTIC CELLULAR COMPANY, L.P.
KNLU294	CD	B KEVIN KLESSER.
WPFP861	GS	BEARD, DAVID P.
WPFP862	GS	BEARD, DAVID P.
WPJY600	GS	BEARD, DAVID P.
KNLR367	CD	BEAULIEU, ARTHUR.
KNLM994	CD	Beeper Express, Inc.
KNLT835	CD	Beeper Network Inc.
KNLT837	CD	Beeper Network Inc.
KNLT839	CD	Beeper Network Inc.
KNLT840	CD	Beeper Network Inc.
KNLT841	CD	Beeper Network Inc.
KNLT842	CD	Beeper Network Inc.
KNLT849	CD	Beeper Network Inc.
KNLV796	CD	BESSEY, DAVID J.
KNLV436	CD	BIG APPLE PAGING CORP.
KNLV529	CD	BIG APPLE PAGING CORP.
WPJW872	GS	BLACK, BRIAN.
KNLN457	CD	BLACK, CHARES E.
KNKK821	CD	BLASIAR, INC. DBA: ALERT COMMUNICATIONS COMPANY.
KNLR886	CD	BRENT D. CROWDER.
KNLV765	CD	BREVARD, JAMES P.
KNLV747	CD	BRIAN PHELPS DBA: PHELPS & STRICKLAND.
KNLQ873	CD	BROWN, IRENE H.
KNLQ765	CD	BUCKLAN, BARNETT AND PHYLLIS.
WNJB602	GS	BUSINESS COMMUNICATION EXPERTS INC.
KNLT629	CD	BUSINESS PRODUCTIVITY SYSTEMS, INC.
KNLR783	CD	BUZB CORP.
KNLV749	CD	BYRON RAY KOCIAN.
KNLN473	CD	CA PAGING, INC.
KNNH791	GS	CACTUS COMMUNICATIONS INC.
KNKO618	CD	Calypso Communications LLC.
KNLR435	CD	CAPITOL PAGING, INC.
WPKJ511	GS	CARAWAY, DWAYNE H.
WPKK227	GS	CARAWAY, DWAYNE H.

Call sign	Radio service	Licensee
KNLU363	CD	CARL S. SANKO.
KNLT915	CD	CARMEN MEO.
KNLU286	CD	CAROL S. BENCH.
KNLV617	CD	CAROLYN SINES.
KNLR344	CD	CARR, GEORGE L.
KNKE220	CD	CARRIER COMMUNICATIONS CORP.
KNLM533	CD	CARRIER COMMUNICATIONS CORP.
KNKG541	CD	CARRIER COMMUNICATIONS, INC.
KNKC825	CD	CAR-TEL COMMUNICATIONS, INC.
KNLQ784	CD	CARY G. COOK.
KNLP962	CD	CATALAN, CHARLES.
KNLT778	CD	CATALAN, CHARLES T.
KNKM364	CD	CEL AIR COMMUNICATIONS.
KNKM473	CD	CEL AIR COMMUNICATIONS.
KNKB538	CD	Central Vermont Communications, Inc.
KUS392	CD	Central Vermont Communications, Inc.
KWT916	CD	Central Vermont Communications, Inc.
KNLR310	CD	CHADWICK J. GUILLORY.
KNLT483	CD	CHARLES CATALAN.
KNLT636	CD	CHARLES CATALAN.
KNLV772	CD	CHARLES L HERMAN.
KNLV774	CD	CHARLES L HERMAN.
KNLV748	CD	CHARLES L. HERMAN.
KNLQ957	CD	CHARLES M KEELER DBA: SOUTHEAST PAGING NETWORK.
KWH305	CD	CHARLES P. ODEN DBA: NEBRASKA RADIO TELEPHONE SYSTEM.
KNLN416	CD	CHISHOLM, MICHAEL G. DBA: CYPHER COMMUNICATIONS.
KNLU350	CD	CODELL GIBSON.
KNKO900	CD	COLLINS, DONNA N.
KDS453	CD	COMMERCIAL COMMUNICATIONS, INC.
KKB667	CD	COMMERCIAL COMMUNICATIONS, INC.
KPE379	CD	COMMERCIAL COMMUNICATIONS, INC.
KUS258	CD	COMMERCIAL COMMUNICATIONS, INC.
KWU469	CD	COMMERCIAL COMMUNICATIONS, INC.
WRV267	CD	COMMERCIAL COMMUNICATIONS, INC.
KNLQ499	CD	COMMERCIAL MOBILE NETWORK, INC.
KNLU776	CD	Commstar Communications.
KNLT216	CD	COMMUNITRONICS, INC.
KNKJ870	CD	COMMUNICATIONS EQUIPMENT & SERVICE, INC.
KNLR887	CD	COMMUNITRONICS, INC.
KLF565	CD	Communitronics, Inc.
KNLR866	CD	COMMUNITRONICS, INC.
KNLR872	CD	COMMUNITRONICS, INC.
KNLR889	CD	COMMUNITRONICS, INC.
KNLS237	CD	COMMUNITRONICS, INC.
WXS438	CD	COMMUNITRONICS, INC.
WXS490	CD	COMMUNITRONICS, INC.
WXS428	CD	COMMUNITRONICS, INC.
KNKI239	CD	COMPUCOL, INC.
KNLU298	CD	CORNELIS M. HOFMANS.
WRD369	CD	CORSICANA PAGING SERVICE, INC.
WRV925	CD	CORSICANA PAGING SERVICE, INC.
KNLU908	CD	COY OTWELL.
KNKC796	CD	CRYSTAL COMMUNICATIONS, INC.
KNKD271	CD	CRYSTAL COMMUNICATIONS, INC.
KNKP756	CD	CSSI.
KWU214	CD	CULLMAN MOBILE PHONE, WILLIAM B. FOLSOM.
KWU213	CD	CULLMAN MOBILE PHONE, INC.
KNLQ779	CD	CUTE-DEROSE, ROBERTA.
KNKL513	CD	D.A. SANDERS, JR.
KNKD302	CD	D.A. SANDERS, JR.
KNLR422	CD	DALIA WILLIAMS.
KNLU351	CD	DAN HOLLORAN.
KNLU217	CD	DANIELLE GIBB.
KNLS404	CD	DANNY RAY BOYER DBA: CENTRAL MOBILFONE.
KNLR469	CD	DANNY RAY BOYER DBA: CENTRAL MOILFONE.
KNLR471	CD	DANNY RAY BOYER DBA: DBA, CENTRAL MOBILEFONE.
KNLR446	CD	DANNY RAY BOYER DBA: DBA, CENTRAL MOBILFONE.
KNKL806	CD	DANNY'S TWO WAY COMMUNICATIONS, INC.
KNKL718	CD	DANNY'S TWO WAY COMMUNICATIONS, INC.
KNKK854	CD	DANNY'S TWO WAY COMMUNICATIONS, INC. DBA: DAN COMM PAGING.
KNKM272	CD	DANNY'S TWO WAY COMMUNICATIONS, INC. DBA: D/B/A DAN COMM PAGING.
KNKJ591	CD	DANNY'S TWO WAY COMMUNICATIONS, INC. DBA: DAN COMM PAGING.
KNKK593	CD	DANNY'S TWO WAY COMMUNICATIONS, INC. DBA: DAN COMM PAGING.
KNKK844	CD	DANNY'S TWO WAY COMMUNICATIONS, INC. DBA: DAN COMM PAGING.

Call sign	Radio service	Licensee
KNKL995	CD	DANNY'S TWO WAY COMMUNICATIONS, INC. DBA: DAN COMM PAGING.
KNKL742	CD	DANNY'S TWO-WAY COMMUNICATIONS, INC.
WPGH961	GS	DAVE & DAN INC DBA PROCELL COMMUNICATIONS.
KNLT489	CD	DAVID E SELMON.
KNLV701	CD	DAVID E. RIVERS.
KNLV725	CD	DAVID E. RIVERS.
KNLV691	CD	DAVID J. BESSEY.
KNLV435	CD	DAVID KONG CHAN.
KNLU443	CD	DAVID M. COZZOLINO.
KNKI884	CD	DAVID P. BEARD.
KNLT476	CD	DAVID SELL.
KNLU825	CD	DAVID SELL.
KNLU851	CD	DAVID SELL.
KNLU874	CD	DAVID SELL.
KNLQ733	CD	DAWN D CATLETT.
KNLR219	CD	DEROSE, WILLIAM, JR.
WPOK432	CD	DIAL-A-PAGE, INC.
KNLV779	CD	DIMITRI A. MOSS.
KNLQ856	CD	DION, STEVEN L. DBA: SOUTHEAST PAGING NETWORK.
KNKB920	CD	DISK COMMUNICATIONS COMPANY, DON KEELER.
KNLV352	CD	DIVYA C PATEL.
KNLR483	CD	DOBBS, JONES DBA: SOUTHEAST PAGING NETWORK.
KNKI212	CD	DON KEELER DBA: DISK COMMUNICATIONS COMPANY.
KNKB548	CD	DON KEELER DBA: DISK COMMUNICATIONS, CO.
KNKB723	CD	DON KELLER DBA: DISK COMMUNICATIONS.
KNKC466	CD	DON KELLER DBA: DISK COMMUNICATIONS.
KPD990	CD	DON KELLER DBA: DISK COMMUNICATIONS.
KNLV302	CD	DONALD J. MENNING & HELEN.
KNLV484	CD	DONALD P. FROELICH.
KNLV203	CD	DORA FAISON.
KNLT904	CD	DOROTHY A. WILLIAMS.
KNLU964	CD	DOUGLAS BRADY.
KNLU394	CD	DOUGLAS NONAKA.
KNLU953	CD	DOUGLAS NONAKA.
KNLU966	CD	DOUGLAS NONAKA.
KNLU988	CD	DOUGLAS NONAKA.
KNLV246	CD	DOUGLAS NONAKA.
KNKL656	CD	DRIVEFONE, INC.
KNKL657	CD	DRIVEFONE, INC.
KNLQ211	CD	DUWAYNE & LORI A. HARRINGTON.
KNLT654	CD	DWAYNE H. CARAWAY.
KNLT960	CD	EARL E. WILKISON.
KNLP879	CD	EASTEX TELECOMMUNICATIONS CORP.
KNKJ435	CD	ECONOPAGE OF CLEVELAND, INC.
KNLV232	CD	EDWARD F. SCHLUETER.
KNLV501	CD	EDWIN W. GANTZ.
KNLV510	CD	EDWIN W. GANTZ.
KNLS535	CD	EDWIN W. GANTZ.
KNLV214	CD	EDWIN W. GANTZ.
KNLV243	CD	EDWIN W. GANTZ.
KNLQ546	CD	ESPINOZA, RAUL.
KNKO610	CD	EXPRESS MESSAGE CORPORATION.
KNKO614	CD	EXPRESS PAGE, INC.
KNKP564	CD	EXPRESS PAGE, INC.
WPDU269	GS	F T C PAGING INC DBA FLORIDA TELEPHONE.
KNLU331	CD	F/W TELECOMM.
KEC939	CD	FARKILL COMMUNICATIONS, INC.
KNLM367	CD	FARRINGTON, VIRGINIA V.
KNLN497	CD	Faye Wells d/b/a Southern Digital Network.
KNLN499	CD	Faye Wells d/b/a Southern Digital Network.
WNZT210	GS	FIRSTPAGE USA OF DELAWARE INC.
KNLP313	CD	FLORIDA NETWORK USA, INC.
KNLM381	CD	FRALEY, CARL D.
KNLU365	CD	FRANK BECKERER.
KNLV722	CD	FRANKIE L. ROBERTS.
KNLV723	CD	FRANKIE L. ROBERTS.
KNLU767	CD	FEDERICK E SPRENGELMEYER.
KNLW367	CD	FRIEND, PAUL W. JR.,
WPIR815	GS	FTC PAGING INC DBA FLORIDA TELEPHONE.
WPKM766	GS	FTC PAGING INC DBA FLORIDA TELEPHONE.
KNLU931	CD	GANTZ, EDWIN W.
KNLU232	CD	GENEVIVE AHLES.
KNLR748	CD	GERALD J. SKROCKI.
KNLQ882	CD	GIBSON, JOYCE DBA: HAWAII ALPHANUMERIC PAGING NETWORK.

Call sign	Radio service	Licensee
KNLT590	CD	GIBSON, JOYCE DBA: SOUTHEAST PAGING NETWORK.
KNLV252	CD	GLADSTONE B. WALKER.
KNLU264	CD	GLEN ROSS RIDDELL.
WPBY887	GS	GREENLINE PARTNERS INC.
KNLU758	CD	GREG FLEMING.
KNLQ782	CD	GREGORY C. GARCIA.
KNLT687	CD	GROVER HARDING WEAVER & BARRY KENT WEAVER.
KNLQ844	CD	GRUNBERG, DAVID.
KNLP517	CD	GULF COAST MOBILE COMMUNICATION, INC.
WPGZ955	GS	HAFNER, CARL J.
WPHC604	GS	HALL, RANEY.
KNLQ414	CD	HAMPEL, BERNECE.
KNLU347	CD	HARRY C. DUNLOP.
KNLU216	CD	HARVEY GRIMM.
KNLV694	CD	HELEN VERENA T. WILLIAMS.
KNLV705	CD	HELEN VERENA T. WILLIAMS.
KNLV711	CD	HELEN VERENA T. WILLIAMS.
KNLV713	CD	HELEN VERENA T. WILLIAMS.
KNLV732	CD	HELEN VERENA T. WILLIAMS.
WPHW401	GS	HENSLEY, DARREN.
WPHD825	GS	HENSLEY, JAMES D.
KNLU291	CD	HERBERT B. MACKEY.
KNKP286	CD	HIORT, FREDERICK W. JR. DBA: B&B PROPERTIES.
KNKP287	CD	HIORT, FREDERICK W. JR. DBA: B&B PROPERTIES.
KNKP366	CD	HIORT, FREDERICK W., JR.
KNKP371	CD	HIORT, FREDERICK W., JR.
KNKP288	CD	HIORT, FREDERICK W., JR. DBA: B&B BEEPERS.
KNKP365	CD	HIOT, FREDERICK W., JR.
KNLQ949	CD	HOFER, LEE.
KNKC506	CD	HOME TELEPHONE COMPANY OF NEBRASKA.
KNLP924	CD	HOUSTON WIRELESS CORPORATION.
KNLN332	CD	HRW & ASSOCIATES, LTD.
WPOK949	CD	INABNET COMMUNICATIONS INC.
KNKP802	CD	Inabnet Sr., Billy L.
WRW285	CD	Inabnet Sr., Billy L.
KKV692	CD	INABNET TOWER & COMMUNICATIONS SERVICE.
KSW215	CD	INABNET TOWER & COMMUNICATIONS SERVICE.
KRS618	CD	INABNET TOWER & COMMUNICATIONS SERVICES.
WPAY210	GS	INABNET, BILLY.
KNLQ761	CD	INGRID TAORMINA.
WNSD489	GS	INNER CITY PAGE INC.
WNSD490	GS	INNER CITY PAGE INC.
WNXM893	GS	INSTA PAGE INC.
KNKP567	CD	INTER PAGE, INC.
KNKP782	CD	INTER PAGE, INC.
KNKB329	CD	INTERELECTRONICS CORPORATION.
KPD814	CD	INTERELECTRONICS CORPORATION.
WRW238	CD	INTERELECTRONICS CORPORATION.
KNLP852	CD	INTERNATIONAL MOBILE TRACKING.
KNLR472	CD	INTERNATIONAL MOBILE TRACKING SYSTEM, INC.
KNLV769	CD	IONE C ROBINSON:
KNLM582	CD	IRVIN, HOWARD R., JR.
KNLU391	CD	IRVIN G. GEIB.
KNLV565	CD	IRVING BRUNNER KEMP III.
KNLV437	CD	J. KEN MAURIN.
KNLV444	CD	J. KEN MAURIN.
KNLV449	CD	J. KEN MAURIN.
KTS211	CD	J.K. COMMUNICATIONS, INC.
KNEJ924	GS	JACKSON MEMORIAL HOSPITAL.
KNLQ740	CD	JAMES A. ZACH.
KNLV253	CD	JAMES W. BOTTOMLEY.
KNKL575	CD	JAMES WILLIAM BUFORD DBA STEAMBOAT VOICE & DIGITAL COMM.
KNLU909	CD	JANICE R GRENTZ.
KNLV248	CD	JASON ALLEN RICHARDS.
KNLU348	CD	JEAN M. BENFORD.
KNLU270	CD	JEROME NALBANDIAN.
KUS399	CD	JIMCO, INC. DBA: PUBLIC COMM. PAGING AND RADIOTEL SERVICE.
KLB761	CD	JIMCO, INC. DBA: PUBLIC COMM. PAGING AND RADIOTEL SERVICE.
KNLW294	CD	JOANNE BAKEWELL.
KNLR911	CD	JOE EDD SWEATT DBA: NORTH TEXAS MOBILE PHONE.
KNLR912	CD	JOE EDD SWEATT DBA: NORTH TEXAS MOBILE PHONE.
KNLR916	CD	JOE EDD SWEATT DBA: NORTH TEXAS MOBILE PHONE.
KNLR919	CD	JOE EDD SWEATT DBA: NORTH TEXAS MOBILE PHONE.
KNKP763	CD	JOE WALTERS, JR.

Call sign	Radio service	Licensee
KNLM382	CD	JOE WALTERS, JR.
KNLQ767	CD	JOHN J. HILL JR.
KNLT941	CD	JOHN PAK.
KNLU903	CD	JOHN PISKOR.
KNLU939	CD	JOHN PISKOR.
KNLV277	CD	JOHN PISKOR.
KNLV285	CD	JOHN PISKOR.
KNLV395	CD	JOHN PISKOR.
KNLV396	CD	JOHN PISKOR.
KNLV421	CD	JOHN PISKOR.
KNLV524	CD	JOHN PISKOR.
KNLV532	CD	JOHN PISKOR.
KNLV548	CD	JOHN PISKOR.
KNLV554	CD	JOHN PISKOR.
KNLV557	CD	JOHN PISKOR.
KNLV201	CD	JOHN WAYNE PARRETT.
KNLQ619	CD	JOHNSON, NELL G.
KNKK876	CD	JONES, HUGH DBA: RICH MOUNTAIN COMMUNICATIONS.
KSJ750	CD	KANKAKEE TELEPHONE ANSWERING SERVICE, INC.
KWH301	CD	KANKAKEE TELEPHONE ANSWERING SERVICE, INC.
WPJX284	GS	KAPADIA INC.
WPKJ827	GS	KAPADIA INC.
KNLT213	CD	KASE, CHARLES.
KNLM429	CD	KASE, CHARLES A.
KNLV734	CD	KENDALL, ALAN L.
KNLU285	CD	KENNETH COHN, TRUSTEE U.A.
KNLV322	CD	KENNETH COHN, TRUSTEE U.A.
KNLV426	CD	KERRY AHLSTORM.
KYSR–FM	CD	KYSR INC.
KNLT628	CD	LAR-LIN ENTERPRISES, INC.
WPOK420	CD	LAUBENSTEIN, MOLLY-JEAN W.
KNKM844	CD	LAWCO COMMUNICATIONS GROUP.
KDS435	CD	Lawrence, James D.
WPQN884	CD	Lawrence, James D.
KKFR	CD	LEADING EDGE TECHNOLOGIES INC.
KNLV692	CD	LEE P. ANDREWS.
WXS462	CD	LEESBURG COMMUNICATIONS & ANSWERING SERV.
KWU497	CD	Leesburg Communications, Inc.
KNLN886	CD	LEPERA, FRANK.
KNLN788	CD	LEPERA, FRANK.
KNLT246	CD	LILIAN PINHO.
KNLV234	CD	LINDLEY, WILFORD B.
KNKM780	CD	Link Two Communications, Inc.
KNKS255	CD	Link Two Communications, Inc.
KNKS258	CD	Link Two Communications, Inc.
KNLM267	CD	Link Two Communications, Inc.
KNLR304	CD	Link Two Communications, Inc.
KNLR306	CD	Link Two Communications, Inc.
KNLR322	CD	Link Two Communications, Inc.
KNLV256	CD	LISA LYNN NITTI.
KPE354	CD	LOU GOLDSTEIN DBA: WEST FLORDIA COMMUNICATIONS.
KNKC768	CD	LOU GOLDSTEIN DBA: WEST FLORIDA COMMUNICATIONS.
KNLU266	CD	LOUIS ANDREW RIDDELL JR.
KNLQ932	CD	LOWE, LYNN W. DBA: SOUTHEAST PAGING NETWORK.
KWT915	CD	LOWRANCE SOUND CO., INC.
KNLV380	CD	LUCILLE M. NEAL.
KNLM914	CD	MANN, SCOTT K. DBA: MANN COMMUNICATIONS.
KNLU408	CD	MARIO RESTREPO.
KUC886	CD	MARLYS J. FIE DBA: LAKE PAGING.
KNLU442	CD	MARTIN & ANGELA WALKER.
KNLU974	CD	MARTIN W. LADD.
KNLT453	CD	MARTIN WALKER.
KNLV833	CD	MARVIN G. SELL.
KNLR941	CD	MARVIN SELL.
KNLR954	CD	MARVIN SELL.
KNLT445	CD	MARVIN SELL.
KNLU813	CD	MARVIN SELL.
KNLU816	CD	MARVIN SELL.
KNLU820	CD	MARVIN SELL.
KNLU844	CD	MARVIN SELL.
KNLU849	CD	MARVIN SELL.
KNLU910	CD	MARY M PARKER.
KNKP277	CD	MCCAW COMMUNICATIONS OF PORTLAND, INC.
WSI707	CD	McRoberts, Allyn C. and Mary D. DBA: Mohave Communications.

Call sign	Radio service	Licensee
KNLS603	CD	MELVIN H. MIDDENTS.
WNZT214	GS	MERCURY MESSAGE PAGING INC.
WPCM733	GS	MERCURY MESSAGE PAGING INC.
WPCM768	GS	MERCURY MESSAGE PAGING INC.
WPJS320	GS	MERCURY MESSAGE PAGING INC.
WPDA716	GS	MERCURY MESSENGER SERVICE INC.
KNLV265	CD	MERLYN W. V. LOFGREN.
KNLT782	CD	METRO/DELTA, INC.
KNLT783	CD	METRO/DELTA, INC.
KNLP881	CD	METROLINK, INC.
KNLP896	CD	METROLINK, INC.
KNLP908	CD	METROLINK, INC.
KNLP913	CD	METROLINK, INC.
KNLP935	CD	METROLINK, INC.
KNLP956	CD	METROLINK, INC.
KNLQ205	CD	METROLINK, INC.
KNLQ207	CD	METROLINK, INC.
KNLQ240	CD	METROLINK, INC.
KNLV307	CD	MICHAEL C OWENS.
KNLU429	CD	MICHAEL H. SHIFLETT.
KNLU418	CD	MICHAEL JOSEPH DANDREA.
WPHC479	GS	Miguel A Mendez Trustee.
WPHC481	GS	Miguel A Mendez Trustee.
WPHC482	GS	Miguel A Mendez Trustee.
WPJY220	GS	Miguel A Mendez Trustee.
WPHA618	GS	MILLER, NEIL.
KNLU315	CD	MIRIAM L BEAMAN.
WPJY849	GS	MISCHLER, JANET.
WPJY930	GS	MISCHLER, JANET.
WPJZ209	GS	MISCHLER, JANET.
WPJZ263	GS	MISCHLER, JANET.
KNKO616	CD	MOBILE COMM. CORP. OF AMERICA.
KNKK943	CD	MOBILE TEL & PAGER, INC.
KNKL233	CD	MOBILE TEL & PAGER, INC.
KUS219	CD	MOBILE TEL & PAGER, INC.
WPWY916	CD	Monroe, County of
KNLV490	CD	MONTICELLO LEASING CORPORATION.
KNKI772	CD	MORRIS, LLOYD V. DBA: LLOYD V MORRIS & ASSOCIATES.
WNVN570	GS	Motorola Inc.
KDS669	CD	MOUNT VIEW COMMUNICATONS, INC.
KNLV775	CD	MR & MRS MADISON SIPPERLEY.
KNKP415	CD	MULTIPAGE, INC.
KNKP416	CD	MULTIPAGE, INC.
KNLV226	CD	N & N PARTNERS.
KNLR961	CD	NASHVILLE DIGICOM, INC.
KKB699	CD	NATIONLINK COMMUNICATIONS CORPORATION, INC.
KKB780	CD	NATIONLINK COMMUNICATIONS CORPORATION, INC.
KRS705	CD	NATIONLINK COMMUNICATIONS CORPORATION, INC.
WXS443	CD	NEBRASKA RADIO TELEPHONE SYS., INC.
KNLV315	CD	NELL S. NICHOLS.
KNLU928	CD	NONAKA, DOUGLAS.
KNKB547	CD	NORARK PAGING OF LITTLE ROCK, INC.
KNKJ940	CD	NORARK PAGING OF LITTLE ROCK, INC.
KNKP574	CD	North American Communications Group, Inc.
KNKP575	CD	North American Communications Group, Inc.
KNKP576	CD	North American Communications Group, Inc.
KNKP577	CD	North American Communications Group, Inc.
KNKP578	CD	North American Communications Group, Inc.
KNKP581	CD	North American Communications Group, Inc.
KNKP605	CD	North American Communications Group, Inc.
KNKP607	CD	North American Communications Group, Inc.
KNLQ852	CD	O'NEILL, C. M.
KNLU947	CD	OPA JEAN PRICE.
KNKI807	CD	OZARK TELECOM, INC.
KNLS320	CD	P.G. PARNERSHIP.
KNLS319	CD	P.G. PARTNERSHIP.
WRV927	CD	PAGE A PHONE INC.
WXR916	CD	PAGE A PHONE INC.
KDS450	CD	PAGE N' TEL, INC.
WNYS465	GS	PAGE TELECOMMUNICATIONS LLC.
WNYS496	GS	PAGE TELECOMMUNICATIONS LLC.
WPBG813	GS	PAGE TELECOMMUNICATIONS LLC.
WPBG814	GS	PAGE TELECOMMUNICATIONS LLC.
WPBJ795	GS	PAGE TELECOMMUNICATIONS LLC.

Call sign	Radio service	Licensee
WPBM957	GS	PAGE TELECOMMUNICATIONS LLC.
WPBW291	GS	PAGE TELECOMMUNICATIONS LLC.
WPFK217	GS	PAGE TELECOMMUNICATIONS LLC.
WPFK274	GS	PAGE TELECOMMUNICATIONS LLC.
WPFK278	GS	PAGE TELECOMMUNICATIONS LLC.
WPGZ553	GS	PAGE TELECOMMUNICATIONS LLC.
WPGZ559	GS	PAGE TELECOMMUNICATIONS LLC.
WPGZ561	GS	PAGE TELECOMMUNICATIONS LLC.
WPGZ563	GS	PAGE TELECOMMUNICATIONS LLC.
WPGZ571	GS	PAGE TELECOMMUNICATIONS LLC.
WPGZ591	GS	PAGE TELECOMMUNICATIONS LLC.
WPGZ626	GS	PAGE TELECOMMUNICATIONS LLC.
WPJQ625	GS	PAGE TELECOMMUNICATIONS LLC.
WPJQ998	GS	PAGE TELECOMMUNICATIONS LLC.
WPJR202	GS	PAGE TELECOMMUNICATIONS LLC.
WPJX254	GS	PAGE TELECOMMUNICATIONS LLC.
WPJX440	GS	PAGE TELECOMMUNICATIONS LLC.
WPJY517	GS	PAGE TELECOMMUNICATIONS LLC.
WPJY522	GS	PAGE TELECOMMUNICATIONS LLC.
WPJY756	GS	PAGE TELECOMMUNICATIONS LLC.
WPKA606	GS	PAGE TELECOMMUNICATIONS LLC.
WPKD699	GS	PAGE TELECOMMUNICATIONS LLC.
WPKE430	GS	PAGE TELECOMMUNICATIONS LLC.
WPKE490	GS	PAGE TELECOMMUNICATIONS LLC.
WPKG246	GS	PAGE TELECOMMUNICATIONS LLC.
WNPO381	GS	PAGEPROMPT USA.
WPDD244	GS	PAGER & CELLULAR DEPOT INC DBA PAGER AND CELLULAR DEPOT.
WPDS994	GS	PAGER & CELLULAR DEPOT INC DBA PAGER AND CELLULAR DEPOT.
KNLM514	CD	PAGER ONE INC.
KNNR909	GS	PAGER ONE INC.
KNNR910	GS	PAGER ONE INC.
WPIX617	GS	PAGER ONE INC.
KNLM379	CD	PAGER ONE INC.
WPFM203	GS	PAGER ONE OF FLORIDA INC.
WPFM323	GS	PAGER ONE OF FLORIDA INC.
WPFM335	GS	PAGER ONE OF FLORIDA INC.
WPFM343	GS	PAGER ONE OF FLORIDA INC.
WPFM347	GS	PAGER ONE OF FLORIDA INC.
WPFM648	GS	PAGER ONE OF FLORIDA INC.
WPFM652	GS	PAGER ONE OF FLORIDA INC.
WPFM656	GS	PAGER ONE OF FLORIDA INC.
KNLR201	CD	PAGER ONE OF FLORIDA, INC.
KNLQ993	CD	PAGER ONE OF FLORIDA, INC.
KNLQ994	CD	PAGER ONE OF FLORIDA, INC.
KNLV600	CD	PAGER ONE, INC.
KNLV602	CD	PAGER ONE, INC.
KNLV603	CD	PAGER ONE, INC.
KNKP736	CD	PAGER ONE, INC.
KNKS201	CD	PAGER ONE, INC.
KNKS202	CD	PAGER ONE, INC.
KNKS203	CD	PAGER ONE, INC.
KNKS205	CD	PAGER ONE, INC.
KNKS206	CD	PAGER ONE, INC.
KNKS207	CD	PAGER ONE, INC.
KNKS209	CD	PAGER ONE, INC.
KNLM995	CD	PAGER ONE, INC.
KNLN215	CD	PAGER ONE, INC.
KNLN217	CD	PAGER ONE, INC.
KNLN379	CD	PAGER ONE, INC.
KNLN980	CD	PAGER ONE, INC.
KNLR942	CD	PAGER ONE, INC.
WPOJ683	CD	PAGER ONE, INC.
WPDV784	GS	PAGETECH COMMUNICATIONS INC.
KNKB898	CD	PAGEX COMPANY.
KNKP554	CD	PAGING CONSULTANTS, INC.
KNEE813	GS	PAGING DIMENSIONS INC.
WNGS882	GS	PAGING DIMENSIONS INC.
WNKF849	GS	PAGING DIMENSIONS INC.
WPBN988	GS	PAGING DIMENSIONS INC.
WPBW327	GS	PAGING DIMENSIONS INC.
WPBY928	GS	PAGING DIMENSIONS INC.
WPFW875	GS	PAGING DIMENSIONS INC.
KNLM397	CD	PAGING SYSTEMS INC.
KNLR718	CD	PAGING SYSTEMS MANAGEMENT, INC.

Call sign	Radio service	Licensee
KNLR719	CD	PAGING SYSTEMS MANAGEMENT, INC.
WPEB521	GS	Paging USA INC.
KKB742	CD	PARSONS MOBILE & PAGING, INC.
KNLU345	CD	PATEL, SONAL C.
KKB791	CD	PATRICIA A. BURGDORFF DBA: CONROE WILLIS PAGING SYSTEM.
KNLV429	CD	PAUL K. BORKEY & M.D. BARONE.
KNLV430	CD	PAUL K. BORKEY & M.D. BARONE.
KNLV427	CD	PAUL K. BORKEY AND M.D. BARONE.
KNLU398	CD	PAUL MATZEK.
KNLV778	CD	PAUL R ROBINSON.
WPGD551	GS	PELLISH COMMUNICATIONS INC.
WPGD552	GS	PELLISH COMMUNICATIONS INC.
WPGD553	GS	PELLISH COMMUNICATIONS INC.
WPGD599	GS	PELLISH COMMUNICATIONS INC.
WPGF245	GS	PELLISH COMMUNICATIONS INC.
WPHC586	GS	PELLISH COMMUNICATIONS INC.
WPHC587	GS	PELLISH COMMUNICATIONS INC.
WPHF440	GS	PELLISH COMMUNICATIONS INC.
WPHF459	GS	PELLISH COMMUNICATIONS INC.
WPHG837	GS	PELLISH COMMUNICATIONS INC.
WPHG841	GS	PELLISH COMMUNICATIONS INC.
WPHG856	GS	PELLISH COMMUNICATIONS INC.
KNKO686	CD	PELLISH COMMUNICATIONS, INC.
KNKO687	CD	PELLISH COMMUNICATIONS, INC.
KNKO688	CD	PELLISH COMMUNICATIONS, INC.
KNLR508	CD	PELLISH COMMUNICATIONS, INC.
KNKD549	CD	PEOPLES TELEPHONE COMPANY.
KNLV242	CD	PHIL KOESTER BISSON.
KNLS994	CD	PHILLIP BURKHARDT.
KNKO272	CD	PHONE HOME, INC.
KNLN470	CD	PHONE HOME, INC.
KNLV558	CD	PISKOR, JOHN.
KNLV959	CD	PNI SPECTRUM, LLC.
KNLV980	CD	PNI SPECTRUM, LLC.
KNLV247	CD	PRASHANT N. PATEL.
KNLV263	CD	PRASHANT N. PATEL.
KNLP358	CD	PREMIER PAGING GROUP PARTNERS.
KNLR382	CD	PRUNTY, ROBERT L.
KNLR386	CD	PRUNTY, ROBERT L.
KEA263	CD	Qualco Wireless Corp.
KEA855	CD	Qualco Wireless Corp.
KNKO395	CD	Qualco Wireless Corp.
KNKO800	CD	Qualco Wireless Corp.
KNKO801	CD	Qualco Wireless Corp.
KNKP423	CD	R&G DISTRIBUTORS, INC.
KNLR388	CD	R.T. COMMUNICATIONS, INC.
KNLV512	CD	RAMBABU KONERU.
WXS230	CD	RAPIDS RADIO, INC.
KNLU221	CD	RAYMOND BASSETT.
KNLR953	CD	REV DR. JOHNNY HECKARD.
KNLQ947	CD	REYES, RENIEL DBA: SOUTHEAST PAGING COMPANY.
KKB658	CD	Richard A. Sullivan.
KNLU407	CD	RICHARD M ZURAWSKI.
KNLV304	CD	RICK HAVIL.
KNKO456	CD	RING 10 INC.
KNLR952	CD	ROBERT A WILLIAMS.
KNLV493	CD	ROBERT D DALE.
KNLV518	CD	ROBERT D DALE.
KNLU343	CD	ROBERT E. NAY.
KNLU768	CD	ROBERT M THIRLAWAY.
KNLV764	CD	ROBERT MCCREARY.
KNLT546	CD	ROBERTA CUITE-DEROSE.
WSI652	CD	ROCKY TOP ENTERPRISES, INC.
KNLT305	CD	ROGER L. FORBES.
KNLV453	CD	ROGER L. FORBES.
KNLV456	CD	ROGER L. FORBES.
KNLS299	CD	ROMAN H MASSENBERG DBA: SOUTHEAST PAGING NETWORK.
KNLU341	CD	RONALD GREENLEE & STEVEN CRANE.
KNKD291	CD	SANDERS JR, DORSEY A.
KNLN219	CD	Satellite Paging Inc.
KNKJ741	CD	SATELLITE PAGING, INC.
KNLP239	CD	SATELLITE PAGING, INC.
WPHD905	GS	SATER, GARY N.
WPHD909	GS	SATER, GARY N.

Call sign	Radio service	Licensee
WPHD913	GS	SATER, GARY N.
KNLQ339	CD	SAVILLE CAMIE.
KNLS297	CD	SEBASTIAN & NORMA SANCHEZ.
KNKP289	CD	Select Carrier Corp.
KNLV497	CD	SETH KRAUSS.
KNLQ717	CD	SHARON L. SMITH.
KNLR290	CD	SHEIKH, MUHAMMED.
KNKI931	CD	SIGNAL ONE PAGING, INC.
KNLM596	CD	SIGNAL SOUTHEAST.
KNLQ409	CD	SIKORSKI, KENNETH S.
KNLN450	CD	SIMMONS, MARK W. DBA: SIMMONS COMMUNICATIONS.
KNLN697	CD	SKROCKI, GERARD.
KNLN730	CD	SKROCKI, GERARD.
KNLN737	CD	SKROCKI, GERARD.
KNLQ319	CD	SMALLEY SHAWN.
KNLN616	CD	SMALLEY, SHAWN.
KNLT303	CD	SMITH, GENE A.
KNLQ233	CD	SMITH, GENE A.
KNLQ649	CD	SMITH, GENE A.
KNLN524	CD	SMR/USA, INC.
KNLV334	CD	SONAL C. PATEL.
KNLV335	CD	SONAL C. PATEL.
KWT842	CD	SONOMA COMMUNICATIONS, INC.
WPKR311	GS	SOUKIASSIAN, HARRY: GOLD, DANNY DBA S & G COMMUNICATIONS.
KNKM735	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKO239	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP714	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP721	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP722	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP723	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP724	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP725	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP726	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP727	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP728	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP729	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP730	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP731	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP742	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP743	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKP783	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKS227	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKS228	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKS230	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKS256	CD	SOURCE ONE WIRELESS II, L.L.C.
KNKS257	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM277	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM296	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM348	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM389	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM482	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM515	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM610	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM735	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM758	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM774	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM812	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM847	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM871	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLM991	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLN230	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLN294	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLN300	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLN322	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLN361	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLN368	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLP878	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLQ632	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLQ662	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR300	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR301	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR331	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR337	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR338	CD	SOURCE ONE WIRELESS II, L.L.C.

Call sign	Radio service	Licensee
KNLR341	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR373	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR375	CD	SOURCE ONE WIRELESS II, L.L.C.
KNLR376	CD	SOURCE ONE WIRELESS II, L.L.C.
WPKD756	GS	SOUTH TEXAS PAGING INC.
KNKO381	CD	SOUTHERN HIGHLANDS COMMUNICATIONS, INC.
KKB662	CD	SOUTHWEST MOBILE SYSTEMS, INC.
KNKO341	CD	SPACE MARK COMMUNICATIONS, INC.
KNKI510	CD	SPS COMMUNICATIONS, INC.
KNKL889	CD	ST. LOUIS ELECTRONICS COMM. CORP.
KNLQ721	CD	STANLEY A. STANEK.
WXR982	CD	STAR COMMUNICATIONS, INC.
WRW252	CD	STAR COMMUNICATIONS, INC.
KNLQ506	CD	STASZAK, SIEGFRIED.
KNLQ905	CD	STEM, J. ROBERT DBA: SOUTHEAST PAGING NETWORK.
WPHB307	GS	STEM, JAMES ROBERT.
WPHD342	GS	STEM, JAMES ROBERT.
KNLW393	CD	STEVEN S. SELTZER.
KNLP597	CD	STEWART JACKSON.
KNLU417	CD	SUMITRA C. PATEL.
KNLU437	CD	SUMITRA C. PATEL.
KNKB752	CD	TBA Communications Inc.
KNKK349	CD	TBA Communications Inc.
KPD997	CD	TBA Communications Inc.
WQZ648	CD	TBA Communications Inc.
KKB425	CD	TEL-A-VOICE.
KKB553	CD	TEL-CAR INC.
KLF490	CD	TEL-CAR INC.
KLF594	CD	TEL-CAR INC.
KNKC854	CD	TEL-CAR INC.
KRM969	CD	TEL-CAR INC.
KSV957	CD	TEL-CAR INC.
KUA224	CD	TEL-CAR INC.
KUS393	CD	TEL-CAR INC.
KWT899	CD	TEL-CAR INC.
KRS711	CD	TELCOM GROUP, INC.
WQZ513	CD	TELE-SERV.
WQZ594	CD	TELE-SERV.
KNKJ786	CD	Tener, William J.
KNLU444	CD	TERRACHEM CORPORATION.
KNLU376	CD	THAKOR R. PATEL.
KNLV344	CD	THOMAS N & INGRID S DUPREE.
KNKB858	CD	THOMPSON PAGING AND MOBILE TELEPHONE, INC.
KNLN764	CD	THORSON, BILL DBA: PRAIRIE COMMUNICATIONS.
KNLV207	CD	TOM WILLIE DBA: T & M ASSOCIATES.
KNLQ933	CD	TRACY CORPORATION II.
KRS685	CD	TRI-STAR COMMUNICATIONS, INC.
KNLV572	CD	TRUDI STRYKER DBA: ONE WORLD COMMUNICATION.
KNLM843	CD	TSR PAGING, INC.
KNEE874	GS	TULSA SECURITY PATROL INC.
WPJX289	GS	UNICOM PAGING NETWORK OF AMERICA INC.
WPJX344	GS	UNICOM PAGING NETWORK OF AMERICA INC.
WPJW846	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPJY989	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPJY990	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPJZ234	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPJZ235	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPJZ275	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKC849	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKC873	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKC876	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKF506	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKF516	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKH933	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKI636	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPKJ847	GS	UNICOM PAGING NETWORK OF TEXAS INC.
WPMJ401	GS	UNICOM PAGING NETWORK OF TEXAS INC.
KNLV262	CD	VINCENT H. STACK MD.
KNLU960	CD	WAYNE SPOONEMORE.
KNLN714	CD	Wells Jr., G. Larry.
KNLN319	CD	Wells Jr., Larry.
KNLR616	CD	WESTLINK LICENSEE CORPORATION DBA: WESTLINK PAGING.
WPOM363	CD	WESTLINK LICENSEE CORPORATION DBA: WESTLINK PAGING.
KNKK773	CD	WETMORE, H SCOTT.

Call sign	Radio service	Licensee
KKB639	CD	WGM BUSINESS COMMUNICATIONS, INC. DBA: CENTRAL ANSWERING AND PAGING SERVICE.
KNKC970	CD	WGM BUSINESS COMMUNICATIONS, INC. DBA: CENTRAL ANSWERING AND PAGING SERVICE.
KNKD261	CD	WGM BUSINESS CORPORATION, INC. DBA: CENTRAL ANSWERING AND PAGING SERVICE.
KNLP288	CD	WHARTON TELECOM HOLDINGS, INC.
KNLP291	CD	WHARTON TELECOM HOLDINGS, INC.
KNLP310	CD	WHARTON TELECOM HOLDINGS, INC.
KNLP337	CD	WHARTON TELECOM HOLDINGS, INC.
KNLP475	CD	WHARTON TELECOM HOLDINGS, INC.
KNLQ800	CD	WHARTON TELECOM HOLDINGS, INC.
KNLQ809	CD	WHARTON TELECOM HOLDINGS, INC.
KNLQ812	CD	WHARTON TELECOM HOLDINGS, INC.
KNLQ820	CD	WHARTON TELECOM HOLDINGS, INC.
KNLQ862	CD	WHARTON TELECOM HOLDINGS, INC.
KNLP333	CD	WHARTON TELECOM HOLDINGS, INC. DBA: SOUTHEAST PAGING NETWORK.
KNLP418	CD	WHARTON TELECOM HOLDINGS, INC. DBA: SOUTHEAST PAGING NETWORK.
KNLQ870	CD	WHARTON TELECOM HOLDINGS, INC. DBA: SOUTHEAST PAGING NETWORK.
KNLQ898	CD	WHARTON TELECOM HOLDINGS, INC. DBA: SOUTHEAST PAGING NETWORK.
WNRS604	GS	WHISKEY PETES CASINO.
KNLM542	CD	WIGGINS, BETTY M. & FOLKS, SR., RICHARD.
KNLV257	CD	WILLIAM J. ST. ONGE SR.
KNLV683	CD	WILLIAM SARCHET DBA: SFT, LTD.
KNLV770	CD	WILLIAM SARCHET DBA: SFT, LTD.
KNLV751	CD	WILLIAMS, HELEN VERENA T.
KNLV756	CD	WILLIAMS, HELEN VERENA T.
KNLQ731	CD	WILLIAMS, RONALD D.
KLB314	CD	Wilson Communications Inc.
WRV992	CD	Wilson Communications Inc.
KKB449	CD	YAZOO ANSWER CALL, INC.
KRH663	CD	YAZOO ANSWER CALL, INC.
WPFN859	GS	YELLOW PAGER COMMUNICATION SYSTEM.
WPFN381	GS	YOO, KENNETH K.
KNLN733	CD	ZAREMBA DAVE.
KNLN878	CD	ZAREMBA CASIMER.
KNLN701	CD	ZAREMBA DAVE.
KNLN719	CD	ZAREMBA, CASIMER.
KNLN946	CD	ZAREMBA, CASIMER.
KNLN625	CD	ZAREMBA, CHESTER.
KNLN843	CD	ZAREMBA, CHESTER.
KNLP549	CD	ZAREMBA, CHESTER.
KNLP676	CD	ZAREMBA, CHESTER.
KNLN623	CD	ZAREMBA, DAVE.
KNLN899	CD	ZAREMBA, DAVE.
KNLN454	CD	ZINSER, ROBERT A.

[FR Doc. 05–7182 Filed 4–12–05; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket No. 03–251; FCC 05–78]

BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document initiates an inquiry on whether the Commission should consider developing policies or rules regarding the separate provision of services that are offered as a service bundle by communications providers and seeks comment on the appropriate statutory authority under which the Commission could implement such policies or rules, if warranted.

DATES: Comments are due on or before June 13, 2005 and reply comments are due on or before July 12, 2005.

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 Inquiry* (NOI) in WC Docket No. 03–251, adopted March 17, 2005, and released March 25, 2005. The complete text of this NOI 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. 03–251. 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. 03–251. 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 Inquiry

1. The NOI seeks comment on a broad range of issues regarding the tying or bundling of services in general that have been raised before the Commission. In the NOI, the Commission seeks to examine the competitive consequences when providers bundle their legacy services with new services, or "tie" such services together such that the services are not available independent from one another to end users. The Commission seeks comment on how such bundling might affect both intramodal and intermodal competition and the effect that it might have on the public interest, including benefits to consumers. Several commenters in Commission proceedings have raised the possibility that bundling services potentially harms competition because consumers have to purchase redundant or unwanted services. As the communications marketplace continues to move toward bundled solutions for consumers, the Commission asks commenters to address specifically whether competition is supplying sufficient incentives for providers to disaggregate bundles to maximize consumer choice. The Commission seeks comment on whether such bundling behavior is harmful to competition, particularly unaffiliated providers of new services, such as voice over Internet protocol (VoIP), and if so, how this is related to several previous decisions or ongoing proceedings relating to dominance and classification issues. Finally, the Commission seeks comment on its authority to impose remedies, the adequacy and costs of any potential regulatory remedies, and the least invasive regulations that could effectively remedy any potential competitive concerns.

Paperwork Reduction Act

2. This NOI does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. 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, Pub. L. 107–198, *see* 44 U.S.C. 3506(c)(4).

Ordering Clause

Accordingly, it is ordered that the Notice of Inquiry is adopted.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7181 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WT Docket No. 05–157; FCC 05–80]

Wireless Telecommunications Bureau Requests Comment on Spectrum Needs of Emergency Response Providers

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (Act) into law to reform the United States intelligence community and intelligence-related activities. Title VII of the Act implements certain recommendations of the National Commission on Terrorist Attacks Upon the United States, including a number of communications-related provisions, particularly with respect to use of the electromagnetic spectrum by Federal, State, and local emergency response providers. Among other requirements, the Intelligence Reform Act requires the Federal Communications Commission (Commission) to conduct a study to assess the short-term and long-term spectrum needs of emergency response providers, and report its findings to Congress not later than December 17, 2005.

DATES: Submit comments on or before April 28, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See Supplementary Information.

FOR FURTHER INFORMATION CONTACT: David Siehl, *David.Siehl@fcc.gov*, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, (202) 418–0680.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice, WT Docket No. 05–157, released on March 29, 2005. Commissioner Copps issued a statement when this action was taken.

1. The Commission initiates the present proceeding pursuant to the requirements of Section 7502 of the Act. Section 7502(a) provides:

The Federal Communications Commission shall, in consultation with the Secretary of Homeland Security and the National Telecommunications and

Information Administration, conduct a study to assess short-term and long-term needs for allocations of additional portions of the electromagnetic spectrum for Federal, State, and local emergency response providers, including whether or not an additional allocation of spectrum in the 700 megahertz band should be granted by Congress to such emergency response providers.

2. In addition, section 7502(c) provides that, in conducting this study, the Commission shall:

(1) Seek input from Federal, State, local, and regional emergency response providers regarding the operation and administration of a potential nationwide interoperable broadband mobile communications network; and

(2) Consider the use of commercial wireless technologies to the greatest extent practicable.

3. Finally, section 7502(d) requires the Commission to submit a report on the study, including the study's findings, to the Senate Committee on Commerce, Science, and Transportation, the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Energy and Commerce, and the House Select Committee on Homeland Security no later than one year after the date of enactment of the Intelligence Reform Act, *i.e.*, by December 17, 2005.

4. We hereby seek input regarding the need for, operation, and administration of a potential nationwide interoperable broadband mobile communications network. In addition, we more broadly request comment from emergency response providers and other interested parties on any related issues that would provide additional pertinent information for the Commission's study, pursuant to section 7502. We ask commenters to address the future spectrum needs of the emergency responder community, for interoperability purposes and otherwise, both on a short-term basis and on a long-term basis. Commenters are encouraged to address whether or not Congress should provide an additional allocation of spectrum in the 700 MHz band for emergency response provider communications. We also ask that commenters consider the extent to which commercial wireless technologies may be used to satisfy the communications needs of emergency response providers.

5. Proponents of additional spectrum allocations to accommodate public safety interoperability, and to otherwise satisfy the spectrum needs of emergency response providers, are asked to identify specific frequency bands which can be designated for that purpose, and to offer support for the amount of spectrum identified. We also ask that these commenters discuss the potential benefits and difficulties associated with use of spectrum in the identified bands for emergency response/interoperability communications.

6. We note that, as technological innovations have created new and innovative uses for wireless technology, and as wireless communications have taken on increasing importance in emergency response incidents, the Commission has endeavored to keep pace with public safety spectrum needs. Currently, more than 97 megahertz of spectrum is allocated in support of public safety communications, including 24 megahertz in the 700 MHz band, and the designation of 50 megahertz at 4940–4990 MHz for broadband and advanced technology applications in support of public safety. Recently, the Commission reallocated television spectrum in the New York City area for public safety use to promote interoperability among area users. In addition, the Commission's recent decision in the 800 MHz band reconfiguration proceeding created access to an average of 4.5 megahertz of additional spectrum for public safety licensees. The Commission continues to evaluate its rules in light of public safety communications needs and to facilitate the deployment of interoperable networks to serve local, state, and federal entities throughout the country.

7. Comments must be filed no later than April 28, 2005. All filings concerning matters referenced in this Notice should refer to FCC 05–80 and WT Docket No. 05–157.

8. Commenters may file comments using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, commenters must submit only one copy of an electronic submission. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Commenters 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 *ecfs@fcc.gov,* and should include the following words in the body of the message, "get form <your e-mail address>." Commenters will receive a sample form and directions in reply.

9. Parties that choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Commenters may send filings by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues 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. Commenters must bind all hand deliveries together with rubber bands or fasteners and must dispose of any envelopes before entering the building. This facility is the only location where the Commission's Secretary will accept hand-delivered or messenger-delivered paper filings. Commenters must send commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) to 9300 East Hampton Drive, Capitol Heights, MD 20743. Commenters should address U.S. Postal Service first-class mail, Express Mail, and Priority Mail to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

10. One copy of each filing must be delivered electronically, by e-mail or facsimile, or if delivered as paper copy, by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (according to the procedures set forth above for paper filings), to: (1) The Commission's duplicating contractor, Best Copy and Printing, Inc., at *FCC@BCPIWEB.COM* or (202) 488–5563 (facsimile); and (2) David Siehl, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, at *David.Siehl@fcc.gov,* or (202) 418–2643 (facsimile).

11. Copies of the comments and other filings in this docket may be obtained from Best Copy and Printing, Inc. in person at 445 12th Street, SW., Room CY–B402, Washington, DC 20554, via telephone at (202) 488–5300, via facsimile at (202) 488–5563, or via e-mail at *FCC@BCPIWEB.COM.* The

comments and other filings are also available for public inspection and copying during normal reference room hours at the following Commission office: FCC Reference Information Center, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The comments are also available electronically through the Commission's ECFS, which may be accessed on the Commission's Internet Web site at *http://www.fcc.gov*. Alternate formats of this Public Notice (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 (voice), (202) 418–7365 (TTY), or by sending an e-mail to *access@fcc.gov*.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7413 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2700]

Petition for Reconsideration of Action in Rulemaking Proceeding

March 31, 2005.

Petition for Reconsideration has been filed in the Commission's Rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of this document is available for viewing and copying in Room CY–B402, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) (1–800–378–3160). Oppositions to this petition must be filed by April 28, 2005. *See* Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: In the Matter of Amendment of Part 13 and 80 of the Commission's Rules Concerning Maritime Communications (WT Docket No. 00–48).

Petition for Rulemaking Filed by Globe Wireless, Inc. (RM–9499).

Amendment of the Commission's Rules Concerning Maritime Communications (PR Docket No. 92–257).

Number of Petitions Filed: 1.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7177 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2699]

Petitions for Reconsideration of Action in Rulemaking Proceeding

March 30, 2005.

Petitions for Reconsideration have been filed in the Commission's Rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of this document is available for viewing and copying in Room CY–B402, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) (1–800–378–3160). Oppositions to these petitions must be filed by April 28, 2005. *See* Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems (ET Docket No. 00–258).

Amendment to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216–220 MHz, 1390–1395 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz Government Transfer Bands (WT Docket No. 02–8).

Mobile Satellite Service (ET Docket No. 95–18).

Policy & Service Rules for 2 GHz MSS (IB Docket No. 99–81).

Number of Petitions Filed: 2.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7178 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting Notices

AGENCY: Federal Election Commission.

PREVIOUSLY ANNOUNCED DATE AND TIME: Thursday, April 7, 2005, 10 a.m. Meeting open to the public. This meeting was cancelled.

DATE AND TIME: *Tuesday, April 19, 2005 at 10 a.m.*

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED: Compliance matters pursuant 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: *Thursday, April 21, 2005 at 10 a.m.*

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED: Correction and Approval of Minutes.

Advisory Opinion 2005–02: Senator Jon Corzine and Corzine for Governor, Inc., by counsel, Marc E. Elias and Brian G. Svoboda.

Advisory Opinion 2005–03: American College of Obstetricians and Gynecologists, by counsel, Michael Kurman.

Routine Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Mr. Robert Biersack, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 05–7533 Filed 4–11–05; 2:22 pm]

BILLING CODE 6715–01–M

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.: 011426–034.

Title: West Coast of South America Discussion Agreement.

Parties: A.P. Moller-Maersk A/S; Compania Chilena de Navigacion Interoceanica, S.A.; Compania Süd Americana de Vapores, S.A.; Hamburg-Suüd KG; APL Co. Pte Ltd.; Seaboard Marine Ltd.; Trinity Shipping Line; Mediterranean Shipping Company, S.A.; P&O Nedlloyd B.V.; South Pacific Shipping Company, Ltd. (d/b/a Ecuadorian Line); CMA CGM, S.A.; Lykes Lines Limited, LLC; Frontier Liner Services, Inc.; and King Ocean Services Limited, Inc.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW., Suite 900; Washington, DC 20036.

Synopsis: The amendment expands the scope of the agreement to include the Caribbean Coast of Columbia (Colombian section); makes technical changes to accommodate the expanded scope; and adds Lykes, Frontier, and King Ocean as parties to the Colombian section of the agreement.

Agreement No.: 011722–001.

Title: New World Alliance/Maersk Sealand Slot Exchange Agreement.

Parties: A.P. Moller Maersk A/S; American President Lines, Ltd.; APL Co. PTE Ltd.; Mitsui O.S.K. Lines, Ltd., and Hyundai Merchant Marine Co., Ltd.

Filing Party: Wayne R. Rohde, Esquire; Sher & Blackwell LLP; 1850 M Street, NW., Suite 900; Washington, DC 20036.

Synopsis: The amendment updates Maersk's corporate name.

Agreement No.: 011911.

Title: Sinolines/WHL Slot Exchange and Sailing Agreement.

Parties: Sinotrans Contrainer Lines Co., Ltd. and Wan Hai Lines, Ltd.

Filing Party: Robert B. Yoshitomi, Esq.; Nixon Peabody LLP; 2040 Main Street, Suite 850; Irvine, CA 92614.

Synopsis: The agreement authorizes Sinotrans Container Lines Co., Ltd. and Wan Hai Lines, Ltd. to exchange and sell slots in the trade between ports in Asia and the United States West Coast ports.

Agreement No.: 011912.

Title: Dole/Hamburg-Sud Space Charter and Sailing Agreement.

Parties: Dole Ocean Cargo Express, Inc. and Hamburg-Sud.

Filing Party: Michael G. Roberts, Esquire; Venable LLP; 575 7th Street, NW.; Washington, DC 20004–1601.

Synopsis: The agreement would authorize the parties to share vessel space in the trades between U.S. Atlantic and Gulf ports, and ports in Central America as well as from ports in Puerto Rico to ports in North Europe.

The parties request expedited review.

By Order of the Federal Maritime Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 05–7428 Filed 4–12–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding date shown below:

License Number: 004428N and 004428F.

Name: A A Shipping LLC.

Address: 11100 South Wilcrest, Unit #3, Houston, TX 90260.

Date Revoked: March 18, 2005 and March 10, 2005.

Reason: Failed to maintain valid bonds.

License Number: 012095N.

Name: American Steamship Agency Corporation dba American Intermodal Systems.

Address: 300 Knickerbocker Road, Cresskell, NJ 07626.

Date Revoked: February 25, 2005.

Reason: Failed to maintain a valid bond.

License Number: 016232N.

Name: Bluesea Shipping Line, Inc.

Address: 841 Sandhill Avenue, Carson, CA 90746.

Date Revoked: January 23, 2005.

Reason: Failed to maintain a valid bond.

License Number: 015674N.

Name: Bral Marine Service Inc.

Address: 7766 NW 46th Street, Miami, FL 33166.

Date Revoked: February 24, 2005.

Reason: Failed to maintain a valid bond.

License Number: 016916N.

Name: Cargo Express Northwest, Inc.

Address: 427 SW 7th Street, Redmond, OR 97756.

Date Revoked: March 28, 2005.

Reason: Failed to maintain a valid bond.

License Number: 018892N.

Name: Concordia Shipping Line, Inc.

Address: 9990 SW 128th Terrace, Miami, FL 33190.

Date Revoked: February 19, 2005.

Reason: Failed to maintain a valid bond.

License Number: 013624N.

Name: Ea-Land International, Inc.

Address: 11222 La Cienega Blvd., #160, Inglewood, CA 90304.

Date Revoked: March 31, 2005.

Reason: Surrendered license voluntarily.

License Number: 018206F.

Name: FYT, Inc. dba Fan Yang Transportation.

Address: 17588 E. Rowland Street, #A–216, City of Industry, CA 91748.

Date Revoked: February 17, 2005.

Reason: Failed to maintain a valid bond.

License Number: 003139F.

Name: GAC International Transport, Inc.

Address: 320 Cantor Avenue, Linden, NJ 07036.

Date Revoked: February 4, 2005.

Reason: Failed to maintain a valid bond.

License Number: 009943N.

Name: Gondrand Transport Co., Inc.

Address: c/o Graf Repetti & Co., LLP, 1114 Avenue of the Americas, New York, NY 10036.

Date Revoked: March 17, 2005.

Reason: Surrendered license voluntarily.

License Number: 017435F.

Name: Malvazia Co. dba Advanced Cargo.

Address: 2535 Seaboard Coastline Drive, Savannah, GA 31415.

Date Revoked: February 4, 2005.

Reason: Failed to maintain a valid bond.

License Number: 017520F.

Name: Medtrans, LLC.

Address: 1200 Townline Road, Mundelein, IL 60060.

Date Revoked: March 11, 2005.

Reason: Failed to maintain a valid bond.

License Number: 018762F.

Name: Montebello Management Company, LLC dba Aero Logistics dba Aero Logistics of the United States.

Address: P.O. Box 281135, San Francisco, CA 94128–1135.

Date Revoked: March 21, 2005.

Reason: Surrendered license voluntarily.

License Number: 015904N.

Name: Navigation Dynamic Services Inc.

Address: 16920 South Avalon Blvd., Carson, CA 90746.

Date Revoked: March 23, 2005.

Reason: Failed to maintain a valid bond.

License Number: 018072N.

Name: Oceanair Freight International, Inc.

Address: 4280 NW 147th Terrace, Opalocka, FL 33054.

Date Revoked: March 30, 2005.

Reason: Failed to maintain a valid bond.

License Number: 009618N.

Name: Overseas International Corporation.

Address: 334 Union Street, Holbrook, MA 02343.

Date Revoked: February 21, 2005.

Reason: Failed to maintain a valid bond.

License Number: 018357N.

Name: Reliable Logistics LLC.
Address: 175–01 Rockaway Blvd., Suite 215, Jamaica, NY 11434.
Date Revoked: February 21, 2005.
Reason: Failed to maintain a valid bond.

License Number: 003406F.
Name: Simmons International Express, Inc.
Address: 101 East Clarendon Street, Prospect Hts., IL 60070.
Date Revoked: March 4, 2005.
Reason: Failed to maintain a valid bond.

License Number: 017670NF.
Name: Summit Cargo Group.
Address: 724 S. Hindry Avenue, Inglewood, CA 90301.
Date Revoked: March 18, 2005.
Reason: Failed to maintain valid bonds.

Sandra L. Kusumoto,
Director, Bureau of Certification and Licensing.

[FR Doc. 05–7424 Filed 4–12–05; 8:45 am]
BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel—Operating Common Carrier Ocean Transportation Intermediary Applicants

Cargo Zone Express Corporation, 19550 Dominguez Hills, Dr., #101, Rancho Dominguez, CA 90220.
Officer: Moo Sang Cho, Vice President, (Qualifying Individual).

Generation Logistics, Inc., 145–40 157th Street, Jamaica, NY 11434.
Officer: Daniel M. Corbett, President, (Qualifying Individual).

Anmi Air & Sea Transportation Inc., 8032 NW. 66th Street, Miami, FL 33166.
Officers: Mildre Jimenez, Secretary, (Qualifying Individual), Paz Moreno, President.

JT Shipping Corporation, 7515 El Escorial Way, Buena Park, CA 90620.
Officers: Ming Zhong, Secretary/CFO, (Qualifying Individual), Julia Li Hawksworth, President.

MCLX, Inc., One Canal Place, Suite 1600, New Orleans, LA 70130.
Officers: Paula L. Maher, Chairman, (Qualifying Individual), David F. Schulingkamp, President.

Wellton Logistics, Inc., 160–23 Rockaway Blvd., Jamaica, NY 11434.
Officers: Feng Chan Hsieh, Secretary, (Qualifying Individual), Terry Mui, President.

Caribbean Logistics, Inc., 6832 NW. 77th Court, Miami, FL 33166.
Officers: Geoffrey Hooper Woodman, President, (Qualifying Individual), Berry Reyes, Vice President.

16 East Tremont Corp. dba American & Caribbean Shipping, 13 East Tremont Avenue, Bronx, NY 10453.
Officer: Nuris Estela Minaya, Vice President, (Qualifying Individual).

Pillar-Trans, LLC, 533 Division Street, Elizabeth, NJ 07201.
Officers: Ki Hun Yoo, Member, (Qualifying Individual), Hye Chong Yoo, Member.

TAN Cargo Services, LTD, 7215 NW., 41st Street, Bay-E, Miami, FL 33166.
Officer: Edgard Jose Toruno, President, (Qualifying Individual).

All Right Shipping, 1350 Bronx River Avenue, Bronx, NY 10472.
Officer: Denzil Barker, President, (Qualifying Individual).

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Intrans Logistics, Inc., 1408 Sutter Creek Drive, El Dorado Hills, CA 95762.
Officers: Michael A. Dew, Director, (Qualifying Individual), Jean M. Dew, CEO.

Worldwide Integrated Logistics, LLC dba WIL Lines, 6304 NW. 97th Avenue, Miami, FL 33178.
Officers: Doumit Shmouni, President, (Qualifying Individual), Maurice Mead, Vice President.

Doma Consolidating Inc. dba Doma Shipping, 2520 S. State St., Chicago, IL 60616.
Officer: Asimoula Mina Georgalas, President, (Qualifying Individual).

Priority Air Express, LLC, 111 Henderson Drive, Sharon Hill, PA 19079.
Officers: Steve Giampapa, Vice President, (Qualifying Individual), Christopher Carpenter, President.

G.L.E., International, Inc., 8382 NW. 68th Street, Miami, FL 33166.
Officer: Ligia Estrada, President, (Qualifying Individual).

Advanced Logistics Inc., 5567 NW. 72nd Avenue, Miami, FL 33166.
Officers: Armando Arias, Vice President, (Qualifying Individual), Jose R. Castillo-Ospina, President.

Delmar Logistics (GA) Inc., 4345 International Pkwy, Suite 110, Atlanta, GA 30354.
Officers: Mario Alfonso, President, (Qualifying Individual), Robert Iny, Vice President.

Senaduana Freight Forwarders, 7778 NW., 46th Street, Miami, FL 33166.
Officer: Jorge Escribani, Ocean Manager, (Qualifying Individual).

LT Freight International, Inc., 4751 Blanco Drive, San Jose, CA 95129.
Officers: Tony Tian, Vice President, (Qualifying Individual), Lisa S. Tian, President.

Carolina Forwarding & Brokerage, 3220 Carmel Bay Drive, Mount Pleasant, SC 29466, Lauren Emily Justice, Sole Proprietor.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

North Star Forwarding Solutions, LLC, 8693 Maritime Street, Jacksonville, FL 32226.
Officers: Laura L. Weast, Secretary, (Qualifying Individual), Magnus B. Lindeback, CEO.

JR&K Logistics, LLC, 11812 San Vicente Blvd., Suite 610, Los Angeles, CA 90049.
Officer: Ricky Y. Seung, President, (Qualifying Individual).

Pointer Int'l Forwarders, Inc., 4851 NW. 79th Avenue, Suite 7, Doral, FL 33166.
Officers: Maria A. Ramos, President, (Qualifying Individual), Eduardo C. Ramos, Vice President.

Sun Cargo (USA) Inc., Suite 250, Bldg. 9, JFK Int'l. Airport, Jamaica, NY 11430.
Officers: Tom Yip, Vice President, (Qualifying Individual), Aaron Man, President.

DAK Logistics, 1010 Bluejay Drive, Suisun City, CA 94585, David A. Knott, Sole Proprietor.

Fast Transport Associates, Inc., 2154 NW. 23rd Court, Miami, FL 33142.
Officers: Norberto Martinez, President, (Qualifying Individual), Sonia Alvarenga, Vice President.

AAB Logistics, L.L.C., 2371 Hurst Drive, NE., Suite #100, Atlanta, GA 30305.
Officer: Alexander S.M. Gibson, Director, (Qualifying Individual).

Dated: April 8, 2005.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 05–7425 Filed 4–12–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
004666NF	Magnum Freight Corporation, 6701 NW 7th Street, Suite 165, Miami, FL 33126	January 17, 2005.
016236N	Target Shipping Co., Inc., 123 North Union Avenue, Suite 101, Cranford, NJ 07016	March 5, 2005.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 05–7423 Filed 4–12–05; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Labor-Management Cooperation Program; Application Solicitation

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Request for public comment on final Fiscal Year 2005 Program Guidelines/Application Solicitation for labor-management committees.

SUMMARY: The Federal Mediation and Conciliation Service (FMCS) is publishing the final Fiscal Year 2005 Program Guidelines/Application Solicitation for the Labor-Management Cooperation Program to inform the public. The program is supported by Federal funds authorized by the Labor-Management Cooperation Act of 1978, subject to annual appropriations. This solicitation contains a change in the application process in an effort to maximize participation under current budget constraints. In the past, applicants were required to submit applications by a fixed date. In Fiscal Year 2005, the date for application submission will be open, contingent upon fund availability. Applications will be accepted for consideration after May 15, 2005 and all funds will be awarded by September 30, 2006.

Comments: No comments have been received in response to the **Federal Register** notice advising that application solicitations may be submitted any time after May 15, 2005 and will be considered for funding pending funds availability.

FOR FURTHER INFORMATION CONTACT: Linda Stubbs, Grant Management Specialist, FMCS 2100 K Street, NW., Washington, DC 20427, 202–606–8181 or *lstubbs@fmcs.gov*.

Labor-Management Cooperation Program; Application Solicitation for Labor-Management Committees FY2005

A. Introduction

The following is the final Solicitation for the Fiscal Year (FY) 2005 cycle of the Labor-Management Cooperation Program as it pertains to the support of labor-management committees. These guidelines represent the continuing efforts of the Federal Mediation and Conciliation Service to implement the provisions of the Labor-Management Cooperation Act of 1978, which was initially implemented in FY81. The Act authorizes FMCS to provide assistance in the establishment and operation of company/plant, area, public sector, and industry-wide labor-management committees which:

(A) Have been organized jointly by employers and labor organizations representing employees in that company/plant, area, government agency, or industry; and

(B) Are established for the purpose of improving labor-management relationships, job security, and organizational effectiveness; enhancing economic development; or involving workers in decisions affecting their working lives, including improving communication with respect to subjects of mutual interest and concern.

The Program Description and other sections that follow, as well as a separately published FMCS Financial and Administrative Grants Manual, make up the basic guidelines, criteria, and program elements a potential applicant for assistance under this program must know in order to develop an application for funding consideration for either a company/plant, area-wide, industry, or pubic sector labor-management committee. Directions for obtaining an application kit may be found in Section H. A copy of the Labor-Management Cooperation Act of 1978, included in the application kit, should be reviewed in conjunction with this solicitation.

B. Program Description

Objectives

The Labor-Management Cooperation Act of 1978 identifies the following seven general areas for which financial assistance would be appropriate:

1. To improve communication between representatives of labor and management;

2. To provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;

(3) To assist workers and employers in solving programs of mutual concern not susceptible to resolution within the collective bargaining process;

(4) To study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the company/plant, area, or industry;

(5) To enhance the involvement of workers in making decisions that affect their working lives.

(6) To expand and improve working relationships between workers and managers; and

(7) To encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employees through Federal assistance in the formation and operation of labor-management committees.

The primary objective of this program is to encourage and support the establishment and operation of joint labor-management committees to carry out specific objectives that meet the aforementioned general criteria. The term "labor" refers to employees represented by a labor organization and covered by a formal collective bargaining agreement. These committees may be found at either the plant (company), area, industry, or public sector levels.

A plant or company committee is generally characterized as restricted to

one or more organizational or productive units operated by a single employer. An area committee is generally composed of multiple employers of diverse industries as well as multiple labor unions operating within and focusing upon a particular city, county, contiguous multicounty, or statewide jurisdiction.

An industry committee generally consists of a collection of agencies or enterprises and related labor union(s) producing a common product or service in the private sector on a local, State, regional, or nationwide level. A public sector committee consists of government employees and managers in one or more units of a local or State government, managers and employees of public institutions of higher education, or of employees and managers of public elementary and secondary schools. Those employees must be covered by a formal collective bargaining agreement or other enforceable labor-management agreement. In deciding whether an application is for an area or industry committee, consideration should be given to the above definitions as well as to the focus of the committee.

In FY 2005, competition will be open to company/plant, area, private industry, and public sector committees. Special consideration will be given to committee applications involving innovative or unique efforts. All application budget requests should focus directly on supporting the committee. Applicants should avoid seeking funds for activities that are clearly available under other Federal programs (*e.g.*, job training, mediation of contract disputes, etc.).

Required Program Elements

1. *Problem Statement*—The application should have numbered pages and discuss in detail what specific problem(s) face the company/plant, area, government, or industry and its workforce that will be addressed by the committee. Applicants must document the problem(s) using as much relevant data as possible and discuss the full range of impacts these problem(s) could have or are having on the company/plant, government, area, or industry. An industrial or economic profile of the area and workforce might prove useful in explaining the problem(s). This section basically discusses *WHY* the effort is needed.

2. *Results or Benefits Expected*—By using specific goals and objectives, the application must discuss in detail *WHAT* the labor-management committee will accomplish during the life of the grant. Applications that promise to provide objectives *after* a grant is awarded will receive little or no credit in this area. While a goal of "improving communication between employers and employees" may suffice as one over-all goal of a project, the objectives must, whenever possible, be expressed in *specific* and *measurable* terms. Applicants should focus on the outcome, impacts or changes that the committee's efforts will have. Existing committees should focus on *expansion* efforts/results expected from FMCS funding. The goals, objectives, and projected impacts will become the foundation for future monitoring and evaluation efforts of the grantee, as well as the FMCS grants program.

3. *Approach*—This section of the application specifies *HOW* the goals and objectives will be accomplished. At a minimum, the following elements must be included in all grant applications:

(a) A discussion of the strategy the committee will employ to accomplish its goals and objectives;

(b) a listing, by name and title, of all existing or proposed members of the labor-management committee. The application should also offer a rationale for the selection of the committee members (*e.g.*, members represent 70% of the area or company/plant workforce).

(c) a discussion of the number, type, and role of all committee staff persons. Include proposed position descriptions for all staff that will have to be hired as well as resumes for staff already on board; noting, that grant funds may not be used to pay for existing employees; an assurance that grant funds will not be used to pay for existing employees;

(d) in addressing the proposed approach, applicants must also present their justification as to why Federal funds are needed to implement the proposed approach;

(e) a statement of how often the committee will meet (we require meetings at least every other month) as well as any plans to form subordinate committees for particular purposes; and

(f) for applications from existing committees, a discussion of past efforts and accomplishments and how they would integrate with the proposed expanded effort.

4. *Major Milestones*—This section must include an implementation plan that indicates what major steps, operating activities, and objectives will be accomplished as well as a timetable for *WHEN* they will be finished. A milestone chart must be included that indicates what specific accomplishments (process and impact) will be completed by month over the life of the grant using "month one" as the start date. The accomplishment of these tasks and objectives, as well as problems and delays therein, will serve as the basis for quarterly progress reports to FMCS.

Applicants must prepare their budget narrative and milestone chart using a start date of "month one" and an end date of "month twelve" or "month eighteen", as appropriate. Thus, if applicant is seeking a twelve month grant, use figures reflecting month one through twelve. If applicant is seeking an eighteen month grant, use figures reflecting month one through eighteen. If the grant application is funded, FMCS will identify the start and end date of the grant on the Application for Federal Assistance (SF–424) form.

5. *Evaluation*—Applicants must provide for either an external evaluation or an internal assessment of the project's success in meeting its goals and objectives. An evaluation plan must be developed which briefly discusses what basic questions or issues the assessment will examine and what baseline data the committee staff already has or will gather for the assessment. This section should be written with the application's own goals and objectives clearly in mind and the impacts or changes that the effort is expected to cause.

6. *Letters of Commitment*—Applications must include current letters of commitment from *all* proposed or existing committee participants and chairpersons. These letters should indicate that the participants support the application and will attend scheduled committee meetings. A blanket letter signed by a committee chairperson or other official on behalf of all members is not acceptable. We encourage the use of individual letters submitted on company or union letterhead represented by the individual. The letters should match the names provided under Section 3(b).

7. *Other Requirements*—Applicants are also responsible for the following:

(a) The submission of data indicating approximately how many employees will be covered or represented through the labor-management committee;

(b) from existing committees, a copy of the existing staffing levels, a copy of the by-laws (if any), a breakout of annual operating costs and identification of all sources and levels of current financial support;

(c) a detailed budget narrative based on policies and procedures contained in the FMCS Financial and Administrative Grants Manual;

(d) an assurance that the labor-management committee will not interfere with any collective bargaining agreements; and

(e) an assurance that committee meetings will be held at least every other month and that written minutes of all committee meetings will be prepared and made available to FMCS.

(f) an assurance that the maximum rate for an individual consultant paid from grant project can be no more than $950 for an eight-hour day. The day includes preparation, evaluation and travel time. Also, time and effort records must be maintained.

Selection Criteria

The following criteria will be used in the scoring and selection of applications for award:

(1) The extent to which the application has clearly identified the problems and justified the needs that the proposed project will address.

(2) The degree to which appropriate and *measurable* goals and objectives have been developed to address the problems/needs of the applicant.

(3) The feasibility of the approach proposed to attain the goals and objectives of the project and the perceived likelihood of accomplishing the intended project results. This section will also address the degree of innovativeness or uniqueness of the proposed effort.

(4) The appropriateness of committee membership and the degree of commitment of these individuals to the goals of the application as indicated in the letters of support.

(5) The feasibility and thoroughness of the implementation plan in specifying major milestones and target dates.

(6) The cost effectiveness and fiscal soundness of the application's budget request, as well as the application's feasibility vis-a-vis its goals and approach.

(7) The overall feasibility of the proposed project in light of all of the information presented for consideration; and

(8) The value to the government of the application in light of the overall objectives of the Labor-Management Cooperation Act of 1978. This includes such factors as innovativeness, site location, cost, and other qualities that impact upon an applicant's value in encouraging the labor-management committee concept.

C. Eligibility

Eligible grantees include State and local units of government, labor-management committees (or a labor union, management association, or company on behalf of a committee that will be created through the grant), and certain third-party private non-profit entities on behalf of one or more committees to be created through the grant. Federal government agencies and their employees are not eligible.

Third-party private, non-profit entities that can document that a major purpose or function of their organization is the improvement of labor relations are eligible to apply. However, all funding must be directed to the functioning of the labor-management committee, and all requirements under part B must be followed. Applications from third-party entities must document particularly strong support and participation from all labor and management parties with whom the applicant will be working. Applications from third-parties which do not directly support the operation of a new or expanded committee will not be deemed eligible, nor will applications signed by entities such as law firms or other third-parties failing to meet the above criteria.

Successful grantees *will* be bound by OMB Circular 110 i.e. "contractors that develop or draft specifications, requirements, statements of work, and invitations for bids and/or requests for proposals shall be *excluded* (emphasis added from competing for such procurements)."

Applicants who received funding under this program in the last 6 years for committee operations are not eligible to re-apply. The only exception will be made for grantees that seek funds on behalf of an entirely different committee whose efforts are totally outside of the scope of the original grant.

D. Allocations

The FY2005 appropriation for this program is $1,488,000 of which at least $1,000,000 will be available competitively for new applicants. Specific funding levels will not be established for each type of committee. The review process will be conducted in such a manner that when possible and where merited, two awards will be made in each category (company/plant, industry, public sector, and area) depending upon applications submitted. After these applications are considered for award, the remaining applications will be considered according to merit without regard to category.

In addition, to the competitive process identified in the preceding paragraph, FMCS will set aside a sum not to exceed thirty percent of its non-reserved appropriation to be awarded on a non-competitive basis. These funds will be used only to support applications that have been solicited by the Director of the Service and are not subject to the dollar range noted in Section E. All funds returned to FMCS from a competitive grant award may be awarded on a non-competitive basis in accordance with budgetary requirements.

FMCS reserves the right to retain up to five percent of the FY2005 appropriation to contract for program support purposes (such as evaluation) other than administration.

E. Dollar Range and Length of Grants

Awards to expand existing or establish new labor-management committees will be for a period of up to 18 months. If successful progress is made during this initial budget period and all grant funds are not obligated within the specified period, these grants may be extended for up to six months. The dollar range of awards is as follows:

—Up to $65,000 over a period of up to 18 months for company/plant committees or single department public sector applicants;

—Up to $125,000 per 18-month period for area, industry, and multi-department public sector committee applicants.

Applicants are reminded that these figures *represent maximum Federal funds only.* If total costs to accomplish the objectives of the application exceed the maximum allowable Federal funding level and its required grantee match, applicants may supplement these funds through voluntary contributions from other sources. Applicants are also strongly encouraged to consult with their local or regional FMCS field office to determine what kinds of training may be available at no cost before budgeting for such training in their applications. A list of our field leadership team and their phone numbers may be obtained from the FMCS Web site (*http://www.fmcs.gov*) under "Who We Area."

F. Cash Match Requirements and Cost Allowability

All applicants must provide at least 10 percent of the total allowable project costs in cash. Matching funds may come from State or local government sources or private sector contributions, but may generally not include other Federal funds. Funds generated by grant-supported efforts are considered "project income," and may not be used for matching purposes.

It is the policy of this program to reject all requests for *indirect or overhead* costs as well as *"in-kind"* match contributions. In addition, grant funds must not be used to supplant private or local/state government funds currently spent for committee purposes.

Funding requests from existing committees should focus entirely on the costs associated with the expansion efforts. Also, under no circumstances may business or labor officials participating on a labor-management committee be compensated out of grant funds for *time* spent at committee meetings or *time* spent in committee training sessions. Applicants generally will not be allowed to claim all or a portion of *existing* full-time staff as an expense or match contribution. For a more complete discussion of cost allowability, applicants are encouraged to consult the FY2005 FMCS Financial and Administrative Grants Manual, which will be included in the application kit.

G. Application Submission and Review Process

The Application for Federal Assistance (SF–424) form must be signed by *both* a labor and management representative. In lieu of signing the SF–424 form, representatives may type their name, title, and organization on plain bond paper with a signature line signed and dated, in accordance with block 18 of the SF–424 form. The individual listed as contact person in block 6 on the application form will generally be the only person with whom FMCS will communicate during the application review process. Please be sure that person is available once the application has been submitted. Additionally, it is the applicant's responsibility to notify FMCS in writing of any changes (e.g. if the address or contact person has changed).

We will accept applications beginning May 15, 2005, and continue to do so until all FY 2005 grant funds have been obligated, with awards being made by September 30, 2006. While proposals may be accepted at any time between May 15, 2005 and September 30, 2006, proposals received late in the cycle have a greater risk of not being funded due to unavailability of funds. Once your application has been received and acknowledged by FMCS, no applications or supplementary materials will be accepted thereafter. Applicants are highly advised to contact the grants director prior to committing any resources to the preparation of a proposal.

An original application containing numbered pages, plus *three* copies should be addressed to the Federal Mediation and Conciliation Service, Labor-Management Grants Program, 2100 K Street, NW., Washington, DC 20427. FMCS will not consider videotaped submissions or video attachments to submissions. FMCS will confirm receipt of all applications within 10 days thereof.

All eligible applications will be reviewed and scored preliminarily by one or more Grant Review Boards. The Board(s) will recommend selected applications for rejection or further funding consideration. The Director, Labor-Management Grants Program, will finalize the scoring and selection process. All FY2005 grant applications will be notified of results and all grant awards will be made by September 30, 2006. Applications that fail to adhere to eligibility or other major requirements will be administratively rejected by the Director, Labor-Management Grants Program.

H. Contact

Individuals wishing to apply for funding under this program should contact the Federal Mediation and Conciliation Service as soon as possible to obtain an application kit. Please consult the FMCS Web site *(http://www.fmcs.gov)* to download forms and information. Additional information or clarification can be obtained free of charge by contacting the Federal Medication and Conciliation Service, Labor-Management Grants Program, 2100 K Street, NW., Washington, DC 20427, Linda Stubbs at (202) 606–8181 *(lstubbs@fmcs.gov)*.

Fran Leonard,

Director, Budget and Finance, Federal Mediation and Conciliation Service.

[FR Doc. 05–7397 Filed 4–12–05; 8:45 am]

BILLING CODE 6732–01–M

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 April 27, 2005.

A. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. Jason Anis Awad, Las Vegas, Nevada; to acquire additional voting shares of Business Park Corporation, Las Vegas, Nevada, and thereby indirectly acquire additional voting shares of Business Bank of Nevada, Las Vegas, Nevada.

Board of Governors of the Federal Reserve System, April 7, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–7398 Filed 4–12–05; 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 May 6, 2005.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior

Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105-1521:

1. Univest Corporation of Pennsylvania, Souderton, Pennsylvania; to retain 8.53 percent of the voting shares of New Century Bank, Phoenixville, Pennsylvania.

Board of Governors of the Federal Reserve System, April 7, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–7399 Filed 4–12–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Employee Thrift Advisory Council; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), a notice is hereby given of the following committee meeting:

Name: Employee Thrift Advisory Council.
Time: 10:30 a.m.
Date: May 4, 2005.
Place: 4th Floor, Conference Room, Federal Retirement Thrift Investment Board, 1250 H Street, NW., Washington, DC.
Status: Open.
Matters To Be Considered:
1. Approve minutes of the November 9, 2004, meeting.
2. Report of the Executive Director on Thrift Savings Plan status.
3. Open Season elimination.
4. "Life" funds.
5. Legislation.
6. New Business.
7. Frequency of meetings.
For Further Information Contact: Elizabeth S. Woodruff, Committee Management Officer, on (202) 942–1660.

Dated: April 8, 2005.

Elizabeth S. Woodruff,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 05–7525 Filed 4–11–05; 2:07 pm]

BILLING CODE 6760–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS), Workgroup on the National Health Information Infrastructure (NHII).

Time and Date: 9 a.m.–5:30 p.m April 26, 2005. 8:30 a.m.–1 p.m. April 27, 2005.

Place: Holiday Inn Capitol, 550 C Street, SW., Washington, DC 20024.

Status: Open.

Purpose: The Workgroup will meet to discuss and hear testimony from invited experts on policy issues related to sponsorship of personal health records (PHRs), to discuss market forces promoting or inhibiting acceptance and adoption of PHRs ("tethered" and "untethered") by providers, plans, and employers; and to explore strategies for overcoming major barriers to widespread adoption of PHRs by major stakeholders. The Subcommittee will also be briefed on other key developments related to PHRs.

Contact Person for more information: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Mary Jo Deering, Lead Person for the NCVHS Workgroup on the National Health Information Infrastructure, Director for Informatics Dissemination, NCI Center for Bioinformatics, National Cancer Institute, National Institutes of Health, USDHHS, 6116 Executive Blvd. —#400, Rockville, MD 20852, Phone: (301) 594–1273, Fax: (301) 480–3441, E-mail: *deeringm@mail.nih.gov* or Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.nevhs.hhs.gov/*, where an agenda for the meeting will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: April 5, 2005.

James Scanlon,

Acting Deputy Assistant Secretary for Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 05–7396 Filed 4–12–05; 8:45 am]

BILLING CODE 4151–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–05BU]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 or send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Assessment and Monitoring of Breastfeeding-Related Maternity Care Practices in Intrapartum Care Facilities in the United States and Territories—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

There is substantial evidence on the social, economic and health benefits of breastfeeding for both the mother and infant and the importance of the health care system in promoting the initiation and maintenance of breastfeeding. Yet breastfeeding initiation rates and duration in the United States did not achieve Healthy People 2000 goals, and significant disparities continue to exist between African American and White

women in breastfeeding rates. The Healthy People 2010 goals are to increase the proportion of mothers who breastfeed in the early postpartum period from 64% to 75%, the proportion who breastfeed their babies through 6 months of age from 29% to 50%, and to increase from 16% to 25% the proportion of mothers who breastfeed to 1 year of age (the first figure in each comparison is a 1998 estimate). In addition, Healthy People 2010 seeks to decrease the disparities in breastfeeding initiation, exclusivity, and duration between African American and White women. Along with ethnic and racial disparities, there is evidence of significant variation in state breastfeeding rates. For example, in 2003 the breastfeeding initiation rate in Louisiana was 46.4 percent and in Oregon was 88.8 percent.

One important and effective means to promote and support the initiation and maintenance of breastfeeding is through the health care system. The few studies on breastfeeding practices at intrapartum care facilities (facilities that manage and deliver care to women in labor) within individual states show significant variation in practices. However, with the data currently available it is not possible to assess and monitor breastfeeding-related practices and policies in hospitals and free-standing childbirth centers across the United States.

CDC plans to conduct an assessment of breastfeeding-related maternity care practices in intra-partum care facilities in the United States and Territories to provide information to individual facilities, state health departments, and CDC on the extent to which facilities are providing effective breastfeeding-related maternity care. The assessment will provide detailed information on general facility characteristics related to maternity care such as: facility management and support policies relevant to breastfeeding-related maternity care practices, practices relevant to the training of health care staff on breastfeeding instruction, rooming-in, infant supplementation, and discharge from facility. CDC will provide facility-specific information based on the assessment to the individual facilities and state-specific information to state health departments. The information from the survey can be used by facilities to evaluate and modify breastfeeding-related maternity care practices, and by states and CDC to inform and target programs and policies to improve breastfeeding-related maternity care practices at intrapartum care facilities.

Approximately 3,500 facilities providing maternity care in the United States and Territories will be mailed a survey every other year in this 4-year study. The survey will be administered for the first time in 2005 and for the second time in 2007. Survey content will be similar in each of the administrations to examine changes in practices and policies over time. It is expected that approximately 3,000 facilities will complete the fifteen minute questionnaire in each administration. The facilities will be identified from the American Hospital Association's (AHA) Annual Survey of Hospitals and the National Association of Childbearing Centers (NACC). A five minute screening telephone call will be made prior to survey administrations to all facilities identified as providing maternity care by AHA and NACC to ensure they are currently providing maternity care, to identify possible satellite clinics providing maternity care, and to identify survey respondents in each of the facilities. The respondents will have the option of either responding by mail or through a web-based system. The survey will provide detailed information about breastfeeding-related maternity care practices and policies at hospitals and free-standing birthing centers. There are no costs to respondents other than their time to respond.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Questionnaire/respondents	Number of respondents	Number of responses/respondent	Average burden per response (in hours)	Total burden (in hours)
Screening call/facilities that have at least one registered maternity bed (2005)	3,500	1	5/60	292
Mail survey/facilities providing maternity care in the past calendar year (2005)	3,000	1	15/60	750
Screening call/facilities that have at least one registered maternity bed (2007)	3,500	1	5/60	292
Mail survey/facilities providing maternity care in the past calendar year (2007)	3,000	1	15/60	750
Total	13,000			2,084

Dated: April 6, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–7385 Filed 4–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–0530]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information

is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Project Proposal

EEOICPA Dose Reconstruction Interviews and Forms, OMB No. 0920–0530—Extension—The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (DHHS).

Background and Brief Description

On October 30, 2000, the Energy Employees Occupational Illness Compensation Program Act of 2000 (Pub. L. 106–398) was enacted. This Act established a federal compensation program for employees of the Department of Energy (DOE) and certain of its contractors, subcontractors and vendors, who have suffered cancers and other designated illnesses as a result of exposures sustained in the production and testing of nuclear weapons.

Executive Order 13179, issued on December 7, 2000, delegated authorities assigned to "the President" under the Act to the Departments of Labor, Health and Human Services, Energy and Justice. The Department of Health and Human Services (DHHS) was delegated the responsibility of establishing methods for estimating radiation doses received by eligible claimants with cancer applying for compensation. NIOSH is applying the following methods to estimate the radiation doses of individuals applying for compensation.

In performance of its dose reconstruction responsibilities, under the Act, NIOSH is interviewing claimants (or their survivors) individually and providing them with the opportunity to assist NIOSH in documenting the work history of the employee by characterizing the actual work tasks performed. In addition, NIOSH and the claimant identify incidents that may have resulted in undocumented radiation exposures, characterizing radiological protection and monitoring practices, and identify co-workers and other witnesses as may be necessary to confirm undocumented information. In this process, NIOSH uses a computer assisted telephone interview (CATI) system, which allows interviews to be conducted more efficiently and quickly as opposed to a paper-based interview instrument.

NIOSH uses the data collected in this process to complete an individual dose reconstruction that accounts, as fully as possible, for the radiation dose incurred by the employee in the line of duty for DOE nuclear weapons production programs. After dose reconstruction, NIOSH also performs a brief final interview with the claimant to explain the results and to allow the claimant to confirm or question the records NIOSH has compiled. This will also be the final opportunity for the claimant to supplement the dose reconstruction record.

At the conclusion of the dose reconstruction process, the claimant submits a form to confirm that all the information available to the claimant has been provided. The form notifies the claimant that signing the form allows NIOSH to forward a dose reconstruction report to DOL and to the claimant, and closes the record on data used for the dose reconstruction. Signing this form does not indicate that the claimant agrees with the outcome of the dose reconstruction. The dose reconstruction results will be supplied to the claimant and to the DOL, the agency that will factor them into its determination of whether the claimant is eligible for compensation under the Act.

There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (hours)
Initial interview	4,200	1	1	4,200
Conclusion form	8,400	1	5/60	700
Total				4,900

Dated: April 6, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–7386 Filed 4–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control

Special Emphasis Panel: Occupational Health and Safety Research, Program Announcement #04038

In accordance with section 10(a)(2) of the Federal Advisory

Committee Act (Pub. L. 92–463), the Centers for Disease

Control and Prevention (CDC) announces the following meeting:

NAME: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Occupational Health and Safety Research, Program Announcement #04038.

TIMES AND DATES: 3 p.m.–4 p.m., April 29, 2005 (Closed).

PLACE: Teleconference.

STATUS: The meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Pub. L. 92–463.

MATTERS TO BE DISCUSSED: The meeting will include the review, discussion, and evaluation of applications received in response to Occupational Health and Safety Research, Program Announcement #04038.

FOR FURTHER INFORMATION CONTACT: Pamela J. Wilkerson, MPA, Scientific Review Administrator, Office of Extramural Programs, National Institute for Occupational Safety and Health, CDC, 1600 Clifton Road, NE., MS–E74, Atlanta, GA 30333, Telephone 404–498–2556.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 5, 2005.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 05–7390 Filed 4–12–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Administration on Children, Youth and Families, Head Start Bureau

Funding Opportunity Title: Head Start Tribally Controlled Land Grant College and University Partnerships.

Announcement Type: Initial—Grant.

Funding Opportunity Number: HHS–2005–ACF–ACYF–YT–0012.

CFDA Number: 93.600.

Due Date For Letter of Intent or Preapplications: Letter of intent is due May 13, 2005.

Due Date for Applications: Application is due June 13, 2005.

Executive Summary: The Head Start Bureau is announcing the availability of funds and requesting applications for professional development and training grants for Tribally Controlled Land Grant Colleges and Universities (TCUs). These grants are provided in partnership with Head Start and Early Head Start programs to improve staff training and to thereby enhance services to Head Start and Early Head Start children and families.

Through this announcement, the Administration on Children, Youth and Families (ACYF) is making available up to $1,500,000 annually for each of five years to support Tribally Controlled Land Grant Colleges and Universities (TCUs) partnerships. These partnerships seek to increase the number of Head Start teachers with degrees in early childhood education, in order to improve the quality and long-term effectiveness of Head Start and Early Head Start grantees.

I. Funding Opportunity Description

The overall goal of Head Start is to ensure that children of low-income families acquire the skills and knowledge necessary to allow them to enter school ready for success. In order to accomplish this goal, Head Start provides comprehensive services to these children and their families. Head Start enhances children's physical, cognitive, social, and emotional development. It aids parents in their efforts to fulfill their parental roles as their child's primary educator, helps support them while they work towards employment and self-sufficiency, and provides opportunities for their involvement in administering the Head Start program.

In an attempt to ensure that highly qualified and well-trained staff provides high quality services to enrolled children and their families, Head Start has supported many demonstration projects. For example, Head Start supported the creation of the Child Development Associate (CDA) credential designed for early childhood development teaching staff, implemented the Head Start Teaching Centers, and developed other related innovative projects. The Head Start Bureau also implemented partnerships with Historically Black Colleges and Universities (HBCUs) and Higher Education Hispanic Service Institution Partnerships (HS–HEHSIPs) in addition to key innovative training and staff development projects.

The 1998 reauthorization of the Head Start Act contains provisions to improve Head Start program quality and accountability. These include new education performance standards and measures, the expansion of program monitoring to incorporate evidence of progress on outcomes-based measures, funding to upgrade program quality and staff compensation, and higher education standards for Head Start teachers. In January 2001, the President signed into law the *No Child Left Behind Act* to make the education of every child in America one of the country's top priorities. The Act seeks to ensure that public schools teach children what they need to know to be successful in life and that they also set high education standards in the classroom. In his 2002 State of the Union address, the President indicated the need to prepare our children to read and succeed in school, including the improvement of Head Start and early childhood development programs. In response to these goals, the White House has developed an early childhood initiative, which is built on raising the bar for Head Start education methods to create a better learning environment and improved outcomes for children. In his announcement of the Good Start, Grow Smart Early Childhood Initiative in April 2002, the President identified children's early literacy as a key focus for Head Start program improvement. In this initiative, the President presented three areas of focus for Head Start: (1) Strengthening Head Start programs; (2) partnering with states to improve early childhood education; and (3) providing information to teachers, caregivers, and parents.

The Head Start Act, as amended 42 U.S.C. 9831 *et seq.*, is the authorizing legislation for the Head Start TCU program. The key purpose in funding the TCU program is to increase the number of Head Start staff with college degrees in early childhood education. To ensure that selected colleges and universities will be able to fulfill this task it is important that TCUs applying for funds under this announcement clearly demonstrate that they have established relationships with the Head Start programs in their community and that these Head Start programs have indicated their willingness to work collaboratively with the institution.

Priority Area

Head Start Tribally Controlled Land Grant Colleges and Universities Partnerships

1. *Description:* The Head Start Bureau is announcing the availability of funds and request for applications for professional development and training grants for Tribally Controlled Land Grant Colleges and Universities (TCUs) in partnership with Head Start and Early Head Start programs to improve staff training and to thereby enhance services to Head Start and Early Head Start children and families.

Through this announcement, the Administration on Children, Youth and Families (ACYF) is making available up to $1,500,000 annually for each of five years to support Tribally Controlled Land Grant Colleges and Universities (TCUs) partnerships. These partnerships seek to increase the number of Head Start classroom teaching staff with BA degrees in early childhood education in order to improve the quality and long-term effectiveness of Head Start and Early Head Start grantees.

II. Award Information

Funding Instrument Type: Grant.

Anticipated Total Priority Area Funding: $1,500,000 per budget period.

Anticipated Number of Awards: 6 to 10.

Ceiling on Amount of Individual Awards Per Budget Period: $150,000 per budget period.

Floor on Amount of Individual Awards Per Budget Period: None.

Average Projected Award Amount: $150,000 per budget period.

Length of Project Periods: 60-month project with five 12-month budget periods.

Project Periods for Awards: Up to 60 months with five 12-month budget periods.

Awards will be made on a competitive basis and will be for a one-year budget period. The total project period will not exceed 60 months. Applications for continuation grants funded under these awards beyond the first 12-month budget period (but within the project period) will be considered on a noncompetitive basis subject to the availability of funds, satisfactory progress of the grantee, and a determination that continued funding is in the best interest of the Government.

III. Eligibility Information

1. *Eligible Applicants:* Native American tribal organizations (other than Federally recognized tribal governments).

Additional Information on Eligibility: This announcement is limited to Tribally Controlled Land Grant Colleges and Universities (TCUs) as defined in Section 532 of the Equity in Educational Land Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled Community College Assistance Act of 1978, (25 U.S.C. 1801 *et seq.*), and Navajo Community College, Authorized in the Navajo Community College Assistance Act of 1978, Public Law 95–471, Title II (25 U.S.C. 640a note). Only those institutions that meet these definitions shall be eligible for assistance under this announcement.

Institutions of Higher Education that are not accredited for the degree program they propose are not eligible to apply under this announcement. The applicant must submit documentation of accreditation for the degree program included as part of the method of meeting the objective of this announcement (*i.e.*, increasing the number of teaching staff in the classroom with BA degrees).

TCUs that are currently funded under the Head Start Partnership with TCUs and whose funding will end after October 1, 2005 are not eligible to apply under this announcement.

2. *Cost Sharing/Matching:* None.

3. *Other:* All applicants must have a Dun & Bradstreet number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*http://www.grants.gov/*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com/*.

Non-profit organizations applying for funding are required to submit proof of their non-profit status.

Proof of non-profit status is any one of the following:

- A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.
- A copy of a currently valid IRS tax exemption certificate.
- A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earning accrue to any private shareholders or individuals.
- A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.
- Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

When applying electronically we strongly suggest you attach your proof of non-profit status with your electronic application.

Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

Disqualification Factors

Applications that exceed the ceiling amount will be considered non-responsive and will not be eligible for funding under this announcement.

Any application received after 4:30 p.m., eastern time, on the deadline date will not be considered for competition.Any application that fails to satisfy the deadline requirements referenced in Section IV.3 will be considered non-responsive and will not be considered for funding under this announcement.

IV. Application and Submission Information

1. *Address to Request Application Package:* ACYF Operations Center, c/o The Dixon Group, Inc., Head Start Tribally Controlled Land Grant Colleges and Universities (TCUs), 118 Q Street, NE., Washington, DC 20002, Phone: 866–796–1591, e-mail: *HS@dixongroup.com*.

2. *Content and Form of Application Submission: Submission of Letters of Intent.* Prior to submittal of the application, applicants must submit a post card or call the ACYF Operations Center c/o The Dixon Group with the following information: the name, address, telephone and fax numbers, and e-mail address of the college/university intending to apply to receive Tribally Controlled Land Grant Colleges and Universities funds. Please see Section IV.1 for ACYF Operations Center address and telephone contact information.

Letter of Intent information will be used to determine the number of reviewers necessary to complete the panel review process. Failure to submit a Letter of Intent will not impact eligibility to submit an application and will not disqualify an application from competitive review based on non-responsiveness.

Proof of Accreditation Status. Applicants must submit proof of accreditation by an accreditation agency recognized by the Secretary of the Department of Education.

Head Start Program Participation Agreement. With their applications, applicants must submit a letter of agreement from a Head Start Program Director verifying that the applicant has an established relationship with the program and that the Head Start program is willing to work with the TCU.

Application Requirements. The project narrative of the application should be double-spaced and single-sided on 8½″ x 11″ plain white paper, with 1″ margins on all sides. Use only a standard size font no smaller than 12-point throughout the application. Packages should be assembled so the SF–424 and SF–424A are the first pages

of the application package, immediately followed by the project abstract then the table of contents. All narrative sections of the application (including appendices, resumes, charts, references/footnotes, tables, maps and exhibits) must be sequentially numbered, beginning on the first page after the table of contents. *The length of the application, including the project description, appendices and resumes must not exceed 75 pages.* Anything over 75 pages will be removed and not considered by the reviewers. The abstract should not be counted in the 75 pages and should not exceed one page.

Applicants are requested NOT to send pamphlets, brochures, or other printed material along with their applications. These materials, if submitted, will not be included in the review process. In addition, applicants must NOT submit any additional letters of endorsement beyond those stated as required in this announcement.

Project Narrative. Specific factual information and statements of measurable goals in quantitative terms must be included in the project description. Extensive exhibits are not required. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant-funded activity should be placed in an appendix. Please see section V for further information regarding the Project Description.

Table of Contents. All pages must be numbered and a table of contents should be included for easy reference.

Standard Forms and Certifications. Information on required Standard Forms and Certifications follows this section.

You may submit your application to us in either electronic or paper format.

To submit an application electronically, please use the *http://www.Grants.gov/Apply* site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via e-mail or facsimile transmission. Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary, but strongly encouraged.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- We recommend you visit Grants.gov at least 30 days prior to filing your application to fully understand the process and requirements. We encourage applicants who submit electronically to submit well before the closing date and time so that if difficulties are encountered an applicant can still send in a hard copy overnight. If you encounter difficulties, please contact the Grants.gov Help Desk at 1–800–518–4276 to report the problem and obtain assistance with the system.
- To use Grants.gov, you, as the applicant, must have a DUNS number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF–424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.grants.gov/.*
- You must search for the downloadable application package by the CFDA number.

An original and two copies of the complete application are required. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Standard Forms and Certifications: The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under Section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form (SF) 424, Application for Federal Assistance; SF–424A, Budget Information—Non-Construction Programs; SF–424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application.

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application.

Applicants must also understand they will be held accountable for the smoking prohibition included within Pub. L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO–KIDS Act of 1994). A copy of the **Federal Register** notice which implements the smoking prohibition is included with forms. By signing and submitting the application, applicants are providing the certification and need not mail back the certification with the application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Please see Section V.1. Criteria, for instructions on preparing the full project description.

3. *Submission Dates and Times: Due Dates:* Letters of intent are due May 13, 2005.

Applications are due June 13, 2005.

Explanation of Due Dates: The closing time and date for receipt of applications is referenced above. Applications received after 4:30 p.m., eastern time, on the closing date will be classified as late.

Deadline: Applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date referenced in Section IV.6. Applicants are responsible for ensuring applications are mailed or submitted electronically well in advance of the application due date.

Applications hand carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., eastern time, at the address referenced in Section IV.6., between Monday and Friday (excluding Federal holidays).

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. However, applicants will receive an electronic acknowledgement for applications that are submitted via *Grants.gov*.

ACF cannot accommodate transmission of applications by facsimile. Therefore, applications transmitted to ACF by fax will not be accepted regardless of date or time of submission and time of receipt.

Late Applications: Applications that do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

Any application received after 4:30 p.m., eastern time, on the deadline date will not be considered for competition.

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. However, applicants will receive an electronic acknowledgement for applications that are submitted via *Grants.gov*.

Applicants using express/overnight mail services should allow two working days prior to the deadline date for receipt of applications. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

Extension of deadlines: ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

Checklist: You may use the checklist below as a guide when preparing your application package.

What to submit	Required content	Required form or format	When to submit
Letter of Intent	See Section IV	Described in Section IV	4 weeks prior to to application due date.
Table of Contents	See Section IV	Described in Section IV	By application due date.
Project Abstract	See Section IV and V	Described in Section IV and V	By application due date.
Project Narrative	See Section IV and V	Described in Section IV and V	By application due date.
SF–424	See Section III	Found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.
SF–424A	See Section III	Found at: *http://www.acf.hhs.gov/programs/ofs.forms.htm.*	By application due date.
Assurances and Certifications	See Section III	May be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*	By date of award.
Support Letters	See Section V	Described in Section V	By application due date.
Proof of TCU Status	See Section III	Described in Section III	By application due date.
Proof of Accreditation	See Section III	Described in Section III	By application due date.
Head Start Program(s) Participation Agreement.	See Section III and V	Described in Section III and V	By application due date.

Additional Forms: Private, non-profit organizations are enccuraged to submit with their applications the survey located under "Grant Related Documents and Forms," "Survey for Private, Non-Profit Grant Applicants," titled, "Survey on Ensuring Equal Opportunity for Applicants," at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

What to submit	Required content	Location	When to submit
Survey for Private, Non-Profit Grant Applicants.	See form	May be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.

4. *Intergovernmental Review: State Single Point of Contact (SPOC).* This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa, Guam, North Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible, to alert them of prospective applications and receive instructions. Applicants

must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade SW., 4th floor, Washington, DC 20447.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by Federally-recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

5. *Funding Restrictions:* Grant awards will not allow reimbursement of pre-award costs.

An application that exceeds the upper value of the dollar range specified will be considered non-responsive.

TCUs that are currently funded under the Head Start Partnership with TCUs and whose funding will end after October 1, 2005 are not eligible to apply under this announcement.

6. *Other Submission Requirements: Submission by Mail:* An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m., eastern time, on or before the closing date. Applications should be mailed to: c/o The Dixon Group, Inc., Head Start TCU Partnerships, ATTN: Delores Dickenson, 118 Q Street, NE., Washington, DC 20002, Attention: ACYF Operations Center.

Hand Delivery: An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m., eastern time, Monday through Friday. Applications should be delivered to: c/o The Dixon Group, Inc., Head Start TCU Partnerships, ATTN: Delores Dickenson, 118 Q Street, NE., Washington, DC 20002, Attention: ACYF Operations Center.

Electronic Submission: http://www.Grants.gov/. Please see section IV. 2 Content and Form of Application Submission, for guidelines and requirements when submitting applications electronically.

V. Application Review Information

The Paperwork Reduction Act of 1995 (Pub. L. 104–13)

Public reporting burden for this collection of information is estimated to average 35 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 4/30/2007.

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.

1. *Criteria: Purpose.* The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, information responsive to each of the requested evaluation criteria must be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application in a manner that is clear and complete.

General Instructions. ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix. Pages should be numbered and a table of contents should be included for easy reference.

Introduction. Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract. Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance. Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected. Identify the results and benefits to be derived.

Specifically, describe how the college or university's conduct of a program to provide educational opportunities for staff of Head Start grantees, including faith-based and community organizations, will further the goals of the Head Start program.

Approach. Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might

accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished:

When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Evaluation. Provide a narrative addressing how the conduct of the project and the results of the project will be evaluated. In addressing the evaluation of results, state how you will determine the extent to which the project has achieved its stated objectives and the extent to which the accomplishment of objectives can be attributed to the project. Discuss the criteria to be used to evaluate results, and explain the methodology that will be used to determine if the needs identified and discussed are being met and if the project results and benefits are being achieved. With respect to the conduct of the project, define the procedures to be employed to determine whether the project is being conducted in a manner consistent with the work plan presented and discuss the impact of the project's various activities on the project's effectiveness.

Geographic Location. Describe the precise location of the project and boundaries of the area to be served by the proposed project. Maps or other graphic aids may be attached.

Additional Information. Following are requests for additional information that need to be included in the application:

Staff and Position Data. Provide a biographical sketch and job description for each key person appointed. Job descriptions for each vacant key position should be included as well. As new key staff is appointed, biographical sketches will also be required.

Plan for Project Continuance Beyond Grant Support. Provide a plan for securing resources and continuing project activities after Federal assistance has ended.

Organizational Profiles. Provide information on the applicant organization(s) and cooperating partners, such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. If the applicant is a non-profit organization, submit proof of non-profit status in its application.

The non-profit agency can accomplish this by providing: (a) A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate, (c) a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status, (e) any of the items immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Letters of Support. Provide statements from community, public and commercial leaders that support the project proposed for funding. All submissions should be included in the application OR by application deadline.

Budget and Budget Justification. Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General. Use the following guidelines for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. "Federal resources" refers only to the AGF grant for which you are applying. "Non Federal resources" are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel. Description: Costs of employee salaries and wages.

Justification: Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits. Description: Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

Justification: Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel. Description: Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

Justification: For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment. Description: "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (Note: Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications,

attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

Justification: For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies. Description: Costs of all tangible personal property other than that included under the Equipment category.

Justification: Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual. Description: Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

Justification: Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

Note: Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other. Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

Justification: Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges. Description: Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

Justification: An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Program Income. Description: The estimated amount of income, if any, expected to be generated from this project.

Justification: Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application which contain this information.

Non-Federal Resources. Description: Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

Justification: The firm commitment of these resources must be documented and submitted with the application so the applicant is given credit in the review process. A detailed budget must be prepared for each funding source.

Evaluation Criteria: The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however, applicants need not develop their applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (e.g. from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Results or Benefits Expected—20 points

Description of general results and benefits expected: The extent to which the results and benefits will be derived. The extent of the anticipated contribution to policy, practice, theory and research. The extent of specific benefits for both the applicant and the Head Start/Early Head Start community.

Description of expected results and benefits specific to the target grantee(s): Based on the stated program objectives, the extent to which results and benefits will be derived. The extent to which specific results or benefits can be expected for the Head Start/Early Head Start grantees and the institution.

Description of method for assessing achievement of results: The extent to which the applicant describes the assessment plan for this project. The extent to which the applicant describes the methods by which qualitative and quantitative data will be collected by the program to measure progress toward the stated results or benefits. The extent to which the applicant will determine whether/how the program has achieved its stated objectives. The extent to which the applicant draws outcome measures directly from the project objectives. The extent to which the applicant describes the development and implementation of a plan for data collection. The extent to which the description outlines the use of statistical methodology to analyze the results to be derived, including periodic updates in addition to the final report.

Description of projected outcomes: The extent to which the applicant provides an accurate projection of the estimated number of Head Start/Early Head Start teachers that will earn degrees over the duration of the project based on an analysis of the current levels of credits/courses earned by participants and a proposed sequence of courses to be offered through this project.

Description of improvement of teaching methods: The extent to which

the applicant proposes new teaching methods for Head Start/Early Head Start teachers and staff for teaching early literacy in the classrooms and enhancing parental skills to encourage children to read and succeed in school. The extent to which the applicant proposes to design and submit a replicable model incorporating a strengths-based perspective and reflective practices as well as their relationship to Head Start competency goals, indicators, priorities and the program performance standards.

Objectives and Need for Assistance—20 points

Description of general objectives and need for assistance: The extent to which the applicant describes relevant physical, economic, social, financial, institutional or other problems requiring intervention, and the need for this project in the proposed community(ies). The extent to which the applicant describes principal and subordinate objectives of the project along with supporting documentation provided or other testimonies from concerned interests other than the applicant.

Defense of project objectives within local community: The extent to which the applicant describes how these objectives are based on an assessment of partner and community needs and how they relate to Head Start goals. The extent to which the applicant proposes a detailed process that will be used to assess the need for the proposed program including the total number of staff needing training, including preschool and infant/toddler teachers.

Defense of project objectives within broader state/community objectives: The consultative process related to the development of the proposed initiative. The extent to which the applicant describes detailed efforts to frame the proposed initiative within broader state of community efforts to enhance professional and career development for staff in all forms of early childhood and child care programs. The extent to which the applicant provides letters of support that document consultation and support from the proposed grantee or delegate agency partners.

Defense of need of population: The extent to which the applicant describes the needs of the specifically identified population to be served.

Defense of participation of grantees and instructors: The extent to which the applicant describes proposed Head Start and Early Head Start grantees as participating partners. The extent to which the applicant provides the number and types of staff to be enrolled in the project, the proposed courses in relationship to courses completed by partner staff before entering the project, and degrees to be awarded.

Defense of the consultative process related to the development of the proposed initiative: The extent to which the applicant describes detailed efforts to frame the proposed initiative within broader state or community efforts to enhance professional and career development for staff in all forms of early childhood and child care programs. The extent to which the applicant provides letters of support that document consultation and support from the proposed grantee or delegate agency partners.

Approach—20 points

Describing the general scope and plan of the project: The extent to which the application describes a detailed plan of action pertaining to the scope of the project including details on how the proposed work will be accomplished, such as detailed timelines and lists of each organization as well as consultant and key individuals who will work on the project. The extent to which the applicant describes a brief yet clear description of the nature of the effort and contribution each organization, consultant, or key individual will make to the project. The extent to which the applicant demonstrates adequate time key staff will devote to the project and that this staff is qualified and knowledgeable of Head Start and Early Head Start. The extent to which the applicant describes an approach and methodology for implementing the project, including a clear description that delineates the relationship of each task to the accomplishment of the proposed objectives. The extent to which the applicant provides evidence that the planned approach reflects sufficient input from and partnership with Head Start and Early Head Start grantees.

Description of planning activities: The extent to which the applicant demonstrates effective planning for activities developed during the start-up period in preparation of implementation of the program including assurance that no more than six months will be devoted to planning activities.

Description of recruitment and selection processes: The extent to which the applicant demonstrates effective methods for recruiting Head Start center-based teaching staff and an effective selection process for participation in the program.

Description of recruitment and selection processes: The extent to which the applicant demonstrates how training and coursework will be contextually and culturally relevant to the Head Start and Early Head Start environment and how it will contribute to enhancing the effectiveness of teachers, program quality, and outcomes for Head Start children and families.

Description of project's cultural competency and contribution to Head Start effectiveness: The extent to which the application describes efforts the applicant and Head Start partners will make to ensure that training and coursework are accessible to teaching staff and how the applicant will support their successful completion of courses and degrees. The extent to which the applicant provides discussion of relevant issues such as timing, scheduling, and location of classes, support to enhance the literacy and study skills of participants, and approaches to integrate training in the working environment of the participants enrolled in the project. The extent to which the applicant describes costs (if any) associated with training and courses for Head Start staff.

Description of course offerings available: The extent to which the applicant describes credit courses offered particularly in the area of Early Childhood Development/Education. The extent to which the applicant describes how CDA training and certification of Head Start and Early Head Start staff, as appropriate, as well as previous coursework and credits will be linked to academic credits and course sequences leading to BA degrees. The extent to which the applicant includes estimates indicating how many Head Start and Early Head Start teaching staff will be included in this effort.

Description of organization structure to support objectives: The extent to which the applicant presents an organizational structure that will support the project objectives. The extent to which the applicant demonstrates how joint planning and assessment with the Head Start and Early Head Start grantees will be effectively implemented with timelines and clear lines of responsibility. The extent to which the applicant explains how staff positions will be assigned and describes their major functions and responsibilities.

Plan for Project Continuance Beyond Grant Support—15 points

The extent to which the applicant describes appropriate activities that will continue after the completion of this project that will ensure that the applicant will continue to participate in providing educational opportunities for Head Start and Early Head Start classroom staff.

Nonfederal Resources—5 points

The extent to which the applicant describes strong efforts to complement the Federal funds requested in this proposal with other sources to maximize the benefits to Head Start and Early Head Start grantees including efforts or plans to assist Head Start/Early Head Start staff in accessing sources of financial assistance or to make use of other funding for training and career development of early childhood program staff.

Staff and Position Data—5 points

The extent to which the applicant demonstrates that key staff are qualified and knowledgeable of Head Start and Early Head Start. The extent to which the applicant demonstrates the capacity of its organization, key leaders, managers, and project personnel to provide: high quality, relevant, and responsive training to Head Start staff; competent project staff to plan and deliver appropriate course material to Head Start trainees that is culturally relevant; implementation of the training grant in an effective and timely manner; and successful partnerships that involve sharing resources, staffing, and facilities.

Budget and Budget Justification—5 points

The extent to which the applicant describes how the proposed project costs are reasonable and appropriate in view of the activities to be carried out and the anticipated outcomes. The extent to which the applicant identifies and explains the relationship of the budgetary items listed under "General Budget Information," in this section, to the objective of this announcement. The extent to which the applicant describes a thorough line item budget for the costs associated with key project staff attending two ACF-sponsored conferences in Washington, DC.

Organizational Profiles—5 points

The extent to which the applicant presents an organizational structure that will support the project objectives. The extent to which the applicant demonstrates how joint planning and assessment with the Head Start and Early Head Start grantees will be effectively implemented with timelines and clear lines of responsibility. The extent to which the applicant explains how staff positions will be assigned and describes their major functions and responsibilities.

Geographic Location—5 points

The extent to which the application describes the precise location of the project and area to be served, including the location of the Head Start and Early Head Start grantees the applicant partners with.

2. *Review and Selection Process:* No grant award will be made under this announcement on the basis of an incomplete application.

Responsive applications received by the due date will be reviewed and scored competitively. Experts in the field, generally persons from outside the Federal government, will use the evaluation criteria listed in Section V of this announcement as well as the eligibility criteria specified in Section III to review and score the applications. The results of this review will be a primary factor in making funding decisions. Application review panels will assign a score to each application and identify its strengths and weaknesses. The Head Start Bureau will conduct an administrative review of the applications and results of the competitive review panels and make recommendations for funding to the Commissioner, ACYF. Subject to the recommendation of the Head Start Bureau Associate Commissioner, the Commissioner, ACYF, will make the final selection of the applications to be funded. An application may be funded in whole or in part depending on: (1) The ranked order of applicants resulting from the competitive review; (2) staff review and consultations; (3) the combination of projects that best meets the objectives of the Head Start Bureau; (4) the funds available; (5) the statutory requirement that reserves funds for Indian Tribes, and Alaska Native Regional Corporations, and Native Hawaiian entities; and (6) other relevant considerations. The Commissioner may also elect not to fund any applicants with known management, fiscal, reporting, program, or other problems, which make it unlikely that they would be able to provide effective services.

Since ACF will be using non-Federal reviewers in the process, applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget and Social Security Numbers, if otherwise required for individuals. The copies may include summary salary information.

Approved but Unfunded Applications:

In cases where more applications are approved for funding than ACF can fund with the money available, the Grants Officer shall fund applications in their order of approval until funds run out. In this case, ACF has the option of carrying over the approved applications up to a year for funding consideration in a later competition of the same program. These applications need not be reviewed and scored again if the program's evaluation criteria have not changed. However, they must then be placed in rank order along with other applications in later competition.

3. *Anticipated Announcement and Award Dates:* The anticipated start date for the new awards is September 30, 2005. Projects may run through September 29, 2010 for a period of up to 60 months.

VI. Award Administration Information

1. *Award Notices:* The successful applicants will be notified through the issuance of a Financial Assistance Award document which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided, and the total project period for which support is contemplated. The Financial Assistance Award will be signed by the Grants Officer and transmitted via postal mail.

The anticipated start date for the new awards is September 30, 2005. Projects may run through September 29, 2010.

Organizations whose applications will not be funded will be notified in writing.

2. *Administrative and National Policy Requirements:* Grantees are subject to the requirements in 45 CFR part 74 (non-governmental) and 45 CFR part 92 (governmental).

Direct Federal grants, subaward funds, or contracts under this ACF Program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this Program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS Web site at *http://www.os.dhhs.gov/fbci/waisgate21.pdf.*

3. *Reporting:* Program Progress Reports: Semi-Annually.

Financial Reports: Semi-Annually.

Grantees will be required to submit program progress and financial reports (SF 269) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. In addition, final programmatic and financial reports are due 90 days after the close of the project period. A suggested format for the program report

will be sent to all grantees after the awards are made.

VII. Agency Contacts

Program Office Contact: Katherine Gray, U.S. Department of Health and Human Services, Administration for Children and Families, ACYF—Head Start Bureau, 330 C Street SW., Switzer Room 2211, Washington, DC 20447, Phone: 312–353–2260, E-mail: *kgray@acf.hhs.gov.*

Grants Management Office Contact: Delores Dickenson, U.S. Department of Health and Human Services, Administration for Children and Families, ACYF—Head Start Bureau, 330 C Street SW., Switzer Room 2220, Washington, DC 20447, Phone: 202–260–7622, E-mail: *dedickenson@acf.hhs.gov.*

VIII. Other Information

Applicants will not be sent acknowledgements of received applications.

Notice: Beginning with FY 2006, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005, applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *http://www.Grants.gov.* Applicants will also be able to find the complete text of all ACF grant announcements on the ACF Web site located at: *http://www.acf.hhs.gov/grants/index.html.*

Dated: March 31, 2005.

Joan E. Ohl,

Commissioner, Administration on Children, Youth and Families.

[FR Doc. 05–7030 Filed 4–12–05; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005N–0059]

Withdrawal of Approval of a New Animal Drug Application; Dichlorophene and Toluene Capsules

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of a new animal drug application (NADA) for dichlorophene and toluene capsules used in dogs and cats for removal of certain intestinal parasites. In a final rule published elsewhere in this issue of the **Federal Register**, FDA is amending the animal drug regulations to remove portions reflecting approval of this NADA.

DATES: Withdrawal of approval is effective April 25, 2005.

FOR FURTHER INFORMATION CONTACT: Pamela K. Esposito, Center for Veterinary Medicine (HFV–212), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–7818, e-mail: *pesposit@cvm.fda.gov.*

SUPPLEMENTARY INFORMATION: Natchez Animal Supply Co., 201 John R. Junkin Dr., Natchez, MS 39120, has requested that FDA withdraw approval of NADA 121–557 for THR Worm (dichlorophene and toluene) Capsules used in dogs and cats for removal of certain intestinal parasites. This action is requested because the product is no longer manufactured or marketed.

Therefore, under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10), redelegated to the Center for Veterinary Medicine (21 CFR 5.84), and in accordance with 21 CFR 514.115 *Withdrawal of approval of applications*, notice is given that approval of NADA 121–557 and all supplements and amendments thereto, is hereby withdrawn, effective April 25, 2005.

In a final rule published elsewhere in this issue of the **Federal Register**, FDA is amending the animal drug regulations to reflect the withdrawal of approval of this NADA.

Dated: March 31, 2005.

Catherine P. Beck,

Acting Director, Center for Veterinary Medicine.

[FR Doc. 05–7338 Filed 4–12–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Request for Nominations for Voting Consumer Representative Members on Public Advisory Committees

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting consumer representatives to serve on its advisory committees that are under the purview of the Center for Drug Evaluation and Research (CDER).

FDA has a special interest in ensuring that women, minority groups, and individuals with disabilities are adequately represented on its advisory committees and, therefore, encourages nominations of qualified candidates from these groups.

DATES: Nominations will be accepted for current vacancies and for those that will or may occur through December 31, 2005. Because vacancies occur on various dates throughout the year, there is no cutoff date for the receipt of nominations.

ADDRESSES: All nominations should be sent to the contact person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

FOR FURTHER INFORMATION CONTACT: Igor Cerny, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, Rockville, Maryland 20857, 301–827–7001, e-mail: *cerny@cder.fda.gov.*

SUPPLEMENTARY INFORMATION: FDA is requesting nominations for voting consumer representatives to all of its advisory committees identified in section I of this document.

I. Functions

The functions of advisory committees under the purview of CDER are listed in the following paragraphs.

A. Arthritis Advisory Committee

The committee reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of arthritis, rheumatism, and related diseases and makes appropriate recommendations to the Commissioner of Food and Drugs (the Commissioner).

B. Anti-Infective Drugs Advisory Committee

The committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of infectious diseases and disorders and makes appropriate recommendations to the Commissioner.

C. Cardiovascular and Renal Drugs Advisory Committee

The committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of cardiovascular and renal disorders and makes appropriate recommendations to the Commissioner.

D. Dermatologic and Ophthalmic Drugs Advisory Committee

The committee reviews and evaluates available data concerning the safety and

effectiveness of marketed and investigational human drug products for use in the treatment of dermatologic and ophthalmic disorders and makes appropriate recommendations to the Commissioner.

E. Endocrinologic and Metabolic Drugs Advisory Committee

The committee reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of endocrine and metabolic disorders and makes appropriate recommendations to the Commissioner.

F. Nonprescription Drugs Advisory Committee

The committee reviews and evaluates available data concerning the safety and effectiveness of over-the-counter (nonprescription) human drug products, or any other FDA-regulated product, for use in the treatment of a broad spectrum of human symptoms and diseases and advises the Commissioner either on the issuance of monographs establishing conditions under which these drugs are generally recognized as safe and effective and not misbranded, or on the approval of new drug applications for such drugs. The committee serves as a forum for the exchange of views regarding the prescription and nonprescription status, including switches from one status to another, of these various drug products and combinations thereof. The committee may also conduct peer review of agency sponsored intramural and extramural scientific biomedical programs in support of FDA's mission and regulatory responsibilities.

G. Pulmonary-Allergy Drugs Advisory Committee

The committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of pulmonary disease and diseases with allergic and/or immunologic mechanisms and makes appropriate recommendations to the Commissioner.

II. Criteria for Members

Persons who are nominated for membership on the committees as consumer representatives must meet the following criteria: (1) Demonstrate ties to consumer and community-based organizations, (2) be able to analyze technical data, (3) understand research design, (4) discuss benefits and risks, and (5) evaluate the safety and efficacy of products under review. The consumer representative must be able to represent the consumer perspective on issues and actions before the advisory committee; serve as a liaison between the committee and interested consumers, associations, coalitions, and consumer organizations; and facilitate dialogue with the advisory committees on scientific issues that affect consumers.

III. Selection Procedures

The selection of members representing consumer interests is conducted through procedures that include the use of organizations representing the public interest and consumer advocacy groups. The organizations have the responsibility of recommending candidates of the agency's selection.

IV. Nomination Procedures

All nominations must include a cover letter, a curriculum vitae or resume (that includes the nominee's office address, telephone number, and e-mail address), and a list of consumer or community-based organizations for which the candidate can demonstrate active participation.

Any interested person or organization may nominate one or more qualified persons for membership on one or more of the advisory committees to represent consumer interests. Self-nominations are also accepted. FDA will ask the potential candidates to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of a conflict of interest. The nomination should specify the committee(s) of interest. The term of office is up to 4 years, depending on the appointment date.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: April 1, 2005.

Sheila Dearybury Walcoff,

Associate Commissioner for External Relations.

[FR Doc. 05–7342 Filed 4–12–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004D–0453]

Compliance Policy Guide Sec. 560.400—Imported Milk and Cream—Federal Import Milk Act (Compliance Policy Guide 7119.05); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a compliance policy guide (CPG) entitled "Sec. 560.400—Imported Milk and Cream—Federal Import Milk Act (CPG 7119.05)." The CPG provides guidance on the applicability of the Federal Import Milk Act (FIMA) to imported milk and cream. This document updates the existing CPG.

DATES: Submit written or electronic comments concerning the CPG or the supporting document at any time.

ADDRESSES: Submit written requests for single copies of the CPG entitled "Sec. 560.400—Imported Milk and Cream—Federal Import Milk Act (CPG 7119.05)" to the Division of Compliance Policy (HFC–230), Office of Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 240–632–6861. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the document.

Submit written comments on the revised CPG to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments.*

FOR FURTHER INFORMATION CONTACT: Esther Lazar, Center for Food Safety and Applied Nutrition (HFS–306), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1485, FAX: 301–436–2632.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 29, 2004 (69 FR 63158), FDA announced the availability of a draft CPG entitled "Sec. 560.400—Imported Milk and Cream—Federal Import Milk Act (CPG 7119.05)." After considering comments received, FDA has finalized the CPG. The CPG updates and replaces "CPG Sec. 560.400—Imported Milk and

Cream—Import Milk Act (CPG 7119.05)."

FDA received 10 comments on the draft CPG. The comments represented the views of individual consumers, industry, and industry trade representatives. One comment requested clarification on whether sweetened condensed milk was subject to a FIMA permit. Nine comments were outside the scope of the draft CPG. After considering carefully the relevant comment received, FDA revised its intended treatment of sweetened condensed milk and evaporated milk under the FIMA. Accordingly, under Section III.B. of the CPG, "Application of the FIMA:," the following changes were made:

- In paragraph 1.i. of the CPG, we removed "Sweetened Condensed Milk" and "Evaporated Milk" from the list of products that FDA intends to consider as subject to the FIMA's permit requirements for importation; and
- In paragraph 2.ii. of the CPG, we added "Sweetened Condensed Milk" and "Evaporated Milk" to the list of products that FDA intends to consider as not subject to the FIMA's permit requirements for importation.

We also edited the CPG to clarify the following:

- In section II of the CPG, regulations under the FIMA are found in 21 CFR part 1210;
- In section II of the CPG, FDA intends to consider sweetened condensed milk and evaporated milk as not subject to the provisions of the FIMA. Sweetened condensed milk is required by § 131.120 (21 CFR 131.120) to contain a quantity of nutritive carbohydrate sweetener sufficient to prevent spoilage, and evaporated milk is required by § 131.130 to be sealed in a container and so processed by heat as to prevent spoilage;
- In section III of the CPG, FDA intends to consider "Nonfat Milk" as subject to the FIMA's permit requirement for importation; and
- In section V of the CPG, the specimen charge should be worded, "The article of [milk] [cream] is not accompanied by a valid import milk permit, as required by the Federal Import Milk Act (21 U.S.C. 141–149)."

The CPG is being issued as level 1 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The CPG represents the agency's current thinking on its enforcement process concerning the FIMA. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4.p.m., Monday through Friday.

III. Electronic Access

An electronic version of the revised CPG is available on the Internet at *http://www.fda.gov/ora* under "Compliance References."

Dated: March 30, 2005.

John R. Marzilli,

Deputy Associate Commissioner for Regulatory Affairs.

[FR Doc. 05–7343 Filed 4–12–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

Program Exclusions: March 2005

AGENCY: Office of Inspector General, HHS.

ACTION: Notice of program exclusions.

During the month of March 2005, the HHS Office of Inspector General imposed exclusions in the cases set forth below. When an exclusions is imposed, no program payment is made to anyone for any items or services (other than an emergency item or service not provided in a hospital emergency room) furnished, ordered or prescribed by an excluded party under the Medicare, Medicaid, and all Federal Health Care programs. In addition, no program payment is made to any business or facility, e.g., a hospital, that submits bills for payment for items or services provided by an excluded party. Program beneficiaries remain free to decide for themselves whether they will continue to use the services of an excluded party even though no program payments will be made for items and services provided by that excluded party. The exclusions have national effect and also apply to all Executive Branch procurement and non-procurement programs and activities.

Subject name, address	Effective date
PROGRAM-RELATED CONVICTIONS	
ALLEN, SHARON LIVINGSTON, TN	4/20/2005
ARTHUR C O'BRIEN MD, INC HAYWARD, CA	4/20/2005
AUGUSTINE, SCOTT BLOMMINGTON, MN	4/20/2005
BAINBRIDGE MANAGEMENT CHICAGO, IL	4/20/2005
BEILHARZ, JOYCE HILLIARD, OH	4/20/2005
BENHAM, JAMES NORTH OAKS, MN	4/20/2005
BLUE, FELICIA DUNN, NC	4/20/2005
BRADDOCK MANAGEMENT LP CHICAGO, IL	4/20/2005
CHEATAM, MARION REYNOLDSBURY, OH	4/20/2005
CORRAI, ANNIE MARYSVILLE, OH	4/20/2005
CORRAL, EDMOND LOS ANGELES, CA	4/20/2005
CUBRIA, ANDREW LISBON, OH	4/20/2005
DIAZ, BLAS LOS ANGELES, CA	4/20/2005
EDOHO-UKWA, ANIETIE MCKINNEY, TX	4/20/2005
EDOHO-UKWA, UKWA FRISCO, TX	4/20/2005
ELLIS, CRISTINA FONTANA, CA	4/20/2005
FLEISCHER, MARK OTISVILLE, NY	4/20/2005
FOREMAN, PAUL COLUMBIA, MO	4/20/2005
GARADA, HAZEM MORGANTOWN, WV	4/20/2005
GRAYSON, CYNTHIA BATON ROUGE, LA	4/20/2005
GREENWALD, BRUCE ST LOUIS, MO	4/20/2005
HEALTH CARE 2000, INC CHAVIES, KY	4/20/2005
HOWARD, ANNIESA REYNOLDSBURG, OH	4/20/2005
J & J SLEEP, INC NEW PORT RICHEY, FL	4/20/2005
JAPSON, SUSANNE BROOKHAVEN, NY	4/20/2005
JETTER, RODNEY CINCINNATI, OH	4/20/2005
JORDAN, LAKESHA SPENCER, NC	4/20/2005
JUN, DINA LONG BEACH, CA	4/20/2005
KARKOTSYAN, KIRAKOS LONG BEACH, CA	4/20/2005
KINGEN, JACK NEW PORT RICHEY, FL	4/20/2005
KIRPICHYAN, HAKOP VAN NUYS, CA	4/20/2005
KLEBER, PENNI PORTLAND, OR	4/20/2005
KOPP, RUTH EDELSTEIN, IL	4/20/2005
KRAJIAN, JOHN BEVERLY HILLS, CA	4/20/2005
KUYKENDALL, PAMELA COOS BAY, OR	4/20/2005
LATONN, EDWARD	4/20/2005

Subject name, address	Effective date
BEAR, DE	
LATONN, JANICE	4/20/2005
BEAR, DE	
LEW, BARRY	4/20/2005
CHINO, CA	
LOS ANGELES HEALTH SERVICES, INC	4/20/2005
LYNWOOD, CA	
MAHONEY, JAMES	4/20/2005
KINGSTON, NY	
MALKIN, WALTER	6/10/2004
GIRARD, OH	
MARDEN, PHYLLIS	4/20/2005
BULLARD, TX	
MAXIMILIANO, MONICA	4/20/2005
WEST COVINA, CA	
MENDEZ, THOMAS	4/20/2005
MONTGOMERY, PA	
NICHOLS, HEATHER	4/20/2005
MAGADORE, OH	
PLASENCIA, ZUBIN	4/20/2005
WEST COVINA, CA	
PRISAMT, ROBERT	4/20/2005
SAN FRANCISCO, CA	
QUAYLE, LYNETTE	4/20/2005
RIVERTON, WY	
RAMASWAMY, TRIVANDRUM	4/20/2005
PLAINFIELD, IN	
RODRIGUEZ, MANUEL	4/20/2005
MIAMI, FL	
ROMERO, GRACIELA	4/20/2005
EL MONTE, CA	
ROMO, JULIO	4/20/2005
ARCADIA, CA	
SAMPER, MYRA	4/20/2005
PHILADELPHIA, PA	
SANTOS, JORGE	4/20/2005
MIAMI, FL	
SCHEXNAYDER, ERNEST	4/20/2005
FRESNO, CA	
SHELLUM, ANGELA	4/20/2005
SOUTH ST PAUL, MN	
SIMS, GLADYS	4/20/2005
COLDWATER, MS	
STOKES, DARTHA	4/20/2005
WAUPON, WI	
TAYLOR-GIVENS, LYNNETTE	4/20/2005
HEPHZIBAH, GA	
THOMAS, CHRISTINE	4/20/2005
CENTEREACH, NY	
VIDMAR, LISA	4/20/2005
OKAWVILLE, IL	
VITA, SHARMAN	4/20/2005
S SALEM, NY	
WARD, SHARON	4/20/2005
SOUTH EUCLID, OH	
WHITE, AMANDA	4/20/2005
KIMBOLTON, OH	
WIEGAND, DIANE	4/20/2005
WOODSTOCK, NY	
WILLIAMS, FREDDY	4/20/2005
BUTNER, NC	
ZANGL, DEBBIE	11/2/2004
SUSSEX, WI	

FELONY CONVICTION FOR HEALTH CARE FRAUD

BUSH, BELITA	4/20/2005
PHILADELPHIA, PA	
CHOQUETTE, STEPHEN	4/20/2005
BURRIVILLE, RI	
DURANTE, DEAN	4/20/2005
ANTHONY, TX	
ERVIN, CHERYL	4/20/2005
HEATH, OH	
FAHRENDORFF, SANDRA	4/20/2005
COO RAPIDS, MN	
FANARA, TIFFANY	4/20/2005
MADISON, OH	
FITE, SOPHIA	4/20/2005
CANTON, OH	
FOGARTY, KIM	4/20/2005
MADISON, OH	
FULLER, CHARLEETA	4/20/2005
TOPEKA, KS	
GARDINER, LINDA	4/20/2005
BEND, OR	
HITE, KATHLEEN	4/20/2005
MILTON, FL	
HUFFMAN, GINA	4/20/2005
RICHMOND HEIGHTS, OH	
HUGHES, GRETCHEN	4/20/2005
SIOUX FALLS, SD	
INGHRAM, ROBERT	4/20/2005
CHESTERLAND, OH	
KANIESKI, EVA	4/20/2005
WILLOUGHBY, OH	
KENNEDY, JOHN	4/20/2005
BOLIVAR, OH	
MCGAVOCK, MAGGIE	4/20/2005
NASHVILLE, TN	
MILLER, KATHLEEN	4/20/2005
HUNTSBURY, OH	
NEUBERT, HAIDE	4/20/2005
MENTOR, OH	
OVERALL, SHANNON	4/20/2005
CONCORD, NC	
RAINVILLE, JOHN	4/20/2005
OAKLAND PARK, FL	
SAUNDERS, MICHELLE	4/20/2005
MENTOR, OH	
SCOTT, THOMAS	4/20/2005
PORTSMOUTH, OH	
SHEPHERD, JOSHUA	4/20/2005
WHEELERSBURG, OH	
SHEPHERD, SALLY	4/20/2005
BELLE CENTER, OH	
THOMAS, REBECCA	4/20/2005
CLINTONVILLES, WI	
VOLK, NANCY	4/20/2005
TUCSON, AZ	
WILLIAMS, LISA	4/20/2005
MENTRO, OH	

FELONY CONTROL SUBSTANCE CONVICTION

BURKHARDT, MELISSA	4/20/2005
MARIETTA, PA	
CANNATA, ROSETTA	4/20/2005
OSPREY, FL	
COHEN, PAUL	4/20/2005
JACKSONVILLE, FL	
EBERTOWSKI, MISTY	4/20/2005
COUNCIL BLUFFS, IA	
FALASCO, NORBERT	4/20/2005
ORLANDO, FL	
FIEDLER, SAMANTHA	4/20/2005
LOVELAND, CO	
GARRETT, MELONIE	4/20/2005
BURLESON, TX	
GREEN, WANDA	4/20/2005
LITTLEROCK, AR	
HOLMES, TAKEISHA	4/20/2005
HUSTLE, VA	
JUMPER, MELVA	4/20/2005
MABANK, TX	
MCNEAL, JENNIFER	4/20/2005
LAKELAND, FL	
PEPSAK, DEBORAH	4/20/2005
CRAWFORDSVILLE, IN	
PICKETT, ROGER	4/20/2005
OKLAHOMA CITY, OK	
PRENDERGAST, THOMAS	4/20/2005
MORGANTOWN, WV	
RHODES, CHERYL	4/20/2005
FAIRBORN, OH	
ROCHA, MARCO	4/20/2005
NEW BEDFORD, MA	
STEWART, LISA	4/20/2005
WHITE LAKE, MI	
TOOHIG, SUSAN	4/20/2005
WILLOWWICK, OH	

PATIENT ABUSE/NEGLECT CONVICTIONS

AYUEL, NHIAL	4/20/2005
SYRACUSE, NY	
BALANCIO, GEMMA	4/20/2005
HONOLULU, HI	
BALANCIO, JOE	4/20/2005
HONOLULU, HI	
BRATCHER, LEON	4/20/2005
COLLEGEDALE, TN	
BREWER, TOVI	4/20/2005
ARLINGTON, TN	
CAMPBELL, MAURICE	4/20/2005
JACKSON, MS	
CARPENTER, JERRETT	4/20/2005
HENRYETTA, OK	
CARROLL, STANLEY	4/20/2005
JACKSONVILLE, FL	
CRISTANTIELLO, KIMBERLY	4/20/2005
PARMA, OH	
CURTIS, TYNETTA	4/20/2005
MILLSBORO, DE	
GOMEZ, GABRIEL	4/20/2005
COOLIDGE, AZ	
GREEN, JACQUETTA	4/20/2005
BALTIMORE, MD	
GUIAO, LARRY	4/20/2005
LEMON GROVE, CA	
JOHNSON, TAMMY	4/20/2005
ELIZABETH CITY, NC	
LIVELY, STELLA	4/20/2005
SHREVEPORT, LA	
LOGAN, CHARLES	4/20/2005
TAMPA, FL	
MATHISON, LYNN	4/20/2005
BRONXVILLE, NY	
MCLENDON, DOROTHY	4/20/2005
GULFPORT, MS	
PARKHURST, MEGGAN	4/20/2005
DUNCAN, OK	
PAUL, AARON	4/20/2005
PINEVILLE, LA	
PAYNE, STEVEN	4/20/2005
HOUSTON, TX	
RIVAS, CHRISTINA	4/20/2005
CORAM, NY	
SALES, GEORGE	4/20/2005
S SAN FRANCISCO, CA	
VANCE, JACQUELINE	4/20/2005
RIVERSIDE, OH	
VOLLBRACHT, FAYE	4/20/2005
WATER VALLEY, MS	
WEST, AMBER	4/20/2005
WATERVILLE, MN	
WILLIAMS, NICOLE	4/20/2005

Subject name, address	Effective date
CINCINNATI, OH	
WILLIAMS, TIMOTHY LARGO, FL	4/20/2005
WILSON, CINDARETHA JACKSON, MS	4/20/2005
YONTZ, JUDY SUMMERFIELD, OH	4/20/2005
CONVICTION FOR HEALTH CARE FRAUD	
SIMMONS, SYLVIA OSSIAN, IN	4/20/2005
SZEKELY, GEORGE LANSDALE, PA	4/20/2005
LICENSE REVOCATION/SUSPENSION/ SURRENDERED	
ALAAWAG, SAMANTHA KITTERY, ME	4/20/2005
ALATORRE, HOLIVIA WHITTIER, CA	4/20/2005
ALMEIDA, OSCAR MOBILE, AL	4/20/2005
AMEMIYA, TETSURO CHICAGO, IL	4/20/2005
APRAMIAN, LISA SAN DIEGO, CA	4/20/2005
ARREDONDO, CONNIE TULARE, CA	4/20/2005
BANKS, FRANCES GARY, IN	4/20/2005
BELISLE, CRISTY DAVENPORT, FL	4/20/2005
BERGER, GERALD LEBANON, NH	4/20/2005
BERRY, DENISE BRATENAHL, OH	4/20/2005
BLUE, DOROTHY HIGH SPRINGS, FL	4/20/2005
BROWN, GREGORY LOUISVILLE, KY	4/20/2005
CAMERON, DEANNA WOLCOTT, VT	4/20/2005
CHAMBERLIN, MATTHEW FINDLAY, OH	4/20/2005
CLAY, BRANDI BLACK OAK, AR	4/20/2005
COLASURDO, PAUL DRUMS, PA	4/20/2005
CORROW, CHRISTINE LYNDONVILLE, VT	4/20/2005
COURTNEY, LORIE HINTON, OK	4/20/2005
CRADLE, GWENDOLYN HORSESHOE, NC	4/20/2005
CRONISTER, LESLIE FRAMINGHAM, MA	4/20/2005
CROSS, VANESSA BERWYN, IL	4/20/2005
CRUZ, JOSE MIAMI BEACH, FL	4/20/2005
CURTO, FRANCISCO NOVATO, CA	4/20/2005
DANAHER, JOHN SANTA ANA, CA	4/20/2005
DECHAVEZ, JOEGRACIO LAS VEGAS, NV	4/20/2005
DEHENRE, MALACHY BIRMINGHAM, AL	4/20/2005
DELLING, CARRIE DIAMOND SPRINGS, CA	4/20/2005
DENNIS, BARBARA MARBURY, AL	4/20/2005
DRAKE-HOFFMAN, MONA BRAZIL, IN	4/20/2005
DUNCAN, DOROTHY MOBILE, AL	4/20/2005
FINN, KEITH HYDE PARK, VT	4/20/2005
FRAKES, PAMELA RADCLIFF, KY	4/20/2005
FRENCH, DEBRA ROCHESTER, NY	4/20/2005
GARCIA, LAURIE PARADISE, CA	4/20/2005
GONZALES, WENDI SAN ANGELO, TX	4/20/2005
GOSSAGE, TERRI SUN CITY, AZ	4/20/2005
GRIFFIN-COLLUM, DEBORAH OLD SAYBROOK, CT	4/20/2005
GUERRINI, KATHLEEN BUZZARDS BAY, MA	4/20/2005
HAHN, CYNDIE ANDERSON, CA	4/20/2005
HAISLUP, LINDA COLUMBUS, IN	4/20/2005
HAMMOND, GINA EAST MOLINE, IL	4/20/2005
HANSEN, VICTORIA NACOGDOCHES, TX	4/20/2005
HARMON, EVANGELINE MENDOTA, IL	4/20/2005
HARRIS, STEVEN EVERETT, WA	4/20/2005
HAWKINS, RENEE LAS VEGAS, NV	4/20/2005
HAWKINS, RICHARD FITCHBURG, MA	4/20/2005
HELLMAN, EVELYN PAHRUMP, NV	4/20/2005
JACKSON, LISA ASHLAND, KY	4/20/2005
JOHNSON, DENISE DENVILLE, NJ	4/20/2005
JOHNSON, SHIRLEY ROBERTSDALE, AL	4/20/2005
JONES, LINDA EVANSVILLE, IN	4/20/2005
KAMAL, HOSSAM BURR RIDGE, IL	4/20/2005
KELLY, DAVID BOULDER CREEK, CA	4/20/2005
KOBYLARZ, DAWN AMESBURY, MA	4/20/2005
KRISHNANAIK, DHANALAL CLOQUET, MN	4/20/2005
LAMPLEY, ASHLEY LEDBETTER, KY	4/20/2005
LANE, IRENE LOWELL, MA	4/20/2005
LITTLE, MARCIA CHESTER, MA	4/20/2005
MANNO, ANTHONY MONTROSE, PA	4/20/2005
MARRET, HELENE LAS VEGAS, NV	4/20/2005
MASCARENAS, ANTONIO HAYWARD, CA	4/20/2005
MELCHOR, JORGE STANTON, CA	4/20/2005
MERRILL, THOMAS APALACHICOLA, FL	4/20/2005
MINNER, ZAIRE PHOENIX, AZ	4/20/2005
MITCHELL, WALTER SPRINGFIELD, MA	4/20/2005
MONSUE, JOHN MCEWEN, TN	4/20/2005
MOORE, LUCIAN PUYALLUP, WA	4/20/2005
MORALES, JESUS SANTA CLARE, CA	4/20/2005
MORGAN, VERNELL HICKORY, NC	4/20/2005
MURPHY, STEPHEN ANDOVER, MA	4/20/2005
MUSA, ROBERT MINNEAPOLIS, MN	4/20/2005
NIZNIK, ROBERT MINOOKA, IL	4/20/2005
NOYES, JULIANNE ATHOL, MA	4/20/2005
O'HARA, MEGAN LAKE WORTH, FL	4/20/2005
ODUM, WENDY ARARAT, VA	4/20/2005
OLDHAM, VERNON DETROIT, MI	4/20/2005
PATSCH, MICHAEL HOUSTON, TX	4/20/2005
PAVLUS, MARILYN ROCKY RIVER, OH	4/20/2005
PENA, MARY ESCONDIDO, CA	4/20/2005
PIATAK, MICHELLE BEDFORD, OH	4/20/2005
PROWS, TARA SALT LAKE CITY, UT	4/20/2005
PRZADOWSKA-KOKINDA, ELIZABETH PRINCETON, NJ	4/20/2005
ROBERTS, BETTIE INDIANAPOLIS, IN	4/20/2005
ROBERTS, MARY RICHMOND, IN	4/20/2005
RODRIGUEZ, CARMEN ONTARIO, CA	4/20/2005
ROSSETSKY, JAMES NORWOOD, MA	4/20/2005
RYAN, RUBY JOHNSON CITY, TX	4/20/2005
SANCHEZ, SERAFIN HIALEAH, FL	4/20/2005
SCOTT, TRACY CHATTANOOGA, TN	4/20/2005
SEIDEL, TARA DAYTON, OH	4/20/2005
SEMICH, MARY LINDALE, TX	4/20/2005
SHAW, GLENWOOD GORHAM, ME	4/20/2005
SHIN, SANG HAWTHORNE, CA	4/20/2005
SHUTES, KIMBERLY WATERTOWN, TN	4/20/2005
SORNSIN, JAMES CULLMAN, AL	4/20/2005
STEPHENS, APRIL WEST MILTON, OH	4/20/2005
SWANSON, FRANCES PLANTATION, FL	4/20/2005
TAYLOR, FAYE DAYTON, OH	4/20/2005
UNDERWOOD, JAMES VINTON, VA	4/20/2005
VAN ZANDT, JESSICA ANAHEIM, CA	4/20/2005
VINTSON, TIFFANY	4/20/2005

Subject name, address	Effective date
CORDOVA, AL	
WAINWRIGHT, ALLISON	4/20/2005
PORTLAND, ME	
WALSH, KEVIN	4/20/2005
TEMPE, AZ	
WATSON, LAWRENCE	4/20/2005
PEORIA, IL	
WEAVER, DENNIS	4/20/2005
LORAIN, OH	
WEBER, PAUL	4/20/2005
LAKE WORTH, FL	
WEDGE, PAM	4/20/2005
ZEPHYRHILLS, FL	
WILMARTH, EUGENE	4/20/2005
N HOLLYWOOD, CA	
WOODS, THOMAS	4/20/2005
BRAINTREE, MA	
WRIGHT, MARY	4/20/2005
SCOTTSDALE, AZ	
WYNN, MARTHA	4/20/2005
CARROLLTON, TX	
YARBROUGH, RICHELLE	4/20/2005
EVERETT, WA	
FRAUD/KICKBACKS/PROHIBITED ACTS/ SETTLEMENT AGREEMENTS	
ALL-DADE HEATLH CARE, INC	8/10/2004
MIAMI, FL	
CALISE, GAETANO	3/4/2004
N PROVIDENCE, RI	
CARE FIRST MEDICAL CENTER, INC	8/10/2004
CORAL GABLES, FL	
DE LOS REYES, RUBEN	8/10/2004
MIAMI, FL	
JENKINS, BRIAN	12/22/2003
SCOTT CITY, KS	
MARTINEZ, CARLOS	8/10/2004
MIAMI, FL	
MARTINEZ, LUIS	8/10/2004
MIAMI, FL	
REYES, JOSEFA	8/10/2004
MIAMI, FL	
REYES, RUBEN	8/10/2004
MIAMI, FL	
RODRIGUEZ, ARTURO	8/10/2004
MIAMI, FL	
RODRIGUEZ, MARTHA	8/10/2004
MIAMI, FL	
SOLANO, RAFAEL	8/27/2004
MIAMI, FL	
WINTERS, STEPHEN	4/20/2005
MEMPHIS, TN	
OWNED/CONTROLLED BY CONVICTED ENTITIES	
ANESTHESIA CONSULTANTS	4/20/2005
CAPE CORAL, FL	
ARCADIA KIDS DENTAL CARE	4/20/2005
ARCADIA, CA	
CORRECTIVE SKIN AND VEIN CENTER, INC	4/20/2005
OKLAHOMA CITY, OK	
CRAIG MARKS, PA	4/20/2005
WESTON, FL	
GENESYS MEDICAL EQUIPMENT	4/20/2005
FRISCO, TX	
GRACE INTERNATIONAL MEDICAL SUPPLIES, INC	4/20/2005
MCKINNEY, TX	
GRACE MEDICAL SERVICES	4/20/2005
MCKINNEY, TX	
GULF SHORE ANESTHESIA, PA	4/20/2005
FT MYERS, FL	
J A CRUZ, MD, PA	4/20/2005
MIAMI, FL	
KNJ GROUP, INC	4/20/2005
CALABASA, CA,	
MARK R HAKANSON, DDS, INC	4/20/2005
ARCADIA, CA	
NATIONAL SPINE MEDICAL CENTERS PLLC	4/20/2005
KINGWOOD, TX	
PERFECT HEALTH & BEAUTY CLINIQUE	4/20/2005
OSPREY, FL	
ROGER LEE PICKETT LIMITED PARTNERSHIP #2	4/20/2005
OKLAHOMA CITY, OK	
ROGER LEE PICKETT MD, INC	4/20/2005
OKLAHOMA CITY, OK	
ROSETTA V CANNATA, MD, PA	4/20/2005
TAMPA, FL	
SOLUTIONS MULTISPECIALTY SURGICAL CTR, A MEDICAL CORP	4/20/2005
BEVERLY HILLS, CA	
TARZANA GARDEN OB/GYN MEDICAL GROUP, A MEDICAL CORP	4/20/2005
TARZANA, CA	
US MEDICAL SUPPLY, INC	4/20/2005
LA CRESCENTA, CA	
DEFAULT ON HEAL LOAN	
ABTAHI, HOSSEIN	4/20/2005
CUPERTINO, CA	
BUSSE, DAVID	4/20/2005
DENVER, CO	
FOX, CARL	4/20/2005
DANA POINT, CA	
HERRING, RAYMOND	4/20/2005
GUILFORD, CT	

Dated: April 4, 2005.

Katherine B. Petrowski,

Director, Exclusions Staff, Office of Inspector General.

[FR Doc. 05–7364 Filed 4–12–05; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Review of Continuing Education Training Grant Applications (T15s).

Date: April 25, 2005.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Shelley S. Sehnert, PhD, Scientific Review Administrator, Review Branch, NIH/NHLBI, 6701 Rockledge Drive, Room 7206, Bethesda, MD 20892–7924, 301/435–0303, *ssehnert@nhlbi.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Review of Research Project Cooperative Agreements (U01s).

Date: April 27, 2005.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Shelley S. Sehnert, PhD, Scientific Review Administrator, Review Branch, NIH/NHLBI, 6701 Rockledge Drive, Room 7206, Bethesda, MD 20892–7924, 301/435–0303, *ssehnert@nhlbi.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: April 5, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–7420 Filed 4–12–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The other and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the other, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel, In review of Loan Repayment Program (L30s) (L40s).

Date: April 30, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate loan Repayment Program.

Plce: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Yan Z. Wang, PhD, Scientific Review Administrator, National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Blvd., Suite 820, Bethesda, MD 20892, (301) 594–4957, *wangy1@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: April 5, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–7421 Filed 4–12–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel, to review Research Program Projects (P01's).

Date: May 6, 2005.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH–NIAMS Institute, 6701 Democracy Boulevard, Suite 800. Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: Eric H. Brown, MS, PhD., Scientific Administrator, National Institute of Arthritis, Musculoskeletal & Skin Diseases, National Institutes of Health, 6701 Democracy Blvd., Room 824, MSC 4872, Bethesda, MD 20892–4872, (301) 594–4955, *browneri@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: April 5, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–7422 Filed 4–12–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2005–0031]

Homeland Security Advisory Council

AGENCY: Office of the Secretary, DHS.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Homeland Security Advisory Council (HSAC) will hold a teleconference for the purposes of receiving reports and recommendations from an HSAC working group and task force, and holding member deliberations. The HSAC will receive reports from the HSAC Working Group on Intelligence and Information Sharing, chaired by Governor Mitt Romney, Governor of Massachusetts; and the HSAC Task Force on the National Strategy for Maritime Security HSPD–13/NSPD–41, chaired by Frank J. Cilluffo, Associate Vice President for Homeland Security, George Washington University. The Romney Working Group will report on the topic of State Fusion Centers, and the Cilluffo Task Force will report on the implementation plan for the National Strategy for Maritime Security. Following each report, the HSAC will hold deliberations and discussions among HSAC members.

DATES: This meeting will be held via teleconference on Thursday, April 28, 2005, and will begin at 3:05 p.m. e.d.t.

ADDRESSES: If you desire to submit comments, they must be submitted by April 22, 2005. Comments must be identified by DHS–2005–0031 and may be submitted by one of the following methods:

- *EPA Federal Partner EDOCKET Web Site: http://www.epa.gov/feddocket.* Follow instructions for submitting comments on the Web site.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: HSAC@dhs.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 772–9718.
- *Mail:* Katie Knapp, Homeland Security Advisory Council, Department of Homeland Security, Washington, DC 20528.

Docket: For access to the docket to read background documents or comments received, go to *http://www.epa.gov/feddocket.* You may also access the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information concerning the meeting, please contact Mike Miron or Katie Knapp of the HSAC Executive Staff Member via e-mail at *HSAC@dhs.gov,* or via phone at 202–692–4283.

SUPPLEMENTARY INFORMATION: *Public Attendance:* Members of the public may register to dial in and listen to this teleconference by contacting the Department officials listed above no later than 5 p.m., e.d.t., Friday, April 22, 2005 via e-mail at *HSAC@dhs.gov,* or via phone at (202) 692–4283. Upon registration, instructions for the dial in will be provided. Persons with hearing disabilities who desire to obtain a transcript of the teleconference must request that the Department produce and provide a verbatim transcript based upon special needs due to a physical impairment at the time of registration. Absent any such request, the Department may not produce a verbatim transcript of the meeting.

Dated: April 8, 2005.

Katie Knapp,

Special Assistant, Homeland Security Advisory Council.

[FR Doc. 05–7403 Filed 4–12–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Agency Information Collection Activities: Declaration of Unaccompanied Articles

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Declaration of Unaccompanied Articles. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (69 FR 76954) on December 23, 2004, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before May 13, 2005.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, Washington, DC 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–6974.

SUPPLEMENTARY INFORMATION: The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Title: Declaration for Unaccompanied Articles.

OMB Number: 1651–0030.

Form Number: CBP Form-255.

Abstract: This collection is completed by each arriving passenger for each parcel or container which is being sent from an Insular Possession at a later date. This declaration allows that traveler to claim their appropriate allowable exemption.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Individuals.

Estimated Number of Respondents: 7,500.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 1,250.

Estimated Total Annualized Cost on the Public: $18,750.

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: April 6, 2005.

Tracey Denning,

Agency Clearance Officer, Information Services Branch.

[FR Doc. 05–7439 Filed 4–12–05; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request Permit to Transfer Containers to a Container Station

AGENCY: Bureau of Customs and Border Protection (CBP), Department of Homeland Security (DHS).

ACTION: Notice and request for comments.

SUMMARY: The Department of Homeland Security, as part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Permit to Transfer Containers to a Container Station. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before June 13, 2005, to be assured of consideration.

ADDRESS: Direct all written comments to CBP, Information Services Group, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Room 3.2C, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to CBP, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office

of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Permit to Transfer Containers to a Container Station.

OMB Number: 1651–0049.

Form Number: N/A.

Abstract: This information collection is needed in order for a container station operator to receive a permit to transfer a container or containers to a container station, he/she must furnish a list of names, addresses, etc., of the persons employed by them upon demand by CBP officials.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 1,200.

Estimated Time Per Respondent: 20 minutes.

Estimated Total Annual Burden Hours: 400.

Estimated Annualized Cost to the Public: $8,700.

Dated: April 6, 2005.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 05–7440 Filed 4–12–05; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Certificate of Origin

AGENCY: Bureau of Customs and Border Protection (CBP), Department of Homeland Security (DHS).

ACTION: Notice and request for comments.

SUMMARY: The Department of Homeland Security, as part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Certificate of Origin. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 13, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments Bureau of Customs and Border Protection (CBP), Information Services Group, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW., Room 3.2C, Washington, DC 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Certificate of Origin.

OMB Number: 1651–0016.

Form Number: Customs Form-3229.

Abstract: This certification is required to determine whether an importer is entitled to duty-free for goods which are the growth or product of a U.S. insular possession and which contain foreign materials representing no more than 70 percent of the goods total value.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 10.

Estimated Time Per Respondent: 20 minutes.

Estimated Total Annual Burden Hours: 113.

Estimated Total Annualized Cost on the Public: $1,030.

Dated: April 6, 2005.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 05–7441 Filed 4–12–05; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request Line Release Regulations

AGENCY: Bureau of Customs and Border Protection (CBP), Department of Homeland Security (DHS).

ACTION: Notice and request for comments.

SUMMARY: The Department of Homeland Security, as part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Line Release Regulations. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 13, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Room 3.2C, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW., Room 3.2.C, Washington, DC 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have

practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Line Release Regulations.

OMB Number: 1651–0060.

Form Number: N/A.

Abstract: Line release was developed to release and track high volume and repetitive shipments using bar code technology and PCS. An application is submitted to CBP by the filer and a common commodity classification code (C4) is assigned to the application.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 25,700.

Estimated Time Per Respondent: 15 minutes.

Estiinated Total Annual Burden Hours: 6,425.

Estimated Total Annualized Cost on the Public: $452,375.

Dated: April 6, 2005.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 05–7442 Filed 4–12–05; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Report of Diversion

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning Report of Diversion. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 13, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed Bureau of Customs and Border Protection, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW., Room 3.2C, Washington, DC 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Report of Diversion.

OMB Number: 1651–0025.

Form Number: Form CBP–26.

Abstract: CBP uses Form–26 to track vessels traveling coastwise from U.S ports to other U.S. ports when a change occurs in scheduled itineraries. This is required for enforcement of the Jones Act (46 U.S.C. App. 883) and for continuity of vessel manifest information and permits to proceed actions.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, Individuals, Institutions.

Estimated Number of Respondents: 2800.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 233.

Estimated Total Annualized Cost on the Public: $3383.

Dated: April 6, 2005.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 05–7443 Filed 4–12–05; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties. For the calendar quarter beginning April 1, 2005, the interest rates for overpayments will be 5 percent for corporations and 6 percent for non-corporations, and the interest rate for underpayments will be 6 percent. This notice is published for the convenience of the importing public and Customs and Border Protection personnel.

DATES: *Effective Date:* April 1, 2005.

FOR FURTHER INFORMATION CONTACT: Trong Quan, National Finance Center, Collections Section, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278; telephone (317) 614–4516.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on

applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2005–15, the IRS determined the rates of interest for the calendar quarter beginning April 1, 2005, and ending June 30, 2005. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%). For corporate overpayments, the rate is the Federal short-term rate (3%) plus two percentage points (2%) for a total of five percent (5%). For overpayments made by non-corporations, the rate is the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%). These interest rates are subject to change for the calendar quarter beginning July 1, 2005, and ending September 30, 2005.

For the convenience of the importing public and Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning Date	Ending Date	Underpayments (percent)	Overpayments (percent)	Corporate Overpayments (Eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	063005	6	6	5

Dated: April 8, 2005.

Robert C. Bonner,

Commissioner, Customs and Border Protection.

[FR Doc. 05–7444 Filed 4–12–05; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2005–20937]

Aviation Security Advisory Committee Meeting

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice of meeting.

SUMMARY: The Aviation Security Advisory Committee (ASAC) is meeting in open session. The meeting will be held by telephonic conference call.

DATES: The meeting will take place on April 28, 2005, from 12 p.m. to 1:30 p.m., local time in Washington, DC.

ADDRESSES: The meeting will be held by telephonic conference call. Dial-in instructions are set forth below under the heading **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Joseph Corrao, Office of Transportation Security Policy (TSA–9), TSA Headquarters, 601 S. 12th Street, Arlington; VA, 22202; telephone 571–227–2980, e-mail *joseph.corrao@dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), Pub. L. 92–463, as amended, (5 U.S.C. App 1 *et seq*). The ASAC will meet to receive a presentation of the report and recommendations of the Freight Assessment System (FAS) working group. FAS would analyze information about shipments of air cargo in order to identify elevated risk air cargo and enable targeted screening of 100% of that cargo prior to loading it on an aircraft. This meeting, from 12 p.m. to 1:30 p.m., is open to the public but telephonic conferencing capacity is limited. Members of the public who wish to monitor the discussion may dial into this telephonic meeting by dialing (888) 809–8967. At the prompt, provide the conference code "ASAC" (pronounced "A-sack"). Parties calling from locations outside the United States may contact the person listed under the heading **FOR FURTHER INFORMATION CONTACT,** for international calling instructions.

The working group's report may be obtained from the following Web site: *http://www.tsa.gov/interweb/assetlibrary/ASAC_FAS_WG_Recommendations_121404.pdf,* or by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT.**

Members of the public must make advance arrangements to present oral statements at this ASAC meeting. Written statements may be presented to the committee by providing copies of them to the Chair prior to 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.** *Public Comments:* You may submit public comments, identified by Docket No. TSA 2005–20937, by one of the following methods:

- *DOT Docket: http://dms.dot.gov.* Please be aware that 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 the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*
- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *E-mail:* e-mail *joseph.corrao@dhs.gov.* When submitting comments electronically, please include TSA–2005–20937 in the subject line of the message.
- *Mail or Hand Delivery:* Address or deliver your written, signed comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001; Fax: 202–493–2251. This mailing address may also be used for paper, disk, or CD–ROM submissions.

Issued in Arlington, Virginia, on April 7, 2005.

Chad Wolf,

Assistant Administrator for Transportation Security Policy.

[FR Doc. 05–7391 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Letters of Authorization to Take Marine Mammals

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972 (MMPA) as amended, notice is hereby given that Letters of Authorization to take polar bears incidental to oil and gas industry exploration activities in the Beaufort Sea and adjacent northern coast of Alaska have been issued.

FOR FURTHER INFORMATION CONTACT: Mr. Craig Perham at the Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503, (800) 362–5148 or (907) 786–3810.

SUPPLEMENTARY INFORMATION: A Letter of Authorization has been issued to the following companies in accordance with Fish and Wildlife Service Federal Rules and Regulations "Marine Mammals; Incidental Take During Specified Activities (68 FR 66744; November 28, 2003)" under section 101(a)(5)(A) of the MMPA and the Fish and Wildlife Service implementing regulations at 50 CFR 18.27(f)(3):

Company	Activity	Location	Date issued
Veritas DGC Land Inc	Exploration	2005 winter seismic	Dec 16, 2004.
Cruz Construction	Development	2005 winter transport	Dec 16, 2004.
ConocoPhillips Alaska, Inc	Exploration	Kokoda 3, 4, 5	Dec 16, 2004.
ConocoPhillips Alaska, Inc	Exploration	Defiance 1	Dec 16, 2004.
ConocoPhillips Alaska, Inc	Exploration	Bounty 1	Dec 16, 2004.
ConocoPhillips Alaska, Inc	Exploration	Noatak 1	Dec 16, 2004.
ConocoPhillips Alaska, Inc	Exploration	Trailblazer H–1	Dec 16, 2004.
Kerr-McGee Oil and Gas Corp	Exploration	Nikaitchuq #2, 3, 5	Dec 22, 2004.
Pioneer Natural Resources Ak	Development	Gwydyr Bay	Jan 10, 2005.
ConocoPhillips Alaska, Inc	Exploration	Iapetús 2	Jan 24, 2005.
Brooks Range Petroleum Corp	Exploration	Sak River #1	Jan 28, 2005.

Company	Activity	Location	Date issued
ConocoPhillips Alaska, Inc	Development	CD3, CD4	Feb 7, 2005.
Ecology and Environment, Inc	Development	JW Dalton	Feb 14, 2005.

Dated: March 16, 2005.

Gary Edwards,

Deputy Regional Director.

[FR Doc. 05–7409 Filed 4–12–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–921–5421–BX–AA07; UTU–82199; UT–921–5421–BX–AA08; UTU–82200]

Notice of Applications for Recordable Disclaimer of Interest in Public Highway Rights-of-Way Established Pursuant to Revised Statute 2477 (43 U.S.C. 932, Repealed October 21, 1976); Alexa Lane and Snake Pass Road in Millard County, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of applications.

SUMMARY: On January 21, 2005, the State of Utah and Millard County submitted two applications for recordable disclaimers of interest from the United States. These recordable disclaimer of interest applications are identified by BLM Serial Number UTU–82199 for Alexa Lane and UTU–82200 for Snake Pass Road, both in Millard County, Utah.

Recordable disclaimers of interest, if issued, would confirm that the United States has no property interest in the identified public highway rights-of-way. This Notice is intended to notify the public of the pending applications and the State's and County's grounds for supporting them.

Specific details of the applications are provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: On or before June 13, 2005, all interested parties may submit comments on the State's and County's applications as follows. Comments on the Alexa Lane application should reference BLM Case File Serial Number UTU–82199, and comments on the Snake Pass Road application should reference BLM Case File Serial Number UTU–82200. Public comment will be accepted if received by BLM or postmarked no later than June 13, 2005. BLM will review all timely comments received on the applications, and will address all relevant, substantive issues raised in the comments. A final decision on the merits of the applications will not be made until at least July 12, 2005.

ADDRESSES: Interested parties and the public are encouraged to access the RS2477 Disclaimer Process public Web site at *http://www.ut.blm.gov/rs2477* to review the application materials and provide comments on the application. For those without access to the public Web site, written comments may be provided to the Chief, Branch of Lands and Realty, BLM Utah State Office (UT–921), P.O. Box 45155, Salt Lake City, Utah 84145–0155.

FOR FURTHER INFORMATION CONTACT: Mike DeKeyrel, Realty Specialist, BLM Utah State Office Branch of Lands and Realty (UT–921) at the above address or phone 801–539–4105 and Fax 801–539–4260

SUPPLEMENTARY INFORMATION: Disclaimers of interest are authorized by Section 315 of the Federal Land Policy and Management Act (FLPMA) of 1976, as amended (43 U.S.C. 1745), the regulations contained in 43 CFR subpart 1864, and the April 9, 2003, Memorandum of Understanding (MOU) Between the State of Utah and the Department of the Interior on State and County Road Acknowledgement.

Alexa Lane is located in north-central Millard County, approximately 25 miles west of Delta, Utah, and is approximately 11 miles in length. Application information submitted by the State and County indicates that road use occurred in the 1920s, and road construction (grading) occurred in the 1930s. The road construction and use was and is for access to grazing, general public access, and travel in and through the area. The road surface is native dirt, and graded throughout its length. The recordable disclaimer of interest application pertains to those road segments across public lands administered by BLM. One road segment approximately 0.74 mile long is across State of Utah land and is not a part of the application.

Snake Pass Road is located in southwest Millard County approximately 70 miles southwest of Delta, Utah, and is approximately 25 miles in length. Application information submitted by the State and County indicates that initial road use began in 1918 and construction (grading) occurred in the 1950s. The road construction and use was and is for access to grazing, general public access, and travel in and through the area. The surface of the road is native dirt, and graded throughout its length. The recordable disclaimer of interest application pertains to those road segments across public lands administered by BLM. One road segment approximately 0.49 mile long is across State of Utah land and is not a part of the application.

The State of Utah and the Millard County assert that they hold a joint and undivided property interest in the road rights-of-way identified above as granted pursuant to the authority provided by Revised Statute 2477 (43 U.S.C. 932, repealed October 21, 1976) over public lands administered by the Bureau of Land Management. The State submitted the following information with the applications in both paper copy and in electronic form (Compact Disk):

1. The claimed right-of-way (disturbed) width for Alexa Lane ranges from 46 to 48 feet. The claimed right-of-way (disturbed) width for Snake Pass Road ranges from 30 to 54 feet.
2. Centerline description of the roads based on Global Positioning System (GPS) data.
3. Detailed descriptions of the rights-of-way (identified segments of each road) passing through public lands including beginning and end points, surface type, and disturbed width.
4. Legal description by aliquot part (*e.g.*, ¼¼ section) of the land parcels through which the roads pass.
5. Maps showing location of the identified road rights-of-way and the location and dates of water diversion points and mining locations to which the roads provide access.
6. Aerial photography dated circa 1978 and 1995.
7. Signed and notarized affidavits by persons attesting to the location of both roads; their establishment as a highway prior to October 21, 1976; familiarity with the character and attributes of both roads including type of travel surface, disturbed width, associated improvements and ancillary features such as bridges, cattleguards, etc.; current public usage of the road; the historic and current purposes for which the road is used; and evidence of periodic maintenance.
8. Recent photographs of the roads at various points along their alignments.

The State of Utah did not identify any known adverse claimants of the identified public highway rights-of-way.

If approved, the recordable disclaimer documents would confirm that the United States has no property interest in the public highway rights-of-way as it is

identified in the official records of the Bureau of Land Management as of the date of the disclaimer document.

Comments, including names and street addresses of commentors, will be available for public review at the Utah State Office (see address above), during regular business hours 8 a.m. to 4 p.m. local time, Monday through Friday, except holidays. Individual respondents may request confidentiality. If you wish to withhold your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comments. Such requests will be honored to the extent allowed by law. All submissions from organizations or business will be made available for public inspection in their entirety. Anonymous comments will not be accepted.

Dated: March 10, 2005.

Kent Hoffman,

Deputy State Director.

[FR Doc. 05–7360 Filed 4–12–05; 8:45 am]

BILLING CODE 4310–DK–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–952–05–1420–BJ]

Notice of Filing of Plats of Survey; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, (30) thirty calendar days from the date of this publication.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico

The plat representing the dependent resurvey and survey in Township 25 North, Range 6 East, and subdivision of sections, accepted September 30, 2004, for Group 943 New Mexico.

The plat representing the dependent resurvey and survey of subdivision of sections for Township 1 North, Range 7 West, accepted March 7, 2005 for Group 1005 New Mexico.

The plat representing the dependent resurvey and survey of subdivision of sections for Township 1 North, Range 6 West, accepted February 7, 2005 for Group 1005 New Mexico.

The plat, in 2 sheets, representing the dependent resurvey in Township 13 North Range 14 East accepted January 27, 2005 for Group 1023 New Mexico.

Indian Meridian, Oklahoma

The plats representing the dependent resurvey and survey of Township 3 North, Range 13 West, accepted February 16, 2005 for Group 99 Oklahoma.

The plat representing the dependent resurvey and survey of Township 4 South, Range 12 West, accepted February 10, 2005, for Group 107 Oklahoma.

The plat representing the dependent resurvey of the portion of the subdivisional lines and a portion of the subdivision of section 34, of Township 29 North Range 24 East accepted March 8, 2005, for Group 98 Oklahoma.

The plats in 4 sheets, representing the dependent resurvey of subdivisional lines, and portion of the subdivisional lines of sections 4, 5, 8, 9, and 10. The meanders of the left bank and the meander of the Abandoned Channel of the Washita River and the Metes and Bounds survey in sections 4, 9, 10, and 15, for Township 7 North, Range 10 West, accepted December 16, 2004 for Group 106 Oklahoma.

If a protest against a survey, as shown on any of the above plats is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed and become final or appeals from the dismissal affirmed.

A person or party who wishes to protest against any of these surveys must file a written protest with the New Mexico State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the New Mexico State Office, Bureau of Land Management, P.O. Box 27115, Santa Fe, New Mexico, 87502–0115. Copies may be obtained from this office upon payment of $1.10 per sheet.

Dated: April 6, 2005.

Stephen W. Beyerlein,

Acting Chief Cadastral Surveyor for New Mexico.

[FR Doc. 05–7381 Filed 4–12–05; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Notice and Agenda for Meeting of the Royalty Policy Committee

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of meeting.

SUMMARY: Agenda items for the second meeting of the newly chartered Royalty Policy Committee (RPC) will include remarks from the Director, MMS, and the Associate Director, Minerals Revenue Management (MRM), MMS, as well as updates from the following subcommittees: Geothermal; Coal; Federal Oil and Gas Valuation; Oil and Gas Royalty Reporting; and Indian Valuation.

The RPC will also hear special reports on the status of the Open and Non-Discriminatory Access proposed rule and an update on energy legislation from MMS. The Bureau of Land Management will update the RPC on exploration, development, and access activities occurring on public lands, and the Bureau of Indian Affairs will brief the RPC on the Indian Energy Resource Development Office.

The RPC membership includes representatives from states, Indian tribes and individual Indian mineral owner organizations, minerals industry associations, the general public, and other Federal departments.

DATES: Thursday, May 26, 2005, from 8:30 a.m. to 5 p.m., central time.

ADDRESSES: The meeting will be held at the Sheraton New Orleans Hotel, 500 Canal Street, New Orleans, Louisiana, telephone number 1–888–627–7033.

FOR FURTHER INFORMATION CONTACT: Gary Fields, Minerals Revenue Management, Minerals Management Service, PO Box 25165, MS 300B2, Denver, Colorado, 80225–0165, telephone number (303) 231–3102, fax number (303) 231–3780, e-mail *gary.fields@mms.gov.*

SUPPLEMENTARY INFORMATION: The RPC provides advice to the Secretary and top Department officials on minerals policy, operational issues, and the performance of discretionary functions under the laws governing the Department's management of Federal and Indian mineral leases and revenues. The RPC will review and comment on revenue management and other mineral-related policies and provide a forum to convey views representative of mineral lessees, operators, revenue payors, revenue recipients, governmental agencies, and the interested public.

The location and dates of future meetings will be published in the

Federal Register and posted on our Internet site at *http://www.mms.gov/mmab/RoyaltyPolicyCommittee/rpc_homepage.htm*. Meetings will be open to the public without registration in advance on a space-available basis. The public may make statements during the meetings, to the extent time permits, and file written statements with the RPC for its consideration. Copies of these written statements should be submitted to Mr. Fields. Within 2 weeks following the conclusion of each meeting, the minutes will be posted on our Internet site, and will be available for public inspection and copying at our offices located in Building 85, Room A–614, Denver Federal Center, Denver, Colorado 80225.

These meetings are conducted under the authority of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 1) and the Office of Management and Budget (Circular No. A–63, revised).

Dated: April 7, 2005.

Cathy J. Hamilton,

Acting Associate Director, Minerals Revenue Management.

[FR Doc. 05–7401 Filed 4–12–05; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731–TA–340–E and H (Second Review)]

Solid Urea From Russia and Ukraine

AGENCY: United States International Trade Commission.

ACTION: Scheduling of full five-year reviews concerning the antidumping duty orders on solid urea from Russia and Ukraine.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty orders on solid urea from Russia and Ukraine would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: Effective April 7, 2005.

FOR FURTHER INFORMATION CONTACT: Olympia DeRosa Hand (202–205–3182), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background. On January 4, 2005, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews pursuant to section 751(c)(5) of the Act should proceed (70 FR 2882, January 18, 2005). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the reviews and public service list. Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report. The prehearing staff report in the reviews will be placed in the nonpublic record on July 13, 2005, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing. The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on August 2, 2005, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before July 20, 2005. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on July 25, 2005, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written submissions. Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is July 22, 2005. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is August 11, 2005; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the reviews on or before August 11, 2005. On September 1, 2005, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before September 6, 2005, but such final comments must not contain new factual information and must otherwise comply

with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: April 8, 2005.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–7452 Filed 4–12–05; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Bureau Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: communications assistance for Law Enforcement Act readiness survey.

The Department of Justice, Federal Bureau of Investigation (FBI), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until June 13, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Norm Wright, CIU–FBI, 14800 Conference Center Drive, Suite 300, Chantilly, VA 20151 or *nwright@askcalea.net*.

Written comments and suggestions from the public and affected TSPs concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

Overview of this information collection:

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Communications Assistance for Law Enforcement Act (CALEA) Readiness Survey.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. Bureau of Federal Investigation.

(4) The information collected in the survey will be stored in a database and be used to evaluate the effectiveness of CIU programs for implementing CALEA solutions in the Public Switched Telephone Network (PSTN). Affected Telecommunications Service Providers (TSP) will be asked to identify the platforms within their networks that have CALEA responsibility. For each identified platform the TSP must specify if it is CALEA ready (Law Enforcement can obtain a CALEA surveillance). If the platform is not CALEA ready, the TSP is asked to identify the software release that provides CALEA functionality and the date when the platform anticipate installing that software release.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 3483 TSPs will provide 21,323 responses. Each response is estimated to take 15 minutes to complete.

(6) *An estimate of the public burden (in hours) associated with the collection:* There are an estimated 5,330.75 total annual burden hours associated with this collection.

FOR FURTHER INFORMATION CONTACT: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: April 8, 2005.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 05–7393 Filed 4–12–05; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: Civil Justice Survey of State Courts 2005.

The Department of Justice (DOJ), Office of Justice Programs (OJP), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until June 13, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Thomas H. Cohen, (202) 514–8344, Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, 810 Seventh Street, NW., Washington, DC 20531 of *Thomas.H.Cohen@usdoj.gov*.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Existing Collection In Use Without an OMB Control Number.

(2) *Title of the Form/Collection:* Civil Justice Survey of State Courts, 2005.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: CJSC. Bureau of Justice Statistics, Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local or Tribal Governments. The Civil Justice Survey of State courts, 2005. (CJSC 05) is the only collection effort that provides basic information on civil cases adjudicated in state trial courts in a sample of the Nation's 75 most populous counties. Information collected includes the types of claims brought by litigants in civil disputes, plaintiff win rates, compensatory and punitive damage awards, case processing time, and post verdict activity. The CJSC 05 provides policymakers, researchers, and lawyers with an opportunity to examine how civil lawsuits are processed in state courts.

(5) *As estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that information will be collected on a total of 30,000 civil cases from 46 responding counties. Annual cost to the respondents is based on the number of hours involved in providing information from court records for the jury trial, bench trial, and non-trial data collection forms. Public reporting burden for this collection of information is estimated to average 30 minutes per data collection form. The estimate of hour burden is based on prior CJSC surveys.

(6) An estimate of the total public burden (in hours) associated with the collection: The estimated public burden associated with this collection is 15,000 hours.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: April 7, 2005.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 05–7340 Filed 4–12–05; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: 2005 National Survey of Prosecutors

The Department of Justice (DOJ), Office of Justice Programs (OJP) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 70, Number 18, page 4151 on January 28, 2005, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 13, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Reinstatement, with change, of previously approved collection for which approval has expired.

(2) *Title of the Form/Collection:* 2005 National Survey of Prosecutors.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form Number: NSP–05. Bureau of Justice Statistics, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The NSP–05 is the only collection effort that provides basic information on prosecutorial office staffing and operations, use of innovative prosecution techniques, felony and misdemeanor caseloads, prosecution of computer related crimes, juvenile offenses, and use of DNA evidence.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 310 surveys, requiring approximately 30 minutes to complete, will be submitted to the State Prosecutor Offices in each selected district.

(6) An estimate of the total public burden (in hours) associated with the collection: The estimated public burden

associated with this collection is 155 hours.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: April 7, 2005.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 05–7341 Filed 4–12–05; 8:45 am]

BILLING CODE 4410–18X–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: National Computer Security Survey (NCSS).

The Department of Justice (DOJ), Office of Justice Programs (OJP), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until June 13, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Ramona Rantala, DOJ, OJP, Bureau of Justice Statistics, 810 Seventh Street, NW., Washington, DC 20531.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* This is a New Information Collection.

(2) *Title of the Form/Collection:* National Computer Security Survey.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: NCSS–1, NCSS–1s, and NCSS–1c. Bureau of Justice Statistics, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Businesses or other for-profit organizations. Other: Not-for-profit institutions. The National Computer Security Survey collects information on the nature and prevalence of computer crime and resulting losses experienced by businesses nationwide. It also collects other information including types of computer security technology and practices used by businesses, routes used to access systems, whether incidents were reported to authorities, reasons for not reporting, and types of offenders. 42 U.S.C. 3711, *et seq.* authorizes the Department of Justice to collect and analyze statistical information concerning crime, juvenile delinquency, and the operation of the criminal justice system and related aspects of the civil justice system and to support the development of information and statistical systems at the Federal, State, and local levels.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 36,000 respondents will each complete a 1.6-hour data collection form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 57,775 total annual burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 05–7392 Filed 4–12–05; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act; Native American Employment and Training Council

AGENCY Employment and Training Administration, Labor.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463), as amended, and section 166(h)(4) of the Workforce Investment Act (WIA)[29 U.S.C. 2911(h)(4)], notice is hereby given of the next meeting of the Native American Employment and Training Council as constituted under WIA.

Time and Date: The meeting will begin at 10:30 a.m., Central Daylight Savings Time (CDT), on Wednesday, April 27, 2005, and continue until 12 p.m. (CDT) that day. The period from 3 p.m. to 5 p.m. (CDT) on April 27 will be reserved for participation and presentation by members of the public. The meeting will reconvene at 1 p.m. (CDT) on April 28, 2005, and adjourn at approximately 4:30 p.m. (CDT) on that day.

Place: All sessions will be held at the Hyatt Regency Houston, 1200 Louisiana Street, Houston, Texas.

Status: The meeting will be open to the public. Persons who need special accommodations should contact Ms. Athena Brown on (202) 693–3737 by April 22, 2005.

Matters to be Considered: The formal agenda will focus on the following topics: (1) Status Report of the UI Wage Study, (2) Implementation of 2000 Decennial Census data in the section 166 finding formula(s), (3) Council workgroup reports, (4) status of the Technical Assistance and Training Initiative, (5) Reauthorization of the WIA, (6) Economic Development—A Presentation by a Top-10 American Indian Owned Business.

FOR FURTHER INFORMATION CONTACT: Ms. Athena Brown, Chief, Division of Indian and Native American Programs, Office

of National Programs, Employment and Training Administration, U.S. Department of Labor, Room C–4311, 200 Constitution Avenue, NW., Washington, DC 20210.

Telephone: (202) 693–3737 (VOICE) (this is not a toll-free number) or (202) 693–3841.

Signed at Washington, DC, this 6th day of April, 2005.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 05–7383 Filed 4–12–05; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of existing safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Chestnut Coal Company

[Docket No. M–2005–019–C]

Chestnut Coal Company, RD 3, Box 142B, Sunbury, Pennsylvania 17801 has filed a petition to modify the application of 30 CFR 75.512–2 (Frequency of examinations) to its No. 10 Slope Mine (MSHA I.D. No. 36–07059) located in Northumberland County, Pennsylvania. The petitioner requests a modification of the existing standard to permit permissible electrical equipment to be examined once a month instead of weekly. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

2. Chestnut Coal Company

[Docket No. M–2005–020–C]

Chestnut Coal Company, RD 3, Box 142B, Sunbury, Pennsylvania 17801 has filed a petition to modify the application of 30 CFR 75.311(b)(2) and (b)(3) (Main mine fan operation) to its No. 10 Slope Mine (MSHA I.D. No. 36–07059) located in Northumberland County, Pennsylvania. The petitioner requests a modification of the existing standard to permit the electrical circuits entering the underground mine to remain energized to the mine's pumps while the main fan is intentionally shut down during idle shifts when miners are not working underground. The petitioner proposes to de-energize the electrical circuits to the pumps and run the main mine fan for 30 minutes after the water from the mine has been removed and prior to entering the mine to conduct a pre-shift examination. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

3. Six M Coal Company

[Docket No. M–2005–021–C]

Six M Coal Company, 482 High Road, Ashland, Pennsylvania 17921 has filed a petition to modify the application of 30 CFR 75.335 (Construction of seals) to its No. 1 Slope Mine (MSHA I.D. No. 36–09138) located in Dauphin County, Pennsylvania. Petitioner proposes constructing seals from wooden materials of moderate size and weight; designing the seals to withstand a static horizontal pressure in the range of 10 psi; and installing a sampling tube only in the monkey (higher elevation) seal. The petitioner asserts that because of the pitch of anthracite veins, concrete blocks are difficult to use and expose miners to safety hazards during transport. The petitioner cites the low level of explosibility of anthracite coal dust and the minimal potential for either an accumulation of methane in previously mined pitching veins or an ignition source in the gob area as justification for the proposed 10 psi design criterion. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

4. Consolidation Coal Company

[Docket No. M–2005–022–C]

Consolidation Coal Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35 (Portable (trailing) cables and cords) to its Blacksville No. 2 Mine (MSHA I.D. No. 46–01968) located in Monongalia County, West Virginia. The petitioner requests a modification of the existing standard to permit the maximum length of trailing cables for supplying power to permissible equipment used in continuous mining section be increased to 1,000 feet. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

5. Warrior Coal, LLC

[Docket No. M–2005–023–C]

Warrior Coal, LLC, 57 J.E. Ellis Road, Madisonville, Kentucky 42431 has filed a petition to modify the application of 30 CFR 75.1103–4(a) (Automatic fire sensor and warning device systems; installation; minimum requirements) to its Cardinal Mine (MSHA I.D. No. 15–17216) located in Hopkins County, Kentucky. The petitioner requests a modification of Section 2(a) of its previously granted petition, M–2004–034–C, to read as follows: "The carbon monoxide monitoring system shall be capable of providing both visual and audible signals. A visual or audible alert signal shall be activated when the carbon monoxide level at any sensor reaches 10 parts per million (ppm) above the ambient level for the mine. An audible and visual alarm signal distinguishable from the alert signal shall be activated when the carbon monoxide level at any sensor reaches 15 ppm above the ambient level for the mine. The District Manager is authorized to require lower alert and alarm levels." The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

6. Ohio County Coal Company

[Docket No. M–2005–024–C]

Ohio County Coal Company, P.O. Box 39, Centertown, Kentucky 42328 has filed a petition to modify the application of 30 CFR 75.1101–1(b) (Deluge-type water spray systems) to its Big Run Mine (MSHA I.D. No. 15–18552) located in Ohio County, Kentucky. The petitioner proposes to train a person in the testing procedures specific to the deluge-type water spray fire suppression systems used at each belt drive to once a week conduct a visual examination of each deluge-type water spray fire suppression system; to conduct a functional test of the deluge-type water spray fire suppression systems by actuating the system and observing its performance; and finally, to record the results of the examination and functional test in a book maintained on the surface that would be made available to the authorized representative of the Secretary. The results of the examination and functional test will be retained at the mine for one year. The petitioner states that if any malfunction or clogged nozzle is detected as a result of the weekly examination or functional test, corrections will be made immediately. The petitioner further states that the procedure used to perform the functional test will be posted at or near each belt drive that uses a deluge-type water spray fire suppression system. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

7. Tech Leasing & Rebuild, Inc.

[Docket No. M–2005–025–C]

Tech Leasing & Rebuild, Inc., R. Rt. 1, Box 48C, Pounding Mill, Virginia 24637 has filed a petition to modify the application of 30 CFR 75.1710–1(4) (Canopies or cabs; self-propelled diesel-powered and electric face equipment; installation requirements) to its Mine #1 (MSHA I.D. No. 44–06859) located in Tazewell County, Virginia. The Tech Leasing & Rebuild, Inc., Mine #1 is developing the War Creek coal seam located North of Rt. 628 on Indian Creek. The petitioner proposes to operate mobile face equipment without canopies or cabs when the mining height is 48 inches or less. The petitioner states that mining height at the Mine #1 averages between 37″ to 45″ with localized dips and elevation changes in the mine floor; and the mining height with the dips and changes in elevation have created conditions in which mining equipment with canopies and cabs have dislodged roof bolts and limits visibility for equipment operators. The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via Federal eRulemaking Portal: *http://www.regulations.gov;* E-mail: *zzMSHA-Comments@dol.gov;* Fax: (202) 693–9441; or Regular Mail/Hand Delivery/Courier: Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209. All comments must be postmarked or received in that office on or before May 13, 2005. Copies of these petitions are available for inspection at that address.

Dated at Arlington, Virginia, this 6th day of April 2005.

Rebecca J. Smith,

Acting Director, Office of Standards, Regulations, and Variances.

[FR Doc. 05–7388 Filed 4–12–05; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that two meetings of the Arts Advisory Panel to the National Council on the Arts will be held as follows:

Opera (Great American Voices): May 3–4, 2005. Detroit Marriott at the Renaissance Center, Room "Richard B," Detroit, MI. This meeting, from 11:30 a.m. to 6 p.m. on May 3, and from 8:30 a.m. to 12 p.m. on May 4, will be closed.

Literature (Translation Projects in Poetry): May 16, 2005, Room 714. This meeting, from 9 a.m. to 6:30 p.m., will be closed.

These meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of April 30, 2003, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call (202) 682–5691.

Dated: April 8, 2005.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 05–7432 Filed 4–12–05; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Determination of the Chairman of the National Endowment for the Arts as to Certain Advisory Committees: Public Disclosure of Information and Activities

The National Endowment for the Arts utilizes advice and recommendations of advisory committees in carrying out many of its functions and activities.

The Federal Advisory Committee Act, as amended (Pub. L. 92–463), governs the formation, use, conduct, management, and accessibility to the public of committees formed to advise and assist the Federal Government. Section 10 of the act specifies that department and agency heads shall make adequate provisions for participation by the public in the activities of advisory committees, except to the extent a determination is made in writing by the department or agency head that a portion of an advisory committee meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code (the Government in the Sunshine Act).

It is the policy of the National Endowment for the Arts to make the fullest possible disclosure of records to the public, limited only by obligations of confidentiality and administrative necessity. Consistent with this policy, meetings of the following Endowment advisory committees will be open to the public except for portions dealing with the review, discussion, evaluation, and/or ranking of grant applications: Arts Advisory Panel and the Federal Advisory Committee on International Exhibitions.

The portions of the meetings involving the review, discussion, evaluation and ranking of grant applications may be closed to the public for the following reasons:

The Endowment Advisory Committees listed above review and discuss applications for financial assistance. While the majority of applications received by the agency are submitted by organizations, all of the applications contain the names of and personal information relating to individuals who will be working on the proposed project. In reviewing the applications, committee members discuss the abilities of the listed individuals in their fields, the reputations of the listed individuals among their colleagues, the ability of the listed individuals to carry through on projects they start, and their background and performance. Consideration of these matters is essential to the review of the artistic excellence and artistic merit of an application.

Consequently, in the interest of meeting our obligation to consider artistic excellence and artistic merit when reviewing applications for financial assistance:

It is hereby determined in accordance with the provisions of section 10(d) of the Act that the disclosure of information regarding the review, discussion, and evaluation of applications for financial assistance as outlined herein is likely to disclose information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Therefore, in light of the above, I have determined that the above referenced meetings or portions thereof, devoted to review, discussion, evaluation, and/or ranking of applications for financial assistance may be closed to the public in accordance with subsection (c)(6) of section 552b of title 5, United States Code.

The staff of each committee shall prepare a summary of any meeting or portion not open to the public within three (3) business days following the conclusion of the meeting of the National Council on the Arts considering applications recommended by such committees. The summaries shall be consistent with the considerations that justified the closing of the meetings.

All other portions of the meetings of these advisory committees shall be open to the public unless the Chairperson of the National Endowment for the Arts or a designee determines otherwise in accordance with section 10(d) of the Act.

The Panel Coordinator shall be responsible for publication in the **Federal Register** or, as appropriate, in local media, of a notice of all advisory committee meetings. Such notice shall be published in advance of the meetings and contain:

1. Name of the committee and its purposes;

2. Date and time of the meeting, and, if the meeting is open to the public, its location and agenda; and

3. A statement that the meeting is open to the public, or, if the meeting or any portion thereof is not to be open to the public, a statement to that effect.

The Panel Coordinator is designated as the person from whom lists of committee members may be obtained and from whom minutes of open meetings or open portions thereof may be requested.

Guidelines

Any interested person may attend meetings of advisory committees that are open to the public.

Members of the public attending a meeting will be permitted to participate in the committee's discussion at the discretion of the chairperson of the committee, if the chairperson is a full-time Federal employee; if the chairperson is not a full-time Federal employee then public participation will be permitted at the chairperson's discretion with the approval of the full-time Federal employee in attendance at the meeting in compliance with the order.

Dated: April 8, 2005.

Dana Gioia,

Chairman, National Endowment for the Arts.

[FR Doc. 05–7431 Filed 4–12–05; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent to Seek Approval to Extend without Revision a Current Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request renewal of this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by June 13, 2005, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone 703–292–7556; or send e-mail to *splimpto@nsf.gov*. You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION: *Title of Collection:* Fellowship Applications and Award Forms.

OMB Approval Number: 3145–0023.

Expiration Date of Approval: July 31, 2005.

Type of Request: Intent to seek approval to extend without revision and information collection for three years.

Abstract: Section 10 of the National Science Foundation Act of 1950 (42 U.S.C. 1861 *et seq.*), as amended, states that "The Foundation is authorized to award, within the limits of funds made available * * * scholarships and graduate fellowships for scientific study or scientific work in the mathematical physical, medical, biological,' engineering, social, and other sciences at appropriate nonprofit American or nonprofit foreign institutions selected by the recipient of such aid, for stated periods of time."

The Foundation Fellowship Programs are designed to meet the following objectives:

- To assure that some of the Nation's most talented students in the sciences obtain the education necessary to become creative and productive scientific researchers.
- To train or upgrade advanced scientific personnel to enhance their abilities as teachers and researchers.
- To promote graduate education in the sciences, mathematics, and engineering at institutions that have traditionally served ethnic minorities.
- To encourage pursuit of advanced science degrees by students who are members of ethnic groups traditionally under-represented in the Nation's advanced science personnel pool

The list of fellowship award programs sponsored by the Foundation may be found via FastLane through the NSF Web site: *http://www.fastlane.nsf.gov*.

Estimate of Burden: These are annual award programs with application deadlines varying according to the fellowship program. Public burden may also vary according to program, however it is estimated that each submission is averaged to be 12 hours per respondent.

Respondents: Individuals.

Estimated Number of Responses: 5,000.

Estimated Total Annual Burden on Respondents: 60,000 hours.

Frequency of Responses: Annually.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: April 17, 2005.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 05–7367 Filed 4–12–05; 8:45 am]

BILLING CODE 7550–01–M

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meetings

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal

Prevailing Rate Advisory Committee will be held on—

Thursday, May 5, 2005;
Thursday, May 26, 2005;
Thursday, June 9, 2005;
Thursday, June 23, 2005;
Thursday, July 14, 2005;
Thursday, July 28, 2005.

The meetings will start at 10 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street, NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal blue-collar employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

These scheduled meetings will start in open session with both labor and management representatives attending. During the meetings either the labor members or the management members may caucus separately with the Chair to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5538, 1900 E Street, NW., Washington, DC 20415 (202) 606–1500.

Dated: April 5, 2005.

Mary M. Rose,

Chairperson, Federal Prevailing Rate Advisory Committee.

[FR Doc. 05–7400 Filed 4–12–05; 8:45 am]

BILLING CODE 6325–49–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Complaint & Question Forms; SEC File No. 270–485; OMB Control No. 3235–0547.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below. The titles of the forms are: Enforcement Complaint Form; Investor Complaint Form; Financial Privacy Notice Complaint Form; and Questions and Feedback Form.

Each year, the SEC receives more than 250,000 contacts from investors who have complaints or questions on a wide range of investment-related issues. These contacts generally fall into the following three categories:

(a) Complaints against SEC-regulated individuals or entities;

(b) Questions concerning the federal securities laws, companies or firms that the SEC regulates, or other investment-related questions; and

(c) Tips concerning potential violations of the federal securities laws.

Investors who submit complaints, ask questions, or provide tips do so voluntarily. To make it easier for investors to contact the agency electronically, the SEC created a series of investor complaint and question Web forms. Investors can access these forms through the SEC Center for Complaints and Enforcement Tips at *http://www.sec.gov/complaint.shtml.*

Although the SEC's complaint and question forms provide a structured format for incoming investor correspondence, the SEC does not require that investors use any particular form or format when contacting the agency. To the contrary, investors may submit complaints, questions, and tips through a variety of other means, including telephone, letter, facsimile, or e-mail. Approximately 20,000 investors each year voluntarily choose to use the complaint and question forms, and approximately 98 percent of those investors submit the forms electronically through the Internet (as opposed to printing and mailing or faxing the forms).

Investors who choose not to use the complaint and question forms receive the same level of service as those who do. The dual purpose of the forms is to make it easier for the public to contact the agency with complaints, questions, tips, or other feedback and to streamline the workflow of the SEC staff who handle those contacts.

The SEC has used—and will continue to use—the information that investors supply on the complaint and question forms to review and process the contact (which may, in turn, involve responding to questions, processing complaints, or, as appropriate, initiating enforcement investigations), to maintain a record of contacts, to track the volume of investor complaints, and to analyze trends.

The complaint forms ask investors to provide information concerning, among other things, their names, how they can be reached, the names of the individuals or entities involved, the nature of their complaint or tip, what documents they can provide, and what, if any, legal actions they have taken. The question form asks investors to provide their names, e-mail addresses, and questions.

The SEC's online complaint and question forms automatically route the investor's complaint, question, or tip to the appropriate division or office—specifically, to either the Division of Enforcement or the Office of Investor Education and Assistance. Many questions on the online complaint and questions forms appear in multiple-choice format or employ drop-down boxes so that the investor can provide information by simply checking a box or selecting a pre-loaded option. Moreover, three of the four forms—specially the Investor Complaint Form, the Financial Privacy Notice Complaint Form, and the Questions and Feedback Form—map directly to the correspondence management system that the Office of Investor Education and Assistance uses, thus significantly reducing the need for SEC staff to enter manually the data that the investor already provided. Investors who use the Enforcement Complaint Form receive an automatic response from the Division of Enforcement. In addition, investors who use the Investor Complaint Form, the Financial Privacy Notice Complaint Form, and the Questions and Feedback Form not only receive an immediate, online

confirmation of their submissions, but they also receive custom responses via e-mail from the Office of Investor Education and Assistance which include an automatically generated file number.

Investor use of the SEC's complaint and question forms is strictly voluntary. Moreover, the SEC does not require investors to submit complaints, questions, tips, or other feedback. Absent the forms; investors would still have several ways to contact the agency, including telephone, facsimile, letters, and e-mail. Nevertheless, the SEC created its complaint and question forms to make it easier for investors to contact the agency with complaints, questions, or tips. The forms further streamline the workflow of SEC staff who record, process, and respond to investor contacts.

The staff of the SEC estimates that the total reporting burden for using the complaint and question forms is 5,000 hours. The calculation of this estimate depends on the number of investors who use the forms each year and the estimated time it takes to complete the forms: 20,000 respondents × 15 minutes = 5,000 burden hours.

Responses to the complaint and question forms are subject to the Freedom of Information Act (FOIA), which generally allows the SEC to make information available to the public upon request. An investor who submits a complaint or question form may request that his or her information not be released to the public by writing a letter asking that the information remain confidential under one of the exemptions described in FOIA (see 5 U.S.C. 552). The SEC determines whether the investor's claim of an exemption is valid when someone requests the investor's information under FOIA. The SEC often makes its files available to other governmental agencies, particularly United States Attorneys, state securities regulators, and state prosecutors. There is a likelihood that information supplied by investors will be made available to such agencies where appropriate. Whether or not the SEC makes its files available to other governmental agencies is, in general, a confidential matter between the SEC and such other governmental agencies.

The document retention period for the correspondence management system used by the Office of Investor Education and Assistance is four years.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or send an e-mail to: *David_Rostker@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: April 4, 2005.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1736 Filed 4–12–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26829; File No. 812–13158]

MetLife Investors Insurance Company, et al.; Notice of Application

April 7, 2005.

AGENCY: The Securities and Exchange Commission ("Commission").

ACTION: Notice of application for an order pursuant to Section 26(c) of the Investment Company Act of 1940 (the "Act") approving certain substitutions of securities and an order of exemption pursuant to Section 17(b) of the Act from Section 17(a) of the Act.

APPLICANTS: MetLife Investors Insurance Company ("MetLife Investors"), MetLife Investors Variable Annuity Account One ("VA Account One"), MetLife Investors Variable Life Account One ("VL Account One"), MetLife Investors Variable Life Account Eight ("VL Account Eight"), First MetLife Investors Insurance Company ("First MetLife Investors"), First MetLife Investors Variable Annuity Account One ("First VA Account One"), MetLife Investors Insurance Company of California ("MetLife Investors of California"), MetLife Investors Variable Annuity Account Five ("VA Account Five"), MetLife Investors Variable Life Account Five ("VL Account Five"), General American Life Insurance Company ("General American"), General American Separate Account Seven ("Separate Account Seven"), General American Separate Account Eleven ("Separate Account Eleven"), General American Separate Account Thirty Three ("Separate Account Thirty Three"), General American Separate Account Fifty Eight ("Separate Account Fifty Eight"), General American Separate Account Fifty Nine ("Separate Account Fifty Nine"), New England Life Insurance Company ("New England"), New England Variable Life Separate Account ("NEVL Separate Account"), New England Variable Life Separate Account Four ("NEVL Separate Account Four"), New England Variable Life Separate Account Five ("NEVL Separate Account Five"), Metropolitan Life Insurance Company ("MetLife") (together with MetLife Investors, First MetLife Investors, MetLife Investors of California, General American and New England, the "Insurance Companies"), Metropolitan Life Separate Account DCVL ("Separate Account DCVL"), Security Equity Separate Account Thirteen ("Separate Account Thirteen"), Security Equity Separate Account Nineteen ("Separate Account Nineteen") (together with VA Account One, VL Account One, VL Account Eight, First VA Account One, VA Account Five, VL Account Five, Separate Account Seven, Separate Account Eleven, Separate Account Thirty Three, Separate Account Fifty Eight, Separate Account Fifty Nine, NEVL Separate Account, NEVL Separate Account Four, NEVL Separate Account Five, Separate Account DCVL and Separate Account Thirteen, the "Separate Accounts"), Met Investors Series Trust ("MIST") and Metropolitan Series Fund, Inc. ("Met Series Fund") (MIST and Met Series Fund are the "Investment Companies"). The Insurance Companies and the Separate Accounts are the "Substitution Applicants." The Insurance Companies, the Separate Accounts and the Investment Companies are the "Section 17 Applicants."

FILING DATE: The application was filed on January 24, 2005, and amended on April 5, 2005. Applicants represent that they will file an amendment to the application during the notice period to conform to the representations set forth herein.

SUMMARY OF APPLICATION: Applicants request an order to permit certain unit investment trusts to substitute (a) shares of Lord Abbett Growth & Income Portfolio for shares of AIM V.I. Premier Equity Fund, VIP Contrafund, VP Income and Growth Fund, Goldman Sachs Growth and Income Fund; (b) shares of Neuberger Berman Real Estate Portfolio for shares of Alliance Bernstein Real Estate Investment Portfolio; (c) shares of Janus Aggressive Growth Portfolio for shares of AllianceBernstein Premier Growth

Portfolio; (d) shares of MFS Research International Portfolio for shares of VP International Fund, Putnam VT International Equity Fund; (e) shares of MetLife Stock Index Portfolio for shares of Dreyfus Stock Index Portfolio; (f) shares of Oppenheimer Capital Appreciation Portfolio for shares of MFS Investors Trust Series, Oppenheimer Capital Appreciation Fund/VA; (g) shares of Lord Abbett Bond Debenture Portfolio for shares of VIP High Income Portfolio, MFS High Income Fund; (h) shares of T. Rowe Price Large Cap Growth Portfolio for shares of MFS Research Series, MFS Emerging Growth Series; (i) shares of Met/AIM Small Cap Growth Portfolio for shares of MFS New Discovery Series; (j) shares of PIMCO Total Return Portfolio for shares of Oppenheimer Strategic Bond Fund/VA; and (k) shares of Third Avenue Small Cap Value Portfolio for shares of SVS Dreman Small Cap Value Portfolio. The shares are held by certain of the Separate Accounts to fund certain group and individual variable annuity contracts and variable life insurance policies (collectively, the "Contracts") issued by the Insurance Companies (defined below).

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 28, 2005 and should be accompanied by proof of service on Applicants, in the form of an affidavit or for lawyers a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request and the issued contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants: Richard C. Pearson, Esq., MetLife Investors Insurance Company, 22 Corporate Plaza Drive, Newport Beach, California 92660, and Robert N. Hickey, Esq., Sullivan & Worcester LLP, 1666 K Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Robert Lamont, Senior Counsel at 202–551–6758 or, Lorna MacLeod, Branch Chief, at 202–551–6795, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the Public Reference Branch of the Commission, 450 Fifth Street, NW., Washington, DC 20549 (tel. 202–942–8090).

Applicants' Representations

1. MetLife Investors is a stock life insurance company organized under the laws of Missouri. MetLife Investors is a wholly-owned subsidiary of MetLife, Inc. MetLife Investors is the depositor and sponsor of VA Account One, VL Account One and VL Account Eight.

2. VA Account One is registered under the Act as a unit investment trust. The assets of VA Account One support certain Contracts. Security interests in the Contracts have been registered under the Securities Act of 1933.

3. VA Account One is currently divided into 78 sub-accounts, 43 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 35 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with VA Account One (except, that, in some instances, VA Account One may own more than 5% of such investment company).

4. VL Account One is registered under the Act as a unit investment trust. The assets of VL Account One support certain Contracts. Security interests in the Contracts have been registered under the Securities Act of 1933.

5. VL Account One is currently divided into 47 sub-accounts, 31 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 16 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with VL Account One (except, that, in some instances, VL Account One may own more than 5% of such investment company).

6. VL Account Eight serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

7. VL Account Eight is currently divided into 20 sub-accounts, 3 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 17 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with VL Account Eight (except, that, in some instances, VL Account Eight may own more than 5% of such investment company).

8. First MetLife Investors is a stock life insurance company organized under the laws of New York. First MetLife Investors is an indirect wholly-owned subsidiary of MetLife, Inc. First MetLife Investors is the depositor and sponsor of First VA Account One.

9. First VA Account One is registered under the Act as a unit investment trust. The assets of First VA Account One support certain Contracts. Security interests in the Contracts have been registered under the Securities Act of 1933.

10. First VA Account One is currently divided into 72 sub-accounts, 43 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 29 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with First VA Account One (except, that, in some instances, First VA Account One may own more than 5% of such investment company).

11. MetLife Investors of California is a stock life insurance company organized under the laws of California. MetLife Investors of California is an indirect wholly-owned subsidiary of MetLife, Inc. MetLife Investors of California is the depositor and sponsor of VA Account Five and VL Account Five.

12. VA Account Five is registered under the Act as a unit investment trust. The assets of VA Account Five support certain Contracts. Security interests under the Contracts have been registered under the Securities Act of 1933.

13. VA Account Five is currently divided into 84 sub-accounts, 48 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 36 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with VA Account Five (except, that, in some instances, VA Account Five may own more than 5% of such investment company).

14. VL Account Five is registered under the Act as a unit investment trust. The assets of VL Account Five support certain Contracts. Security interests in the Contracts have been registered under the Securities Act of 1933.

15. VL Account Five is currently divided into 47 sub-accounts, 31 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 16 of which reflect the performance of registered investment companies

managed by advisers that are not affiliated with VL Account Five (except, that, in some instances, VL Account Five may own more than 5% of such investment company).

16. General American is a stock life insurance company organized under the laws of Missouri. General American is an indirect wholly-owned subsidiary of MetLife, Inc. General American is the depositor and sponsor of Separate Account Seven and Separate Account Eleven.

17. Separate Account Seven serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

18. Separate Account Seven is currently divided into 58 sub-accounts, 20 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 38 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with Separate Account Seven (except, that, in some instances, Separate Account Seven may own more than 5% of such investment company).

19. Separate Account Eleven is registered under the Act as a unit investment trust. The assets of Separate Account Eleven support certain Contracts. Security interests under the Contracts have been registered under the Securities Act of 1933.

20. Separate Account Eleven is currently divided into 50 sub-accounts, 34 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 16 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with Separate Account Eleven (except, that in some instances, Separate Account Eleven may own more than 5% of such investment company).

21. Separate Account Thirty Three serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

22. Separate Account Thirty Three is currently divided into 58 sub-accounts, 20 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 38 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with Separate Account Thirty Three (except, that, in some instances, Separate Account Thirty Three may own more than 5% of such investment company).

23. Separate Account Fifty Eight serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

24. Separate Account Fifty Eight is currently divided into 34 sub-accounts, 26 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 8 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with Separate Account Fifty Eight (except, that, in some instances, Separate Account Fifty Eight may own more than 5% of such investment company).

25. Separate Account Fifty Nine serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

26. Separate Account Fifty Nine is currently divided into 34 sub-accounts, 26 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 8 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with Separate Account Fifty Nine (except, that, in some instances, Separate Account Fifty Nine may own more than 5% of such investment company).

27. New England is a stock life insurance company organized under the laws of Delaware and re-domesticated in Massachusetts. General American is an indirect wholly-owned subsidiary of MetLife, Inc. New England is the depositor and sponsor of NEVL Separate Account, NEVL Separate Account Four and NEVL Separate Account Five.

28. NEVL Separate Account is registered under the Act as a unit investment trust. The assets of NEVL Separate Account support certain Contracts. Security interests under the Contracts have been registered under the Securities Act of 1933.

29. NEVL Separate Account is currently divided into 47 sub-accounts, 41 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 6 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with NEVL Separate Account (except, that in some instances, NEVL Separate Account may own more than 5% of such investment company).

30. NEVL Separate Account Four serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

31. NEVL Separate Account Four is currently divided into 28 sub-accounts, 20 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 8 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with NEVL Separate Account Four (except, that, in some instances, NEVL Separate Account Four may own more than 5% of such investment company).

32. NEVL Separate Account Five serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

33. NEVL Separate Account Nine is currently divided into 28 sub-accounts, 20 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 8 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with NEVL Separate Account Five (except, that, in some instances, NEVL Separate Account Five may own more than 5% of such investment company).

34. MetLife is a stock life insurance company organized under the laws of New York. MetLife is a wholly-owned subsidiary of MetLife, Inc., a publicly traded company. MetLife is the depositor and sponsor of MetLife Separate Account DCVL.

35. Separate Account DCVL serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

36. Separate Account DCVL is currently divided into 50 sub-accounts, 20 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 30 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with Separate Account DCVL (except that in some instances, Separate Account DCVL may own more than 5% of such investment company).

37. Separate Account Thirteen is registered under the Act as a unit investment trust. The assets of Separate Account Thirteen support certain Contracts. Security interests under the Contracts have been registered under the Securities Act of 1933.

38. Separate Account Thirteen is currently divided into 18 sub-accounts,

3 of which reflect the investment performance of a corresponding series of MIST or Met Series Fund, and 15 of which reflect the performance of registered investment companies managed by advisers that are not affiliated with Separate Account Thirteen (except that in some instances, Separate Account Thirteen may own more than 5% of such investment company).

39. Separate Account Nineteen serves as a separate account funding vehicle for certain Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933 and Regulation D thereunder.

40. Separate Account Nineteen is currently divided into 1 sub-account, 0 of which reflects the investment performance of a corresponding series of MIST or Met Series Fund, and 1 of which reflects the performance of a registered investment company managed by an adviser that is not affiliated with Separate Account Nineteen (except that in some instances, Separate Account Nineteen may own more than 5% of such investment company).

41. MIST and Met Series Fund are each registered under the Act as open-end management investment companies of the series type, and their securities are registered under the Securities Act of 1933.

42. Under the Contracts, the Insurance Companies reserve the right to substitute shares of one fund with shares of another.

43. Each Insurance Company, on its behalf and on behalf of the Separate Accounts, proposes to make certain substitutions of shares of eighteen funds (the "Existing Funds") held in sub-accounts of its respective Separate Accounts for certain series (the "Replacement Funds") of MIST and Met Series Fund. The proposed substitutions are as follows: (a) Shares of Lord Abbett Growth and Income Portfolio for shares of AIM V.I. Premier Equity Fund, VIP Contrafund, VP Income & Growth Fund, Goldman Sachs Growth and Income Fund; (b) shares of Neuberger Berman Real Estate Portfolio for shares of AllianceBernstein Real Estate Investment Portfolio; (c) shares of Janus Aggressive Growth Portfolio for shares of AllianceBernstein Premier Growth Portfolio; (d) shares of MFS Research International Portfolio for shares of VP International Fund, Putnam VT International Equity Fund; (e) shares of MetLife Stock Index Portfolio for shares of Dreyfus Stock Index Portfolio; (f) shares of Oppenheimer Capital Appreciation Portfolio for shares of MFS Investors Trust Series, Oppenheimer Capital Appreciation Fund/VA; (g) shares of Lord Abbett Bond Debenture Portfolio for shares of VIP High Income Portfolio, MFS High Income Fund; (h) shares of T. Rowe Price Large Cap Growth Portfolio for shares of MFS Research Series, MFS Emerging Growth Series; (i) shares of Met/AIM Small Cap Growth Portfolio for shares of MFS New Discovery Series; (j) shares of PIMCO Total Return Portfolio for shares of Oppenheimer Strategic Bond Fund/VA; and (k) shares of Third Avenue Small Cap Value Portfolio for shares of SVS Dreman Small Cap Value Portfolio.

44. The investment objectives, policies and restrictions of the Replacement Funds are in each case substantially the same as or sufficiently similar to the investment objectives, policies and restrictions of the respective Existing Funds. Set forth below is a description of the investment objectives and principal investment policies of each Existing Fund and its corresponding Replacement Fund.

Existing fund	Replacement fund
AIM V.I. Premier Equity Fund—seeks to achieve long-term growth of capital. Income is a secondary objective. The Fund normally invests at least 80% of its net assets in equity securities. The Fund may also invest in preferred stocks and debt instruments that have prospects for growth of capital and may invest up to 25% of its total assets in foreign securities. The portfolio managers focus on undervalued equity securities.	Lord Abbett Growth and Income Portfolio—seeks long-term growth of capital and income without excessive fluctuation in market value. The Portfolio normally invests 80% of its net assets in equity securities of large (at least $5 billion of market capitalization), seasoned U.S. and multinational companies that are believed to be undervalued. The Portfolio may also invest in foreign securities.
VIP Contrafund Portfolio—seeks long-term capital appreciation. The Portfolio invests primarily in common stocks of large companies believed to be undervalued. The Portfolio may invest in both domestic and foreign securities.	
VP Income & Growth Fund—seeks to achieve capital growth by investing in common stocks. Income is a secondary objective. The portfolio managers select stocks primarily from the largest 1,500 publicly traded U.S. companies. Securities are ranked by their value as well as growth potential. The Fund seeks to provide better returns than the S&P 500 without taking on significant additional risks. The portfolio managers attempt to create a dividend yield for the Fund that will be greater than that of the S&P 500.	
Goldman Sachs Growth and Income Fund—seeks long-term growth of capital and growth of income. Normally, the Fund invests at least 65% of its total assets in equity securities that have favorable prospects for capital appreciation and/or dividend-paying ability. Up to 25% of the Fund's assets may be invested in foreign securities including securities of issuers in emerging market countries. The Fund may invest up to 35% of its total assets in fixed income securities.	
AllianceBernstein Real Estate Investment Portfolio [1]—seeks total return from long-term growth of capital and from income. The Portfolio invests, normally, at least 80% of its net assets in equity securities of real estate investment trusts and other real estate industry companies. The Portfolio seeks to invest in real estate companies whose underlying portfolios are diversified geographically and by property type. The Portfolio may invest up to 20% of its net assets in mortgage-backed securities.	Neuberger Berman Real Estate Portfolio [1]—seeks total return through investment in real estate securities, emphasizing both capital appreciation and current income. The Portfolio invests, normally, at least 80% of its assets in equity securities of real estate investment trusts and other securities issued by real estate companies. The Portfolio may invest up to 20% of its assets in investment grade or non-investment grade (minimum rating of B) debt securities.

Existing fund	Replacement fund
AllianceBemstein Premier Growth Portfolio[2]—seeks growth of capital by pursuing aggressive investment policies. The Portfolio invests primarily in the securities of a small number of U.S. companies. The Portfolio looks for companies with superior growth prospects. The Portfolio may invest up to 20% of its assets in foreign securities and up to 20% of its assets in convertible securities which may be below investment grade.	Janus Aggressive Growth Portfolio[2]—seeks long-term growth of capital. The Portfolio invests primarily in common stocks selected for their growth potential. Investments may be made in companies of any size. The Portfolio may invest without limit in foreign securities and up to 35% of its assets in high yield/high risk debt securities.
VP International Fund[3]—seeks capital growth. The portfolio managers look for companies with earnings and revenue growth. The Fund's assets will be primarily invested in common stocks companies in at least three developed countries (excluding the U.S.).	MFS Research International Portfolio3—seeks capital appreciation. Normally, at least 65% of the Portfolio's net assets are invested in common stocks and related securities of foreign companies (including up to 25% of its net assets in emerging market issuers) located in at least five countries. The Portfolio seeks companies of any size with favorable growth prospects and attractive valuations.
Putnam VT International Equity Fund—seeks equity capital appreciation. The Fund invests mainly in common stocks of companies outside the U.S. Under normal circumstances, at least 80% of the Fund's net assets are invested in equity securities. The Fund invests mainly in mid- and large-sized companies, although it can invest in companies of any size. The Fund emphasizes investments in developed countries, although it can also invest in emerging market countries.	
Dreyfus Stock Index Portfolio—seeks to match the total return of the S&P 500 Index. The Fund generally invests in all 500 securities of the S&P 500 Index proportion to their weighting in the S&P 500 Index.	MetLife Stock Index Portfolio—seeks to equal the performance of the S&P 500 Index. The Portfolio purchases the common stocks of all the companies in the S&P 500 Index.
MFS Investors Trust Series[4]—seeks mainly to provide long-term growth of capital and secondarily reasonable current income. Normally, the Series invests at least 65% of its net assets in common stocks and related equity securities. While the Series may invest in companies of any size, the Series generally focuses on companies with large market capitalizations believed to have substantial growth prospects and attractive valuations based on current and expected earnings and cash flow. The Series will also seek to generate gross income equal to approximately 90% of the dividend yield of the S&P 500 Index. The Series may invest in foreign equity securities.	Oppenheimer Capital Appreciation Portfolio[4]—seeks capital appreciation. The Portfolio mainly invests in common stocks of growth companies of any market capitalization. The Portfolio currently focuses on the securities of mid-cap and large-cap companies. The Portfolio may also purchase the securities of foreign issuers.
Oppenheimer Capital Appreciation Fund/VA—seeks capital appreciation. The Fund invests mainly in common stocks of growth companies of any market capitalization. The Fund currently focuses on the securities of mid-cap and large-cap domestic companies, but buys foreign stocks as well.	
VIP High Income Portfolio—seeks a high level of current income, while also considering growth of capital. The Portfolio normally invests primarily in income-producing debt securities, preferred stocks and convertible securities, with an emphasis on lower-quality debt securities. The Portfolio may invest in domestic and foreign issuers.	Lord Abbett Bond Debenture Portfolio—seeks to provide high current income and the opportunity for capital appreciation to produce a high total return. The Portfolio normally invests substantially all of its net assets in high yield and investment grade debt securities. Up to 80% of the Portfolio' total assets may be invested in junk bonds. At least 20% of the Portfolio's assets must be invested in any combination of investment grade debt securities, U.S. government securities and cash equivalents. Up to 20% of the Portfolio's assets may be invested in foreign securities.
MFS High Income Series—seeks high current income by investing primarily in a managed diversified portfolio of fixed income securities, some of which may involve equity features. Normally, the Series invests at least 80% of its net assets in high income fixed income securities (junk bonds). The Series may also invest in foreign securities (including emerging market securities.)	
MFS Emerging Growth Series—seeks to provide long-term growth of capital. Normally the Series invests at least 65% of its net assets in common stocks and related securities of emerging growth companies of any size (currently invests primarily in large-cap companies). The Series may invest in foreign securities including emerging market securities.	T. Rowe Price Large Cap Growth Portfolio—seeks long-term growth of capital and, secondarily, dividend income. Normally, the Portfolio invests at least 80% of its assets in the common stocks and other securities of large capitalization growth companies (*i.e.*, those within the market capitalization range of the Russell 1000 Index). The investment adviser seeks companies that have the ability to pay increasing dividends through strong cash flow.
MFS Research Series—seeks to provide long-term growth of capital and future income. The Series invests at least 80% of its net assets in common stocks and related securities. The Series focuses on large cap companies believed to have favorable prospects for long-term growth, attractive valuations and superior management. The Series may invest in companies of any size, in debt securities rated below investment grade, and in foreign securities, including emerging market securities.	

Existing fund	Replacement fund
MFS New Discovery Series—seeks capital appreciation. The Series normally invests at least 65% of its net assets in equity securities of emerging growth companies. The Series generally focuses on smaller capitalization companies that have market capitalizations within the range of companies in the Russell 2000 Index at the time of purchase. The Series may also invest in foreign securities.	Met/AIM Small Cap Growth Portfolio—seeks long-term growth of capital. The Portfolio normally invests at least 80% of its net assets in equity related securities of small-cap companies. To be a small-cap company it will have a market capitalization at the time of purchase, no larger than the largest capitalized company included in the Russell 2000 Index. The Portfolio may invest up to 20% of its net assets in equity securities of issuers whose capitalizations are outside the range of market capitalization of company included in the Russell 2000 Index, in investment grade non-convertible debt securities and U.S.-government securities. The Portfolio may invest up to 25% of its total assets in foreign securities.
Oppenheimer Strategic Bond Fund/VA—seeks a high level of current income principally derived from interest on debt securities. The Fund invests in debt securities of issuers in three market sectors: foreign governments and companies (including emerging market issuers); U.S. government securities; and lower-grade, high yield securities of U.S. and foreign companies. The Fund may invest in securities of any maturity and may invest without limit in junk bonds.	PIMCO Total Return Portfolio—seeks maximum total return, consistent with the preservation of capital and prudent investment management. The Portfolio normally invests at least 65% of its assets in a diversified portfolio of fixed income instruments of varying maturities. The Portfolio invests primarily in investment grade debt obligations, U.S. government securities and commercial paper and other short-term obligations. Up to 20% of the Portfolio's net assets may be invested in securities denominated in foreign currencies and the Portfolio may invest beyond that limit in U.S. dollar-denominated securities of foreign issuers.
SVS Dreman Small Cap Value Portfolio[5]—seeks long-term capital appreciation. Normally, the Portfolio invests at least 80% of its net assets in undervalued stocks of small U.S. companies, which the Portfolio defines as companies that are similar in market value to those in the Russell 2000 Value Index. The Portfolio may also invest up to 20% of its net assets in securities of foreign companies in the form of dollar-denominated American Depositary Receipts.	Third Avenue Small Cap Value Portfolio[5]—seeks long-term capital appreciation. Normally, the Portfolio, which is non-diversified, invests at least 80% of its net assets in equity securities of small companies. The Portfolio considers a "small company" to be one whose market capitalization is no greater than or less than the range of capitalizations of companies in the Russell 2000 Index or the S&P Small Cap 600 Index at the time of the investment. The Portfolio seeks to acquire common stocks of well-financed companies at a substantial discount to what the investment adviser believes is their true value.

[1] As of December 31, 2004, neither AllianceBernstein Real Estate Investment Portfolio nor Neuberger Berman Real Estate Portfolio had any investments in mortgage-backed securities or debt securities including in non-investment grade debt securities. Each Portfolio had over 92% of its assets invested in real estate investment trusts, with the balance in cash or common stock equities.

[2] With respect to AllianceBernstein Premier Growth Portfolio and Janus Aggressive Growth Portfolio, although there is no restriction on Janus Aggressive Growth Portfolio's investment in foreign securities, normally the Portfolio does not invest more than approximately 20% of its assets in foreign securities. With respect to investments in high yield/high risk debt securities, neither Portfolio currently invests more than a minimal amount in such securities.

[3] As of December 31, 2004 MFS Research International Portfolio and VP International Fund had 2.8% and 0%, respectively, of their assets invested in emerging market issuers.

[4] With respect to MFS Investors Trust Series and Oppenheimer Capital Appreciation Portfolio, the S&P 500 Index is the benchmark for both Portfolios. Although income is not a stated objective of Oppenheimer Capital Appreciation Portfolio, approximately 72% of the Portfolio's assets are invested in dividend paying securities. Moreover, at December 31, 2003, 14 of the top 25 securities held by Oppenheimer Capital Appreciation Portfolio are held by MFS Investors Trust Series. Oppenheimer Capital Appreciation Portfolio's current yield as of December 31, 2003 was 1.1%. MFS Investors Trust Series' current yield as of December 31, 2003 was 1.6%.

[5] Although Third Avenue Small Cap Value Portfolio is classified as a non-diversified fund, its investments are similar to a diversified fund. As of December 31, 2004, Third Avenue Small Cap Portfolio's top ten holdings amounted to 21.32% of its portfolio with no holding in excess of 2.63%. SVS Dream Small Cap Value Portfolio's top ten holdings at December 31, 2004 amounted to 18.4% of its portfolio with no holding in excess of 3.1%. It is anticipated that the Third Avenue Small Cap Value Portfolio will continue to be managed as a diversified fund.

45. The following tables compare the total operating expenses of the Existing Fund and the Replacement Fund for each proposed substitution. The comparative expenses are based on actual expenses, including waivers, for the year ended December 31, 2003. In some cases, the expense caps for certain Replacement Funds were decreased effective May 1, 2004, and the management fee was reduced effective January 1, 2005. In such cases the expenses of each Fund as of December 31, 2003, have been restated to reflect the expense cap in effect as of May 1, 2004, or revised management fee, as the case may be. Where a Fund has multiple classes of shares involved in the proposed substitution, the expenses of each class are presented.

	AIM V.I. Premier Equity Fund (Class 1) (percent)	Lord Abbett Growth and Income Portfolio (Class A) (percent)
Management Fee	0.61	0.56
12b–1 Fee	.....	.....
Other Expenses	0.24	0.06
Total Expenses	0.85	0.62
Waivers	.....	.....
Net Expenses	0.85	0.62

	AllianceBernstein Premier Growth Portfolio (Class A) (percent)	Janus Aggressive Growth Portfolio (Class A)* (percent)
Management Fee	1.00	0.70
12b–1 Fee	.....	.....
Other Expenses	0.05	0.12
Total Expenses	1.05	0.82
Waivers	.....	.....
Net Expenses	1.05	0.82

*Restated to reflect lowered management fee.

	AllianceBernstein Real Estate Investment Portfolio		Neuberger Berman Real Estate Portfolio	
	Class A (percent)	Class B (percent)	Class A (percent)	Class B (percent)
Management Fee	0.90	0.90	0.70	0.70
12b–1 Fee	.....	0.25	.....	0.25
Other Expenses	0.34	0.34	0.41	0.41
Total Expenses	1.24	1.49	1.11	1.36
Waivers	0.25	0.35	0.21	0.21
Net Expenses	0.89	1.14	0.90	1.15

	VP Income & Growth Fund (Class 1) (percent)	Lord Abbett Growth and Income Portfolio (Class A) (percent)
Management Fee	0.70	0.56
12b–1 Fee	.....	.....
Other Expenses	.....	0.06
Total Expenses	0.70	0.62
Waivers	.....	.....
Net Expenses	0.70	0.62

	VP International Fund (Class 1) (percent)	MFS Research International Portfolio (Class A) (percent)
Management Fee	1.33	0.80
12b–1 Fee	.....	.....
Other Expenses	0.01	0.31
Total Expenses	1.34	1.11
Waivers	.....	0.02
Net Expenses	1.34	1.09

	Dreyfus Stock Index Fund		MetLife Stock Index Fund	
	Initial (percent)	Service (percent)	Class A (percent)	Class B (percent)
Management Fee	0.25	0.25	0.25	0.25
12b–1 fee	.....	0.25	.....	0.25
Other Expenses	0.02	0.02	0.06	0.06
Total Expenses	0.27	0.52	0.31	0.56
Waivers	.....	.....	.....	.....
Net Expenses	0.27	0.52	0.31	0.56

	VIP High Income Portfolio		Lord Abbett Bond Debenture Portfolio*	
	Initial (percent)	Service 2 (percent)	Class A (percent)	Class B (percent)
Management Fee	0.58	0.58	0.53	0.53
12b–1 Fee	.....	0.25	.....	0.25
Other Expenses	0.11	0.12	0.07	0.06
Total Expenses	0.69	0.95	0.60	0.84

	VIP High Income Portfolio		Lord Abbett Bond Debenture Portfolio*	
	Initial (percent)	Service 2 (percent)	Class A (percent)	Class B (percent)
Waivers	.....	.....	.....	.....
Net Expenses	0.69	0.95	0.60	0.84

*Restated to reflect lowered management fee.

	VIP Contrafund Portfolio (Initial) (percent)	Lord Abbett Growth and Income (Class A) (percent)
Management Fee	0.58	0.56
12b–1 Fee	.....	.....
Other Expenses	0.09	0.06
Total Expenses	0.67	0.62
Waivers	.....	.....
Net Expenses	0.67	0.62

	Goldman Sachs Growth and Income Fund (percent)	Lord Abbett Growth and Income (Class A) (percent)
Management Fee	0.75	0.56
12b–1 Fee	.....	.....
Other Expenses	0.45	0.06
Total Expenses	1.20	0.62
Waivers	0.30	.....
Net Expenses	0.90	0.62

	MFS High Income Series		Lord Abbett Bond Debenture Portfolio*	
	Initial (percent)	Service (percent)	Class A (percent)	Class B (percent)
Management Fee	0.75	0.75	0.53	0.53
12b–1 Fee	.....	0.25	.....	0.25
Other Expenses	0.15	0.15	0.07	0.06
Total Expenses	0.90	1.15	0.60	0.84
Waivers	.....	.....	.....	.....
Net Expenses	0.90	1.15	0.60	0.84

*Restated to reflect lowered management fee.

	MFS Emerging Growth Series (Initial) (percent)	T. Rowe Price Large Cap Growth Portfolio (Class A) (percent)
Management Fee	0.75	0.63
12b–1 Fee	.....	.....
Other Expenses	0.12	0.16
Total Expenses	0.87	0.79
Waivers	.....	.....
Net Expenses	0.87	0.79

	MFS Research Series (Initial) (Percent)	T. Rowe Price Large Cap Growth Portfolio (Class A) (Percent)
Management Fee	0.75	0.63
12b–1 Fee	.....	.....
Other Expenses	0.12	0.16
Total Expenses	0.87	0.79
Waivers	.....	.....
Net Expenses	0.87	0.79

	MFS New Discovery Series		Met/AIM Small Cap Growth Portfolio	
	Initial (Percent)	Service (Percent)	Class A (Percent)	Class B (Percent)
Management Fee	0.90	0.90	0.90	0.90
12b–1 Fee	.....	0.25	.....	0.25
Other Expenses	0.14	0.14	0.26	0.21
Total Expenses	1.04	1.29	1.16	1.36
Waivers	.....	.....	0.12	0.06
Net Expenses	1.04	1.29	1.04	1.30

	MFS Investors Trust Series (Initial) (Percent)	Oppenheimer Capital Appreciation Portfolio (Class A) (Percent)
Management Fee	0.75	0.63
12b–1 Fee	.....	.....
Other Expenses	0.12	0.12
Total Expenses	0.87	0.75
Waivers	.....	0.03
Net Expenses	0.87	0.72

	Oppenheimer Strategic Bond Fund/VA (Class A) (percent)	PIMCO Total Return Portfolio (Class A) (percent)
Management Fee	0.72	0.50
12b–1 Fee	.....	.....
Other Expenses	0.05	0.09
Total Expenses	0.77	0.57
Waivers	0.02	.....
Net Expenses	0.75	0.59

	Oppenheimer Capital Appreciation Fund/VA (Class A) (Percent)	Oppenheimer Capital Appreciation Portfolio (Class A) (Percent)
Management Fee	0.65	0.63
12b–1 Fee	.....	.....
Other Expenses	0.02	0.12
Total Expenses	0.67	0.75
Waivers	.....	0.03
Net Expenses	0.67	0.72

	Putnam VT International Equity Fund		MFS Research International Portfolio	
	Class A (Percent)	Class B (Percent)	Class A (Percent)	Class B (Percent)
Management Fee	0.80	0.80	0.80	0.80
12b–1 Fee	.....	0.25%	.....	0.25
Other Expenses	0.22	0.22	0.31	0.34
Total Expenses	1.02	1.27	1.11	1.39
Waivers	.....	.....	0.02	0.06
Net Expenses	1.02	1.27	1.09	1.33

	SVS Dreman Small Cap Value Portfolio		Third Avenue Small Cap Value Portfolio	
	Class A (Percent)	Class B (Percent)	Class A (Percent)	Class B (Percent)
Management Fee	0.75	0.75	0.75	0.75
12b–1 Fee	.....	0.25	.....	0.25
Other Expenses	0.05	0.19	0.18	0.18
Total Expenses	0.80	1.19	0.93	1.18

	SVS Dreman Small Cap Value Portfolio		Third Avenue Small Cap Value Portfolio	
	Class A (Percent)	Class B (Percent)	Class A (Percent)	Class B (Percent)
Waivers	.....	.....	.....	.....
Net Expenses	0.80	1.19	0.93	1.18

46. Met Advisers, LLC or Met Investors Advisory, LLC is the adviser of each of the Replacement Funds. Each Replacement Fund currently offers up to three classes of shares, two of which, Class A and Class B, are involved in the substitutions. No Rule 12b–1 Plan has been adopted for any Replacement Fund's Class A shares. Each Replacement Fund's Class B shares has adopted a Rule 12b–1 distribution plan whereby up to 0.50% of a Fund's assets attributable to its Class B shares may be used to finance the distribution of the Fund's shares. Currently, payments under the plan are limited to 0.25% for Class B shares.

47. Met Investors Advisory, LLC has entered into agreement with MIST whereby, for the period ended April 30, 2006, and any subsequent year in which the agreement is in effect, the total annual operating expenses of the following Replacement Funds (excluding interest, taxes, brokerage commissions and Rule 12b–1 fees) will not exceed the amounts stated. These expense caps may be extended by the investment adviser from year to year as follows:

	Percent
Met/AIM Small Cap Growth Portfolio	1.05
Third Avenue Small Cap Value Portfolio	0.95
MFS Research International Portfolio	1.00
Oppenheimer Capital Appreciation Portfolio	0.75
Janus Aggressive Growth Portfolio	0.90
Neuberger Berman Real Estate Portfolio	0.90

48. The annuity contracts are individual flexible premium fixed and variable deferred and immediate annuity contracts. Many of the annuity contracts provide that a maximum of 12 transfers can be made every year without charge or that a $10 contractual limit charge will apply or that no transfer charge will apply. During the accumulation period, Contract owners may transfer between the variable account options or from the variable account options to the fixed account option without limitation. Some of the Contracts have no contractual limitation on transfers during the accumulation period. Some Contract owners may make transfers from the fixed account option subject to certain minimum transfer amounts ($500 or the total interest in the account) and maximum limitations. Some of the Contracts have additional restrictions on transfers from the fixed account to the variable account. During the income period or under the immediate annuity, Contract owners may currently make unlimited transfers among investment portfolios and from investment portfolios to the fixed account option. No fees or other charges are currently imposed on transfers for most of the Contracts. Under certain annuity contracts, the Insurance Companies reserve the right to impose additional restrictions on transfers. Any transfer limits will be suspended in connection with the substitutions.

49. Under the life insurance policies, policy owners may allocate account value among the General Account and the available investment portfolios. All or part of the account value may be transferred from any investment portfolio to another investment portfolio, or to the General Account. Generally, for Contracts that are exempt from registration under Section 4(2) of the Securities Act of 1933, there is no General Account. The minimum amount that can be transferred is the lesser of the minimum transfer amount (which currently ranges from $1 to $500), or the total value that is an investment portfolio or the General Account. Certain policies provide that twelve transfers in a policy year can be made without charge. A transfer fee of $25 is payable for additional transfers in a policy year, but these fees are not currently charged. Other policies do not currently limit the number of transfers; however, the Insurance Companies reserve the right to limit transfers to four or twelve (depending on the policy) per policy year end and to impose a $25 charge on transfers in excess of 12 per year or on any transfer. Under the policies, the Insurance Companies reserve the right to impose additional restrictions on transfers. All transfer limits will be suspended in connection with the substitutions.

50. The substitutions are expected to provide significant benefits to Contract owners, including improved selection of portfolio managers and simplification of fund offerings through the elimination of overlapping offerings. The Substitution Applicants believe that the sub-advisers to the Replacement Funds overall are better positioned to provide consistent above-average performance for their Funds than are the advisers or sub-advisers of the Existing Funds. At the same time, Contract owners will continue to be able to select among a large number of funds, with a full range of investment objectives, investment strategies, and managers.

51. In addition, there will be significant savings to Contract owners because certain costs, such as the costs of printing and mailing lengthy periodic reports and prospectuses for the Existing Funds will be substantially reduced. Further, many of the Existing Funds are smaller than their respective Replacement Funds. As a result, various costs such as legal, accounting, printing and trustee fees are spread over a larger base with each Contract owner bearing a smaller portion of the cost than would be the case if the Fund were smaller in size. (More detailed information regarding the amount of each Fund's assets can be found in the Application).

52. In addition, Contract owners with sub-account balances invested in shares of the Replacement Funds will, except as follows, have a lower total expense ratios taking into account fund expenses (including Rule 12b–1 fees, if any) and current fee waivers. In the following substitutions, the total operating expense ratios of the Replacement Funds are higher because expenses, other than the management fee, are somewhat higher.

- AllianceBernstein Real Estate Investment Portfolio/Neuberger Berman Real Estate Portfolio—total expenses of Class A and Class B shares are 1 basis point higher than those of AllianceBernstein Real Estate Investment Portfolio;
- Dreyfus Stock Index Fund/MetLife Stock Index Portfolio—total expenses of Class A and Class B shares are 4 basis points higher than those of Dreyfus Stock Index Fund;

• MFS New Discovery Series/Met/AIM Small Cap Growth Portfolio—total expenses of Class B shares are 1 basis point higher than those of MFS New Discovery Series—Class A expenses are the same;

• Oppenheimer Capital Appreciation Portfolio/VA/Oppenheimer Capital Appreciation Portfolio—total expenses of Class A and Class B shares are 5 basis points higher than those of Oppenheimer Capital Appreciation Portfolio/VA;

• Putnam VT International Equity Fund/MFS Research International Portfolio—total expenses of Class A and Class B shares are 7 basis points and 6 basis points, respectively, higher than those of Putnam VT International Equity Fund; and

• SVS Dreman Small Cap Value Portfolio/Third Avenue Small Cap Value Portfolio—total expenses of Class A and Class B shares are 13 basis points higher than those of SVS Dreman Small Cap Value Portfolio—Class B expenses of Third Avenue Small Cap Value are lower.

Except as stated above for Contract owners with account balances in certain classes of 6 of the 18 funds involved in the substitutions, the substitutions will result in decreased expense ratios (ranging from 1 basis point to 31 basis points). Moreover, there will be no increase in Contract fees and expenses, including mortality and expense risk fees and administration and distribution fees charged to the Separate Accounts as a result of the substitutions.

53. The share classes of the Existing Funds and the Replacement Funds are identical with respect to the imposition of Rule 12b–1 fees currently imposed. While each Replacement Fund's Class B Rule 12b–1 fees can be raised to 0.50% of net assets by the Fund's Board of Trustees/Directors, the Rule 12b–1 fees of 0.25% of the Existing Funds' shares cannot be raised by the Fund's Board of Trustees, without shareholder approval, except as follows:

AllianceBerstein Real Estate Investment Portfolio can be raised by the Board 0.50%; Putnam VT International Equity Fund can be raised by the Board up to 0.35%.

Met Series Fund and MIST represent that, except as set forth in the following sentence, Rule 12b–1 fees for the Replacement Funds' Class B shares issued in connection with the proposed substitutions will not be raised above 0.25% of net assets without approval of a majority in interest of those Contract owners whose shares were involved in the proposed substitutions. The foregoing representation shall apply to the following substitutions only if the Rule 12b–1 fees for the Replacement Funds' Class B shares exceed 0.35% or 0.50% of net assets as indicated: AllianceBernstein Real Estate Investment Portfolio/Neuberger Berman Real Estate Portfolio—0.50%; Putnam VT International Equity Fund/MFS Research International Portfolio—0.35%.

54. Further, in addition to any Rule 12b–1 fees, the investment advisers or distributors of the Existing Funds pay the Insurance Companies or one of the affiliates from 5 to 30 basis points for Class A (or their equivalent) shares sold to the Separate Accounts and, for Class B (or their equivalent) shares, Rule 12b–1 fees of 25 basis points plus additional amounts ranging from 5 to 25 basis points. Following the substitutions, these payments will not be made on behalf of the Existing Funds. Rather, 25 basis points in Rule 12b–1 fees (with respect to Class B shares) and profit distributions to members, if any, from the Replacement Funds' advisers will be available to the Insurance Companies. These amounts from investment advisory fees may be more or less than the fees being paid by the Existing Funds.

55. The Insurance Companies considered the performance history of each Fund and determined that no Contract owners would be materially adversely affected as a result of the substitutions. (More detailed information regarding the Funds' comparative performance histories can be found in the Application).

56. By a supplement to the prospectuses for the Contracts and the Separate Accounts, each Insurance Company will notify all owners of the Contracts of its intention to take the necessary actions, including seeking the order requested by this Application and to substitute shares of the funds as described herein. The supplement will advise Contract owners that from the date of the supplement until the date of the proposed substitution, owners are permitted to make one transfer of Contract value (or annuity unit exchange) out of the Existing Fund sub-account, to another sub-account without the transfer (or exchange) being treated as one of a limited number of permitted transfers (or exchanges) or a limited number of transfers (or exchanges) permitted without a transfer charge. The supplement also will inform Contract owners that for at least 30 days following the proposed substitutions, the Insurance Companies will permit Contract owners affected by the substitutions to make one transfer of Contract value (or annuity unit exchange) out of the Replacement Fund sub-account to another sub-account without the transfer (or exchange) being treated as one of a limited number of permitted transfers (or exchanges) or a limited number of transfers (or exchanges) permitted without a transfer charge.

57. The proposed substitutions will take place at relative net asset value with no change in the amount of any Contract owner's Contract value, cash value, or death benefit or in the dollar value of his or her investment in the Separate Accounts.

58. The process for accomplishing the transfer of assets from each Existing Fund to its corresponding Replacement Fund will be determined on a case-by-case basis. In most cases, it is expected that the substitutions will be effected by redeeming shares of an Existing Fund for cash and using the cash to purchase shares of the Replacement Fund.

59. In certain other cases, it is expected that the substitutions will be effected by redeeming the shares of an Existing Fund in-kind; those assets will then be contributed in-kind to the corresponding Replacement Fund to purchase shares of that Fund. All in-kind redemptions from an Existing Fund of which any of the Substitution Applicants is an affiliated person will be effected in accordance with the conditions set forth in the Commission's no-action letter issued to *Signature Financial Group, Inc.* (available December 28, 1999). If an Existing Fund has not adopted the appropriate procedures set forth in *Signature*, redemptions will be in cash. In light of this fact, the Section 17 Applicants are not requesting relief with respect to those in-kind redemptions.

60. Contract owners will not incur any fees or charges as a result of the proposed substitutions, nor will their rights or an Insurance Company's obligations under the Contracts be altered in any way. All expenses incurred in connection with the proposed substitutions, including brokerage, legal, accounting, and other fees and expenses, will be paid by the Insurance Companies. In addition, the proposed substitutions will not impose any tax liability on Contract owners. The proposed substitutions will not cause the Contract fees and charges currently being paid by existing Contract owners to be greater after the proposed substitutions than before the proposed substitutions. No fees will be charged on the transfers made at the time of the proposed substitutions because the proposed substitutions will not be treated as a transfer for the purpose of assessing transfer charges or for determining the number of

remaining permissible transfers in a Contract year.

61. In addition to the prospectus supplements distributed to owners of Contracts, within five business days after the proposed substitutions are completed, Contract owners will be sent a written notice informing them that the substitutions were carried out and that they may make one transfer of all Contract value or cash value under a Contract invested in any one of the sub-accounts on the date of the notice to another sub-account available under their Contract at no cost and without regard to the usual limit on the frequency of transfers from the variable account options to the fixed account options. The notice will also reiterate that the Insurance Company will not exercise any rights reserved by it under the Contracts to impose additional restrictions on transfers or to impose any charges on transfers (other than with respect to "market timing" activities) until at least 30 days after the proposed substitutions. The Insurance Companies will also send each Contract owner current prospectuses for the Replacement Funds involved to the extent that they have not previously received a copy.

62. The Substitution Applicants agree that, to the extent that the annualized expenses of each Replacement Fund exceeds, for each fiscal period (such period being less than 90 days) during the twenty-four months following the substitutions, the 2003 net expense level of the corresponding Existing Fund, the Insurance Companies will, for each Contract outstanding on the date of the proposed substitutions, make a corresponding reduction in separate account (or sub-account) expenses on the last day of such fiscal period, such that the amount of the Replacement Fund's net expenses, together with those of the corresponding separate account (or sub-account) will, on an annualized basis, be no greater than the sum of the net expenses of the Existing Fund and the expenses of the separate account (or sub-account) for the 2003 fiscal year.

63. The Substitution Applicants further agree that the Insurance Companies will not increase total separate account charges (net of any reimbursements or waivers) for any existing owner of the Contracts on the date of the substitutions for a period of two years from the date of the substitutions.

Applicants' Legal Analysis

1. Section 26(c) of the Act requires the depositor of a registered unit investment trust holding the securities of a single issuer to obtain Commission approval before substituting the securities held by the trust. Specifically, Section 26(c) states:

> It shall be unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission shall have approved such substitution. The Commission shall issue an order approving such substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provision of this title.

2. The Substitution Applicants state that the proposed substitutions appear to involve substitutions of securities within the meaning of Section 26(c) of the Act. The Substitution Applicants, therefore, request an order from the Commission pursuant to Section 26(c) approving the proposed substitutions.

3. The Contracts expressly reserve to the applicable Insurance Company the right, subject to compliance with applicable law, to substitute shares of another investment company for shares of an investment company held by a sub-account of the Separate Accounts. The prospectuses for the Contracts and the Separate Accounts contain appropriate disclosure of this right.

4. Applicants request an order of the Commission pursuant to Section 26(c) of the Act approving the proposed substitutions by the Insurance Companies. The Applicants assert that the proposed substitutions are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

5. The Substitution Applicants represent that with respect to each proposed substitution, the Replacement Fund will have the same or lower management fee and current 12b–1 fee. In addition, Contract owners with balances invested in the Replacement Fund will have, taking into effect any applicable expense waivers, a lower expense ratio in many cases and, for others, a similar expense ratio. However, the Substitution Applicants propose to limit Contract charges attributable to Contract value invested in the Replacement Funds following the proposed substitutions, to a rate that would offset the expense ratio difference between the Existing Funds' 2003 net expense ratios and the net expense ratios for the Replacement Funds. The proposed Replacement Fund for each Existing Fund has an investment objective that is at least substantially similar to that of the Existing Fund. Moreover, the principal investment policies of the Replacement Funds are similar to those of the corresponding Existing Funds. The Insurance Companies believe that the new sub-adviser will, over the long-term, be positioned to provide at least comparable performance to that of the Existing Fund's sub-adviser.

6. In addition, a number of the Existing Funds are currently either not available as investment options under any Contract previously or currently offered by the Insurance Companies or, if available, are available only for additional contributions and/or transfers from other investment options under Contracts not currently offered. The Substitution Applicants submit that, with respect to those Existing Funds with limited or no current availability, there is little likelihood additional significant assets, if any, will be allocated to such Funds, and, therefore, because of the costs of maintaining such Funds as investment options under the Contracts, it is in the interest of shareholders to substitute the applicable Replacement Funds which are currently being offered as investment options by the Insurance Companies.

7. The Substitution Applicants anticipate that Contract owners will be better off with the array of sub-accounts offered after the proposed substitutions than they have been with the array of sub-accounts offered prior to the substitutions. The proposed substitutions retain for Contract owners the investment flexibility which is a central feature of the Contracts. If the proposed substitutions are carried out, all Contract owners will be permitted to allocate purchase payments and transfer Contract values and cash values between and among approximately the same number of sub-accounts as they could before the proposed substitutions. Moreover, the elimination of the costs of printing and mailing prospectuses and periodic reports of the Existing Funds will benefit Contract owners.

8. The Substitution Applicants assert that none of the proposed substitutions is of the type that Section 26(c) was designed to prevent. Unlike traditional unit investment trusts where a depositor could only substitute an investment security in a manner which permanently affected all the investors in the trust, the Contracts provide each Contract owner with the right to exercise his or her own judgment and transfer Contract or cash values into other sub-accounts. Moreover, the Contracts will offer Contract owners the opportunity to transfer amounts out of the affected sub-accounts into any of the remaining sub-accounts without cost or other disadvantage. The proposed

substitutions, therefore, will not result in the type of costly forced redemption which Section 26(c) was designed to prevent.

9. The Substitution Applicants assert that the proposed substitutions also are unlike the type of substitution which Section 26(c) was designed to prevent in that by purchasing a Contract, Contract owners select much more than a particular investment company in which to invest their account values. They also select the specific type of insurance coverage offered by an Insurance Company under their Contract as well as numerous other rights and privileges set forth in the Contract. Contract owners may also have considered each Insurance Company's size, financial condition, relationship with MetLife, and its reputation for service in selecting their Contract. These factors will not change as a result of the proposed substitutions.

10. Section 17(a)(1) of the Act, in relevant part, prohibits any affiliated person of a registered investment company, or any affiliated person of such person, acting as principal, from knowingly selling any security or other property to that company. Section 17(a)(2) of the Act generally prohibits the persons described above, acting as principals, from knowingly purchasing any security or other property from the registered company.

11. Section 2(a)(3) of the Act defines the term "affiliated person of another person" in relevant part as:

> (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; * * * (E) if such other person is an investment company, any investment adviser thereof. * * *

Section 2(a)(9) of the Act states that any person who owns beneficially, either directly or through one or more controlled companies, more than 25% of the voting securities of a company shall be presumed to control such company.

12. Because shares held by a separate account of an insurance company are legally owned by the insurance company, the Insurance Companies and their affiliates collectively own of record substantially all of the shares of MIST and Met Series Fund. Therefore, MIST and Met Series Fund and their respective funds are arguably under the control of the Insurance Companies notwithstanding the fact that Contract owners may be considered the beneficial owners of those shares held in the Separate Accounts. If MIST and Met Series Fund and their respective funds are under the control of the Insurance Companies, then each Insurance Company is an affiliated person or an affiliated person of an affiliated person of MIST and Met Series Fund and their respective funds. If MIST and Met Series Fund and their respective funds are under the control of the Insurance Companies, then MIST and Met Series Fund and their respective funds are affiliated persons of the Insurance Companies.

13. Regardless of whether or not the Insurance Companies can be considered to control MIST and Met Series Fund and their respective funds, because the Insurance Companies own of record more than 5% of the shares of each of them and are under common control with each Replacement Fund's investment adviser, the Insurance Companies are affiliated persons of both MIST and Met Series Fund and their respective funds. Likewise, their respective funds are each an affiliated person of the Insurance Companies. In addition, the Insurance Companies, through their separate accounts own more than 5% of the outstanding shares of certain Existing Funds.

14. Because the substitutions may be effected, in whole or in part, by means of in-kind redemptions and purchases, the substitutions may be deemed to involve one or more purchases or sales of securities or property between affiliated persons. The proposed transactions may involve a transfer of portfolio securities by the Existing Funds to the Insurance Companies; immediately thereafter, the Insurance Companies would purchase shares of the Replacement Funds with the portfolio securities received from the Existing Funds. Accordingly, as the Insurance Companies and the Replacement Funds could be viewed as affiliated persons of one another under Section 2(a)(3) of the Act, it is conceivable that this aspect of the substitutions could be viewed as being prohibited by Section 17(a). Accordingly, the Section 17 Applicants have determined that it is prudent to seek relief from Section 17(a) in the context of this Application for the in-kind purchases and sales of the Replacement Fund shares.

15. Section 17(b) of the Act provides that the Commission may, upon application, grant an order exempting any transaction from the prohibitions of Section 17(a) if the evidence establishes that: (1) The terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; (2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and records filed under the Act; and (3) the proposed transaction is consistent with the general purposes of the Act.

16. The Section 17 Applicants submit that the terms of the proposed in-kind purchase transactions, including the consideration to be paid and received by each fund involved, are reasonable, fair and do not involve overreaching principally because the transactions will conform with all but two of the conditions enumerated in Rule 17a–7. The proposed transactions will take place at relative net asset value in conformity with the requirements of Section 22(c) of the Act and Rule 22c–1 thereunder with no change in the amount of any Contract owner's contract value or death benefit or in the dollar value of his or her investment in any of the Separate Accounts. Contract owners will not suffer any adverse tax consequences as a result of the substitutions. The fees and charges under the Contracts will not increase because of the substitutions. Even though the Separate Accounts, the Insurance Companies, MIST and Met Series Fund may not rely on Rule 17a–7, the Section 17 Applicants submit that the Rule's conditions outline the type of safeguards that result in transactions that are fair and reasonable to registered investment company participants and preclude overreaching in connection with an investment company by its affiliated persons.

17. The boards of MIST and Met Series Fund have adopted procedures, as required by paragraph (e)(1) of Rule 17a–7, pursuant to which the series of each may purchase and sell securities to and from their affiliates. The Section 17 Applicants will carry out the proposed Insurance Company in-kind purchases in conformity with all of the conditions of Rule 17a–7 and each series' procedures thereunder, except that: (1) The consideration paid for the securities being purchased or sold may not be entirely cash, and; (2) the boards of MIST and Met Series Fund will not separately review each portfolio security purchased by the Replacement Funds. Nevertheless, the circumstances surrounding the proposed substitutions will be such as to offer the same degree of protection to each Replacement Fund from overreaching that Rule 17a–7 provides to them generally in

connection with their purchase and sale of securities under that Rule in the ordinary course of their business. In particular, the Insurance Companies (or any of their affiliates) cannot effect the proposed transactions at a price that is disadvantageous to any of the Replacement Funds. Although the transactions may not be entirely for cash, each will be effected based upon (1) the independent market price of the portfolio securities valued as specified in paragraph (b) of Rule 17a–7, and (2) the net asset value per share of each fund involved valued in accordance with the procedures disclosed in its respective Investment Company's registration statement and as required by Rule 22c–1 under the Act. No brokerage commission, fee, or other remuneration will be paid to any party in connection with the proposed transactions.

18. The Section 17 Applicants submit that the sale of shares of the Replacement Funds for investment securities, as contemplated by the proposed Insurance Company in-kind purchases, is consistent with the investment policy and restrictions of the Investment Companies and the Replacement Funds because (1) the shares are sold at their net asset value, and (2) the portfolio securities are of the type and quality that the Replacement Funds would each have acquired with the proceeds from share sales had the shares been sold for cash. To assure that the second of these conditions is met, Met Investors Advisory LLC, MetLife Advisers, LLC and the sub-adviser, as applicable, will examine the portfolio securities being offered to each Replacement Fund and accept only those securities as consideration for shares that it would have acquired for each such fund in a cash transaction.

19. The Section 17 Applicants submit that the proposed Insurance Company in-kind purchases, as described herein, are consistent with the general purposes of the Act as stated in the Findings and Declaration of Policy in Section 1 of the Act. The proposed transactions do not present any of the conditions or abuses that the Act was designed to prevent. The Section 17 Applicants submit that the abuses described in Sections 1(b)(2) and (3) of the Act will not occur in connection with the proposed in-kind purchases.

Conclusion

Applicants assert that for the reasons summarized above the proposed substitutions and related transactions meet the standards of Section 26(c) of the Act and are consistent with the standards of Section 17(b) of the Act and that the requested orders should be granted.

For the Commission, by the Division of Investment Management pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1737 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26830; File No. 812–13130]

John Hancock Life Insurance Company (U.S.A.), et al., Notice of Application

April 7, 2005.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application for an order pursuant to Section 26(c) of the Investment Company Act of 1940 (the "Act"), approving the substitution of securities.

APPLICANTS: John Hancock Life Insurance Company (U.S.A.) ("JHLICO USA") (formerly The Manufacturers Life Insurance Company (U.S.A.)), John Hancock Life Insurance Company (U.S.A.) Separate Account A ("JHLICO USA Account A") (formerly The Manufacturers Life Insurance Company (U.S.A.) Separate Account A), John Hancock Life Insurance Company (U.S.A.) Separate Account H ("JHLICO USA Account H") (formerly The Manufacturers Life Insurance Company (U.S.A.) Separate Account H) (JHLICO USA Accounts A and H are collectively referred to herein as the "JHLICO USA Accounts"), John Hancock Life Insurance Company of New York ("JHLICO New York") (formerly The Manufacturers Life Insurance Company of New York) and John Hancock Life Insurance Company of New York Separate Account A ("JHLICO NY Account A" and collectively with the JHLICO USA Accounts, the "Separate Accounts") (formerly The Manufacturers Life Insurance Company of New York Separate Account A) (JHLICO USA, the JHLICO USA Accounts, JHLICO New York and JHLICO NY Account A are collectively referred to herein as "Applicants").

SUMMARY OF APPLICATION: Applicants seek an order approving each of the following substitutions of shares of series of John Hancock Trust ("JHT") (formerly Manufacturers Investment Trust) (the "Substitutions"): (1) Shares of JHT 500 Index Trust for shares of each of the following series of JHT: (a) Select Growth Trust and (b) Core Value Trust; (2) shares of JHT Mid Cap Index Trust for shares of each of the following series of JHT: (a) Small-Mid Cap Trust and (b) Small-Mid Cap Growth Trust; (3) shares of JHT International Equity Index Trust A for shares of each of the following series of JHT: (a) International Equity Select Trust and (b) Global Equity Select Trust; (4) shares of JHT Investment Quality Bond Trust for shares of the following series of JHT: High Grade Bond Trust; and (5) shares of JHT U.S. Global Leaders Growth Trust for shares of the following series of JHT: Great Companies—America Trust.

FILING DATE: The Application was filed on October 19, 2004 and amended and restated on April 1, 2005 and April 5, 2005. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on April 28, 2005, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the natures of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, c/o John W. Blouch, Esq., Dykema Gossett, PLLC, 1300 I Street NW., Suite 300 West, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Jeffrey Foor, Staff Attorney, or Zandra Bailes, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

SUPPLEMENTARY INFORMATION: The following is a summary of the Application. The complete Application is available for a fee from the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (202–942–8090).

Applicants' Representations

1. JHLICO USA is a stock life insurance company incorporated in Maine in 1955 and re-domesticated under the laws of Michigan in 1992. It is authorized to transact a life insurance and annuity business in the District of Columbia and all states except New York. JHLICO USA is a wholly-owned subsidiary of The Manufacturers Life Insurance Company ("Manulife"), a stock life insurance company organized under the laws of Canada. Manulife Financial Corporation, a publicly-traded company based in Toronto, Canada, is the holding company of Manulife and its subsidiaries, collectively known as "Manulife Financial." For purposes of the Act, JHLICO USA is the depositor and sponsor of the JHLICO USA Accounts as those terms have been interpreted by the Commission with respect to variable life insurance and variable annuity separate accounts.

2. JHLICO New York is a stock life insurance company organized under the laws of New York in 1992. It is authorized to transact a life insurance and annuity business in New York. JHLICO New York is a wholly-owned subsidiary of Manulife. For purposes of the Act, JHLICO New York is the depositor and sponsor of JHLICO NY Account A as those terms have been interpreted by the Commission with respect to variable life insurance and variable annuity separate accounts.

3. JHLICO USA Account A was established in 1986 to fund variable life insurance contracts and is registered under the Act as a unit investment trust (File No. 811–4834).

4. JHLICO USA Account H was established in 1984 to fund variable annuity contracts and is registered under the Act as a unit investment trust (File No. 811–4113).

5. JHLICO NY Account A was established in 1992 to fund variable annuity contracts and is registered under the Act as a unit investment trust (File No. 811–6584).

6. JHT is organized as a Massachusetts business trust and is registered under the Act as an open-end management investment company (File No. 811–4146). JHT is a series investment company, as defined by Rule 18f–2 under the Act, and currently offers 79 separate series or portfolios, each of which has its own investment objectives and policies. The application relates to 13 of these portfolios (the "JHT Portfolios"). Shares of JHT are registered on Form N–1A under the Securities Act of 1933 Act ("1933 Act") (File No. 2–94157).

7. Shares of JHT are not offered directly to the public. Rather, they are offered to separate accounts of JHLICO USA and JHLICO New York as the underlying investment medium for variable contracts issued by such companies, including the Contracts, and to qualified pension and retirement plans within the meaning of Treasury Regulation 1.817–5(f)(3)(iii) ("Qualified Plans") and may in the future be offered to certain other eligible persons described in Treasury Application 1.817–5(f)(3) ("Other Eligible Persons"). JHT does not impose sales charges on purchases of its shares. All dividends and other distributions with respect to a portfolio's shares are reinvested in full and fractional shares of that portfolio.

8. John Hancock Investment Management Services, LLC ("JHIMS") (formerly, Manufacturers Securities Services, LLC), a wholly-owned subsidiary of JHLICO USA, serves as the investment adviser to JHT with respect to each of the JHT Portfolios. JHIMS is a Delaware limited liability company which is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act").

9. Pursuant to investment subadvisory agreements, JHIMS has retained a subadviser to provide day-to-day investment management services for each of the JHT Portfolios. The subadvisers to each of the JHT Portfolios are identified below. Each is registered as an investment adviser under the Advisers Act unless exempt from such registration. One of the subadvisers, MFC Global Investment Management (U.S.A.) Limited, a Canadian corporation ("MFC Global (U.S.A.)"), is a wholly-owned subsidiary of Manulife and an affiliate of JHIMS.

10. John Hancock Variable Series Trust I ("JH VST") is organized as a Massachusetts business trust and is registered under the Act as an open-end management investment company (File No. 811–04490). JH VST is a series investment company, as defined by Rule 18f–2 under the Act, and currently offers 30 separate series or portfolios, each of which has its own investment objectives and policies. Shares of JH VST are registered on Form N–1A under the 1933 Act (File No. 33–2081).

11. Shares of JH VST are not offered directly to the public. Rather, they are offered only to insurance companies as the underlying investment medium for variable contracts issued by such companies and to Qualified Plans and to certain Other Eligible Persons.

12. John Hancock Life Insurance Company ("JHLICO") serves as the investment adviser to JH VST with respect to its portfolios and is registered as an investment adviser under the Advisers Act. JHLICO is a wholly-owned subsidiary of John Hancock Financial Services, Inc. ("John Hancock"). John Hancock became a wholly-owned subsidiary of Manulife Financial Corporation, effective April 28, 2004. In its capacity as investment adviser to JH VST, JHLICO recommends subadvisers for the JH VST portfolios and oversees and evaluates the performance of subadvisers.

13. There are seven kinds of variable insurance contracts affected by the application (the "Contracts"). One of the Contracts is a flexible premium variable life insurance policy (the "VL Contract"); six of the Contracts are variable annuity contracts (the "VA Contracts"). Purchase payments for the VL Contracts are allocated to JHLICO USA Account A. Purchase payments for the VA Contracts are allocated to JHLICO USA Account H or JHLICO NY Account A.

14. Contract owners may allocate purchase payments to one or more subaccounts ("Subaccounts") of a Separate Account. Each Subaccount invests in shares of a portfolio of JHT, JH VST or PIMCO Variable Insurance Trust ("PIMCO VIT") (the "Underlying Portfolios"). The only Subaccounts affected by the application are those which invest in the portfolios of JHT identified below as Replaced Portfolios or Substituted Portfolios.

15. The following table identifies (i) each Contract affected by the application, (ii) the file number under the 1933 Act for each Contract, and (iii) the total number of investment options available under each Contract and the number of those investment options provided by JHT, JH VST and PIMCO VIT.

INVESTMENT OPTIONS

Contract	File No.	Total	JHT	JH VST	PIMCO VIT
VL Contract					
EPVUL	333–85284	19	18	1	0
VA Contracts					
Vantage	333–71072	73	71	1	1
Ven 20–21	333–70728	73	71	1	1
Venture III	333–70850	73	71	1	1
Vision 25	333–71074	73	71	1	1
NY Ven 24	33–79112	73	71	1	1
Ven 9	33–46217	73	71	1	1

16. After the Substitutions, the total number of Investment Options available to the VL Contract and to each of the VA Contracts will be 73.

17. The application covers eight Replaced Portfolios. Of these, seven were created expressly for and were sold only to Subaccounts used to fund the VL Contract. The VL Contract was created at the request of, and has been sold as a proprietary product exclusively by, an entity that is not affiliated with Applicants. Applicants understand that this unaffiliated entity has ceased to actively market the VL Contract. At December 30, 2004, there were 85 VL Contracts and 25 VA Contracts.

18. JHT stopped selling shares of the Great Companies—America Trust on May 1, 2004 and shares of Select Growth Trust, Core Value Trust, Small-Mid Cap Trust, Small-Mid Cap Growth Trust and Global Equity Select Trust on November 29, 2004.

19. Applicants seek an order permitting substitutions of Substituted Portfolios for Replaced Portfolios as indicated in the following table. Great Companies—America Trust has only Series II shares outstanding, and Series II shares of U.S. Global Leaders Growth Trust will be substituted for those shares. Each of the other Replaced Portfolios has only Series I shares outstanding, and Series I shares of the corresponding Substituted Portfolio will be substituted for those shares.

Substitution	Replaced portfolio	Substituted portfolio
One	Select Growth Trust	500 Index Trust.
Two	Core Value Trust	500 Index Trust.
Three	Small-Mid Cap Trust	Mid Cap Index Trust.
Four	Small-Mid Cap Growth Trust	Mid Cap Index Trust.
Five	High Grade Bond Trust	Investment Quality Bond Trust.
Six	Global Equity Select Trust	International Equity Index Trust A.
Seven	International Equity Select Trust	International Equity Index Trust A.
Eight	Great Companies—America Trust	U.S. Global Leaders Growth Trust.

All of the Replaced and Substituted Portfolios are existing portfolios of JHT, except for the International Equity Index Trust A, which will be a newly created portfolio of JHT. It will have the same investment objective, policies and risks and the same subadviser as the International Equity Index Fund of JH VST ("JH VST International Equity Index Fund") and, subject to the approval of the shareholders of that JH VST International Equity Index Fund, will succeed to all the assets and liabilities of that portfolio at the same time that the Substitution is effective.

20. The following table identifies the subadviser for each of the JHT Portfolios:

Portfolio	Subadviser
Select Growth Trust	Roxbury Capital Management, LLC.
Core Value Trust	Rorer Asset Management, LLC.
Small-Mid Cap Trust	Kayne Anderson Rudnick Investment Management, LLC.
Small-Mid Cap Growth Trust	Navellier Management, Inc.
High Grade Bond Trust	Allegiance Capital, Inc.
Global Equity Select Trust	Lazard Asset Management LLC.
International Equity Select Trust	Lazard Asset Management LLC.
Great Companies—America Trust	Great Companies, L.L.C.
500 Index Trust	MFC Global (U.S.A.).
Mid Cap Index Trust	MFC Global (U.S.A.).
Investment Quality Bond Trust	Wellington Management Company, LLP.
International Equity Index Trust A	MFC Global SSgA Funds Management, Inc.
U.S. Global Leaders Growth Trust	Sustainable Growth Advisers, L.P.

21. Select Growth Trust's investment objective is to seek long-term growth of capital. It invests primarily in large cap equity securities. The subadviser defines large cap equity securities as securities of companies with at least $2 billion in market cap. The portfolio may also invest up to 20% of its assets in mid cap securities and in securities of

any market cap where the subadviser believes there are prospects for significant appreciation in the price of the security. Core Value Trust's investment objective is to seek long-term capital appreciation. Under normal market conditions, the portfolio invests primarily in equity and equity-related securities of companies with market capitalization greater than $5 billion at the time of purchase. 500 Index Trust's investment objective is to seek to approximate the aggregate total return of a broad U.S. domestic equity market index. It invests, under normal market conditions, at least 80% of its net assets (plus any borrowing for investment purposes) in (a) the common stocks that are included in the S&P 500 Index and (b) securities (which may or may not be included in the S&P 500 Index) that its subadviser believes as a group will behave in a manner similar to the index.

22. Small-Mid Cap Trust's investment objective is to achieve long-term capital appreciation, with dividend income as a secondary consideration. Under normal market conditions, the portfolio invests at least 80% of its assets (plus any borrowing for investment purposes) in small and mid cap companies that the subadviser believes are of high quality (small and mid cap companies are those whose market cap does not exceed the market cap of the largest company included in the Russell 2500 Index at the time of purchase by the portfolio). Small-Mid Cap Growth Trust's investment objective is to seek long-term growth of capital. The portfolio invests primarily in equity securities of fast growing companies that offer innovative products, services, or technologies to a rapidly expanding marketplace. Under normal market conditions, the portfolio will invest at least 80% of its assets (plus any borrowings for investment purposes) in securities of small to mid cap companies, currently defined as companies with $2 billion to $10 billion in market capitalization at the time of purchase. Mid Cap Index Trust's investment objective is to seek to approximate the aggregate total return of a mid cap U.S. domestic equity market index. Under normal market conditions, the portfolio invests 80% of its net assets (plus any borrowings for investment purposes) in (a) the common stocks that are included in the S&P 400 Index and (b) securities (which may or may not be included in the S&P 400 Index) that the subadviser believes as a group will behave in a manner similar to the index.

23. High Grade Bond Trust's investment objective is to maximize total return, consistent with the preservation of capital and prudent investment management. Under normal market conditions, the portfolio invests at least 80% of its net assets (plus any borrowings for investment purposes) in investment grade, fixed income securities of varying maturities. Investment Quality Bond Trust's investment objective is to provide a high level of current income consistent with the maintenance of principal and liquidity. Under normal market conditions, the portfolio invests at least 80% of its net assets (plus any borrowings for investment purposes) in investment grade bonds. The portfolio tends to focus on corporate bonds and U.S. government bonds with intermediate to longer term maturities.

24. Global Equity Select Trust's investment objective is to seek long-term capital appreciation. Under normal market conditions, the portfolio generally invests at least 80% of its total assets (plus any borrowings for investment purposes) in equity securities, including American and Global Depository Receipts and common stocks of relatively large U.S. and non-U.S. companies with market capitalizations in the range of the Morgan Stanley Capital International World I Index that its subadviser believes are undervalued based on their earnings, cash flow or asset values. International Equity Select Trust's investment objective is to seek long-term capital appreciation. Under normal market conditions, it invests at least 80% of its net assets (plus any borrowings for investment purposes) in equity securities. The portfolio will invest primarily in American Depository Receipts and common stocks, of relatively large non-U.S. companies with market capitalization in the range of the Morgan Stanley Capital International Europe, Australia and Far East Index. International Equity Index Trust A's investment objective is to seek to track the performance of a broad-based equity index of foreign companies primarily in developed countries and, to a lesser extent, in emerging market countries. The portfolio seeks to invest more than 80% of its assets in securities included in the Morgan Stanley Capital International All Country World Excluding U.S. Index, an international stock market index that, as of December 31, 2004, included approximately 1,892 securities listed on the stock exchanges of 49 developed and emerging market countries (but not the United States).

25. Great Companies—America Trust's investment objective is to seek long-term growth of capital. It is non-diversified. The portfolio invests principally in large cap stocks, generally those with a market cap in excess of $15 billion. U.S. Global Leaders Growth Trust's investment objective is to seek long-term growth of capital. It is non-diversified. Under normal market conditions, the portfolio invests at least 80% of its assets primarily in stocks of U.S. Companies with multinational operations that exhibit sustainable growth characteristics. The subadviser to U.S. Global Leaders Growth Trust seeks to identify companies with superior long-term earnings prospects. The portfolio invests in large capitalization companies (companies in the capitalization range of the S&P 500 Index).

26. The following table contains information about the net assets of the portfolios as of December 31, 2004:

Replaced portfolio	Total net assets ($)	Net assets attributable to contracts ($)	Substituted portfolio	Total net assets
Select Growth Trust	3,550,498	639,800	500 Index Trust	$1,263,351,026
Core Value Trust	3,590,295	697,594	500 Index Trust	1,263,351,026
Small-Mid Cap Trust	2,503,291	376,745	Mid Cap Index Trust	247,296,621
Small-Mid Cap Growth Trust	2,991,474	243,506	Mid Cap Index Trust	247,296,621
High Grade Bond Trust	5,884,918	733,261	Investment Quality Bond Trust	472,243,219
Global Equity Select Trust	3,550,498	103,319	International Equity Index Trust A	*
International Equity Select Trust	2,871,718	492,787	International Equity Index Trust A	*
Great Companies—America Trust	2,587,538	306,364	U.S. Global Leaders Growth Trust	397,513,438

*The International Equity Index Trust A will be a newly created portfolio of JHT, and will, subject to the approval of shareholders of JH VST International Equity Index Fund, succeed to all the assets and liabilities of that portfolio attributable to its Series I and II shares ("JH VST Combination"). As of December 31, 2004, total net assets of the JH VST International Equity Fund were $103,030,000.

The shareholders of each of the Replaced Portfolios are their Subaccounts and JHLICO USA.

27. The shareholders of the Strategic Growth Trust, another portfolio of JHT, with net assets of $387,915,360 at December 31, 2004, have approved its combination with U.S. Global Leaders Growth Trust as of the effective time of the Substitution.

28. The following tables set forth the expense ratios for the shares of each of the Replaced and Substituted Portfolios affected by the Substitutions (as a percentage of average net assets) for the year ended December 31, 2004.

	Select Growth Trust (Series I Shares) (percent)	Core Value Trust (Series I Shares) (percent)	500 Index Trust (Series I Shares) (percent)
Management Fees	0.80	0.80	0.38
Distribution (12b–1) Fees	0.15	0.15	0.15
Other Expenses	0.88	0.61	0.03
Total Annual Expenses	1.83	1.56	0.56
Fee Waiver/Expense Reimbursement	(0.59)	(0.39)	(0.00)
Net Annual Expenses	1.24	1.17	0.56

	Small-Mid Cap Trust (Series I Shares) (percent)	Small-Mid Cap Growth Trust (Series I Shares) (percent)	Mid Cap Index Trust (Series I Shares) (percent)
Management Fees	0.95	0.80	0.38
Distribution (12b–1) Fees	0.15	0.15	0.15
Other Expenses	0.13	1.02	0.04
Total Annual Expenses	1.23	1.97	0.57
Fee Waiver/Expense Reimbursement	(0.00)	(0.56)	(0.00)
Net Annual Expenses	1.23	1.41	0.57

	High Grade Bond Trust (Series I Shares) (percent)	Investment Quality Bond Trust (Series I Shares) (percent)
Management Fees	0.56	0.50
Distribution (12b–1) Fees	0.15	0.15
Other Expenses	0.17	0.09
Total Annual Expenses	0.88	0.74
Fee Waiver/Expense Reimbursement	(0.07)	(0.00)
Net Annual Expenses	0.81	0.74

	Global Equity Select Trust (Series I Shares) (percent)	International Equity Index Trust A (Series I Shares) (percent)	
		JH VST International Equity Index Fund	JHT International Equity Index Trust A (estimated)
Management Fees	0.90	0.15	0.55
Distribution (12b–1) Fees	0.15	0.40	0.05
Other Expenses	0.75	0.17	0.06
Total Annual Expenses	1.80	0.72	0.66
Fee Waiver/Expense Reimbursement	(0.45)	(0.00)	(0.00)
Net Annual Expense	1.35	0.72	0.66

	International Equity Select Trust (Series I Shares) (percent)	International Equity Index Trust A (Series I Shares) (percent)	
		JH VST International Equity Index Fund	JHT International Equity Index Trust A (estimated)
Management Fees	0.90	0.15	0.55

	International Equity Select Trust (Series I Shares) (percent)	International Equity Index Trust A (Series I Shares) (percent)	
		JH VST International Equity Index Fund	JHT International Equity Index Trust A (estimated)
Distribution (12b–1)	0.15	0.40	0.05
Fees:			
Other Expenses	0.26	0.17	0.06
Total Annual Expenses	1.31	0.72	0.66
Fee Waiver/Expense Reimbursement	(0.11)	(0.00)	(0.00)
Net Annual Expenses	1.20	0.72	0.66

	Great Companies—America Trust (Series II Shares) (percent)	U.S. Global Leaders Growth Trust (Series II Shares) (percent)
Management Fees	0.75	0.61
Distribution (12b–1)	0.35	0.35
Fees:		
Other Expenses	1.02	0.73
Total Annual Expenses	2.12	1.69
Fee Waiver/Expense Reimbursement	(0.19)	(0.23)
Net Annual Expenses	1.93	1.46

29. The following table contains performance information for the indicated periods ended December 31, 2004 for the shares of each of the Replaced and Substituted Portfolios affected by the Substitutions, except that in the case of the International Equity Index Trust A, the performance shown is for the NAV shares of JH VST International Equity Index Fund. Series I shares of JH VST International Equity Index Fund were not offered prior to May 3, 2004. The performance of the Series I shares of JH VST International Equity Index Fund will be lower than the performance of the NAV shares because of its 12b–1 Fee. JH VST International Equity Index Fund will be the accounting survivor of the JH VST Combination.

Portfolio	One year (percent)	Five year (percent)	Ten year (percent)	Life of portfolic (percent)	Date first available
Select Growth Trust (Series I Shares)	2.62	N/A	N/A	−4.54	07/16/01
Core Value Trust (Series I Shares)	3.27	N/A	N/A	−1.05	07/16/01
500 Index Trust (Series I Shares)	10.26	N/A	N/A	−3.02	05/01/00
Small-Mid Cap Trust (Series I Shares)	7.15	N/A	N/A	1.13	07/16/00
Small-Mid Cap Growth Trust (Series I Shares)	13.70	N/A	N/A	−2.50	07/16/01
Mid Cap Index Trust (Series I Shares)	15.83	N/A	N/A	7.35	05/01/00
High Grade Bond Trust (Series I Shares)	2.77	N/A	N/A	5.20	07/16/01
Investment Quality Bond Trust (Series I Shares)	4.81	7.74	7.63	N/A	06/18/85
Global Equity Select Trust (Series I Shares)	11.86	N/A	N/A	4.09	07/16/01
International Equity Select Trust	18.94	N/A	N/A	7.71	07/16/01
JH VST International Equity Index Fund NAV Shares	20.24	−0.95	5.38	N/A	05/02/88
Series I Shares	N/A	N/A	N/A	18.45	05/03/2004
Great Companies—America Trust (Series II Shares)	1.81	N/A	N/A	9.82	08/04/2003
U.S. Global Leaders Growth Trust (Series II Shares)	N/A	N/A	N/A	5.68	05/03/2004

30. Applicants represent that each of the Substitutions will better serve the interests of the Contract owners because it will provide those owners with an investment option that: (i) Permits them to pursue an investment option that is comparable to their current investment option in terms of pursuing long-term investment goals without becoming subject to greater overall risks; (ii) is much larger; (iii) has a lower advisory fee and overall expense ratio; and (iv) has better overall or short-term historical performance.

31. Applicants anticipate that each of the Substitutions will be effected by having each Subaccount that invests in a Replaced Portfolio redeem its shares of that Portfolio for cash at the net asset value calculated on the Substitution Date and purchase shares of the Substituted Portfolio for cash at net asset value at the same time. Because each of the Substitutions will take place at the relative net asset values determined on the Substitution Date in accordance with Section 22(c) of the Act and Rule 22c–1 thereunder, it will have no financial impact on any Contract owner. In connection with the completion of each of the Substitutions, JHLICO USA will withdraw its seed money from each of the Replaced Portfolios in which it has seed money, and JHT will terminate those Portfolios.

32. Applicants filed with the Commission on October 22, 2004, and provided to Contract owners, a prospectus supplement that described the Substitutions and explained that Applicants had filed with the Commission an application for an order approving the Substitutions, that, if the order is issued, will take place as of the close of regularly scheduled trading on the New York Stock Exchange on April 29, 2005 (the "Substitution Date") and that the Contract owners affected by the Substitutions will be sent written confirmations (described below) informing them of the Substitutions.

33. The disclosure advised Contract owners affected by the Substitutions that they may transfer Contract values, prior to the Substitutions, from Subaccounts investing in the Replaced Portfolios to Subaccounts investing in other investment options available under the applicable Contract, and for 30 days following the Substitution Date, from Subaccounts investing in the Substituted Portfolios to Subaccounts investing in other investment options available under the applicable Contract. The disclosure further advised Contract owners that such transfers may be made without the imposition of any transfer charges, will not be counted for purposes of determining the numbers of permitted transfers or permitted free transfers under a Contract or the Disruptive Short-Term Trading Policy and will not be subject to any maximum amount limitations otherwise applicable under a Contract or the Disruptive Short-Term Trading Policy. A second prospectus supplement filed with the Commission in March 2005 provided Contract owners with substantially the same updated information.

34. Applicants represent that all expenses in connection with the Substitutions, including any brokerage commissions and legal, accounting and other fees and expenses, will be paid by JHLICO USA and JHLICO New York and will not be borne, directly or indirectly, by the Replaced Portfolios, the Substituted Portfolios or Contract owners. Affected Contract owners will not incur any fees or charges as a result of the Substitutions. The Substitutions will not cause the fees and charges under the Contracts currently being paid by Contract owners to be greater after the Substitutions than they were before the Substitutions.

35. Applicants further represent the Substitutions will not have any impact on the insurance benefits that JHLICO USA and JHLICO New York are obligated to provide under the Contracts or on the rights of Contract owners and the other obligations of JHLICO USA and JHLICO New York under the Contracts. The Substitutions will not have a tax impact on Contract owners.

36. Applicants also represent that the Substitutions involving the International Equity Index Trust A will not be effected if the JH VST Combination is not approved by shareholders of JH VST International Equity Index Fund.

Applicants' Legal Analysis

1. Applicants request an order pursuant to Section 26(c) of the Act approving each of the Substitutions. Section 26(c) of the Act makes it unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission approves the substitution. The Commission will approve such a substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Applicants assert that the purposes, terms and conditions of the Substitutions are consistent with the principles and purposes of Section 26(c) and do not entail any of the abuses that Section 26(c) is designed to prevent. Substitution is an appropriate solution to the lack of Contract owner interest in and higher relative expenses of the Replaced Portfolios. Applicants do not expect that any Substitution will have a significant impact on the expense ratio of the Substituted Portfolio and believe that each Substituted Portfolio will serve Contract owner interests better than the Replaced Portfolio because it provides a comparable investment option while being larger and having a lower expense ratio. Each of the Contracts reserves to JHLICO USA or JHLICO New York, as the case may be, the right to effect such substitutions, and each of JHLICO USA and JHLICO New York has made disclosure of this reserved right in the prospectuses for the Contracts.

3. Applicants submit that the Substitutions will not result in the type of costly forced redemptions that Section 26(c) was intended to guard against and, for the following reasons, are consistent with the protection of investors and the purposes fairly intended by the Act:

(a) The Substitutions will make available under the Contracts continuity of investment objectives and expectations.

(b) Contract owners who have allocated Contract values to one or more of the Replaced Portfolios will be provided with advance notice of the Substitutions and will have the opportunity, from the date of such advance notice until 30 days after the Substitution Date, to transfer Contract values to which a Substitution applies from a Subaccount investing in a Replaced Portfolio or a Substituted Portfolio to other available investment options under a Contract. Such transfers may be made without the imposition of any transfer charges, will not be counted for purposes of determining the numbers of permitted transfers or permitted free transfers under a Contract or applicable short-term trading policy and will not be subject to any maximum amount limitations otherwise applicable under a Contract or applicable short-term trading policy.

(c) The Substitutions will be effected at the respective net asset values of the shares of the Replaced Portfolios and their corresponding Substituted Portfolios in conformity with Section 22(c) of the Act and Rule 22c–1 thereunder, without the imposition of any transfer or similar charge by Applicants and with no change in the amount of any Contract owner's Contract value.

(d) The expenses of the Substitutions will be paid by JHLICO USA and JHLICO New York and will not be borne, directly or indirectly, by the Replaced Portfolios, the Substituted Portfolios or Contract owners.

(e) The Substitutions will not have any impact on the insurance benefits that JHLICO USA and JHLICO New York are obligated to provide under the Contracts or on the rights of Contract owners and the other obligations of JHLICO USA and JHLICO New York under the Contracts.

(f) The Substitutions will not cause the fees and charges under the Contracts currently being paid by Contract owners to be greater after than before the Substitutions and will not have any tax impact on Contract owners.

(g) Within five days after a Substitution, JHLICO USA and JHLICO New York will send to Contract owners written confirmation that the Substitution has occurred.

(h) For each fiscal period (not to exceed a fiscal quarter) during the 24 months following the date of each Substitution, JHLICO USA or JHLICO NY, as appropriate, will adjust the Contract values invested in the Substituted Portfolio as a result of the Substitution, to the extent necessary to effectively reimburse the affected Contract owners for their proportionate share of any amount by which the annual rate of the Substituted Portfolio's total operating expenses (after any

expense waivers or reimbursements) for that fiscal period, as a percentage of the Portfolio's average daily net assets, plus the annual rate of any asset-based charges (excluding any such charges that are for premium taxes) deducted under the terms of the owner's Contract for that fiscal period, exceed the sum of the annual rate of the corresponding Replaced Portfolio's total operating expenses, as a percentage of such replaced Portfolio's average daily net assets, for the twelve months ended December 31, 2004, plus the annual rate of any asset-based charges (excluding any such charges that are for premium taxes) deducted under that Contract for such twelve months.

Conclusion

For the reasons and upon the facts set forth in the application, Applicants submit that the requested order meets the standards set forth in Section 26(c) and respectfully request that the Commission issue an order pursuant to Section 26(c) of the Act approving the Substitutions.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1745 Filed 4–12–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27957; International Series Release No. 1284]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

April 7, 2005.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by May 2, 2005, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After May 2, 2005, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Scottish Power plc and Dornoch International Insurance Limited (70–10261)

Scottish Power plc ("ScottishPower"), a foreign registered holding company, 1 Atlantic Quay, Glasgow G2 8SP, Scotland, UK, and Dornoch International Insurance Limited ("DIIL"), 38/39 Fitzwilliam Square, Dublin 2, Ireland, a new captive insurance company subsidiary of ScottishPower, (collectively, "Applicants"), have filed an application-declaration, as amended ("Application"), under sections 12(b), 13(b), and 33(c) of the Act and rules 45, 54, 89, 90 and 91 under the Act.

ScottishPower Investments Limited ("ScottishPower Investments") is the direct parent of ScottishPower Insurance Limited ("SPIL"), an indirect insurance company subsidiary of ScottishPower. ScottishPower Investments is a wholly-owned direct subsidiary of ScottishPower UK, plc ("SPUK"), a foreign utility subsidiary of ScottishPower. SPIL operates as an insurance company domiciled in the Isle of Man and serves as a captive insurer for the UK-based members of the ScottishPower system. SPIL currently is authorized to provide property damage, general liability, employer's liability, motor own damage, and motor liability insurance. DIIL is also a wholly-owned direct subsidiary of ScottishPower Investments.[1]

Applicants are seeking approval to operate DIIL. DIIL will assume the insurance duties currently performed by SPIL on behalf of ScottishPower and also begin to provide insurance services to PacifiCorp, the U.S.-based public utility subsidiary of the ScottishPower system.

On an annual basis, ScottishPower system companies spend approximately $40 million for the purchase of commercial insurance and related services. Under the current insurance program, system companies maintain commercial insurance policies with underlying deductibles of $1 million per event for general liability coverage and $7.5 million for property coverage. Losses below these deductibles are self-insured by system companies whereas losses in excess of these deductibles are paid by the commercial insurance. ScottishPower may from time to time choose to purchase commercial insurance in place of, or to reduce, the deductible or self-insurance to meet their strategic goals and objectives. Commercial premiums and the deductibles and self-insured retained risks are then allocated to subsidiaries owning a given risk based on such factors as number of automobiles, payroll, revenues, total property values, product throughput, as well as loss history.

ScottishPower intends that SPIL would eventually be dissolved after DIIL operates for approximately one year. DIIL intends to provide property damage and liability insurance coverage of all or significant portions of the deductibles in many of PacifiCorp's current insurance policies, and to provide coverage for activities which the commercial insurance industry carriers will no longer provide, *e.g.*, overhead distribution and transmission line property damage insurance.

Premiums for the proposed expansion of the insurance program for the first year were determined to equal the aggregate losses for system companies plus administrative expenses. Aggregate losses for general liability were estimated using actuarial methods.

DIIL would continue to analyze the commercial insurance bought by the ScottishPower system companies, and coordinate the coverage it provides to minimize the risk of loss to the system. Supplementing its primary role of underwriting system retained risk, DIIL may also replace or reduce certain insurance sold to ScottishPower system companies by traditional insurance providers in the areas of property damage and general liability. An actuarial analysis will be performed to determine the proper premiums consistent with methods used to determine the retained risk premium. To the extent traditional insurance programs are reduced, DIIL may attempt to obtain equal levels of loss protection and coverage in the reinsurance market. Applicants state that DIIL will apply stringent credit standards to all reinsurance counterparties.

[1] DIIL was originally incorporated as Dornoch Risk International Limited ("DRIL") on June 30, 2004. DRIL changed its name to DIIL by resolution at its December 10, 2004 board meeting and this was effected by the Irish Registrar of Companies on Jan. 20, 2005.

DIIL will not be operated to generate profits beyond what is necessary to maintain adequate reserves. To the extent that premiums and interest earned exceed current claims and expenses, an appropriate reserve would be accumulated to respond in years when claims and expenses exceed premiums. To the extent that losses over the long term are lower than projected, DIIL could correspondingly lower premiums, thereby reducing the premium expenses that would otherwise by paid to DIIL.

ScottishPower would make an initial equity contribution to DIIL of approximately $40–60 million. Beyond the initial equity contribution and funding of DIIL, ScottishPower may provide any subsequently required capital contributions through additional equity and or debt purchases exempt from the Act. PacifiCorp is not being asked to provide any capital for DIIL's operations. DIIL would set premiums and operate pursuant to rules 90 and 91 under the Act. Premium costs would closely track loss experience and be sufficient to cover DIIL's underwriting costs and future claim payments. The returns from the investment of this capital would be used to pay for DIIL's operating costs and can be used to reduce future premium costs.

Applicants maintain that with maturation DIIL may also be able to provide coverage to a wider number of PacifiCorp activities beyond property damage and general liability. For example, DIIL may seek to provide Workers Compensation coverage. ScottishPower requests a reservation of jurisdiction over the underwriting of additional insurance activities, *i.e.*, other than for property damage and general liability, pending completion of the record.

DIIL will be domiciled in Dublin, Ireland and managed by a professional captive management company, Aon Insurance Managers (Dublin) Ltd, which will perform all the management and administrative services for DIIL. Aon Insurance Managers (Dublin) Ltd is a wholly-owned indirect subsidiary of insurance broker Aon Corporation and is not an affiliate of PacifiCorp or ScottishPower. DIIL would be licensed by the Irish Financial Services Regulatory Authority ("IFSRA"). To receive this license, DIIL has had to meet numerous IFSRA standards including submission of a satisfactory business plan, financial projections, risk management measures and corporate governance standards. DIIL must also meet numerous ongoing IFSRA standards to continue in good standing, including the meeting of established solvency margin, technical reserves and annual audit of financial results requirements.

PNM Resources, Inc., et al. (70–10285)

PNM Resources, Inc. ("PNM Resources"), Alvarado Square, Albuquerque, NM 87158, a registered holding company, Cascade Investment, L.L.C. ("Cascade"), 2365 Carillon Point, Kirkland, WA 98033, a limited liability company formed under the laws of the State of Washington, and William H. Gates III ("Mr. Gates"), One Microsoft Way, Redmond, WA 98052, Cascade's sole member (collectively, "Applicants"), have filed an application-declaration ("Application") under sections 6(a), 7, 9(a)(1), 9(a)(2), 10, 11, 12(e) and 13(b) of the Act and rules 51, 54, 62–65, 90 and 91 under the Act.

PNM Resources proposes to acquire all of the outstanding voting securities of TNP Enterprises, Inc. ("TNP Enterprises"), a public utility holding company claiming exemption by rule 2 under the Act (the acquisition is referred to as the "Transaction"). TNP Enterprises has subsidiary electric utility operations in Texas and New Mexico conducted by Texas-New Mexico Power Company ("TNMP"), its public utility subsidiary. Further, as described below Cascade currently owns about 8.68% of the outstanding common stock of PNM Resources. As a result of this preexisting stock ownership, Cascade and Mr. Gates will indirectly acquire 5% or more of the outstanding voting securities of TNMP in the Transaction. Accordingly, Cascade and Mr. Gates also seek approval under Sections 9(a)(2) and 10 of the Act for their participation in the Transaction.[2]

I. Parties to the Transaction

A. PNM Resources and Its Subsidiaries

PNM Resources became an exempt public utility holding company on December 31, 2001, and conducts its operations consistent with the order of the New Mexico Public Regulation Commission ("NMPRC") which authorized the holding company structure. Except for certain corporate support services provided to its subsidiaries at cost pursuant to that order, PNM Resources conducts no business operations other than as a holding company. PNMR Services Company ("Services") is a subsidiary service company, which provides services at cost to the subsidiaries of PNM Resources. PNM Resources filed a notice of registration under the Act on December 30, 2004, and transferred its service functions to Services on January 1, 2005. PNM Resources reported operating revenues of $1,604,792,000 and operating income of $112,898,000, for the year ended December 31, 2004; PNM Resources had assets of $3,487,635,000 as of December 31, 2004.

PNM Resources' only public utility company subsidiary is Public Service Company of New Mexico ("PNM"), a New Mexico corporation. PNM is an electric and gas public utility company. It is engaged in the generation, transmission, and distribution of electric energy at retail in the State of New Mexico and makes sales for resale ("wholesale" sales) of electricity in interstate commerce. PNM is also engaged in the distribution of natural gas in the State of New Mexico, which includes some off-system wholesale sales of natural gas. PNM had electric revenues for 2004 of $558,412,000, excluding wholesale sales. Its 2004 electric wholesale sales were $554,634,000; natural gas operating revenues for 2004 were $490,921,000.

Through two of its subsidiaries, Luna Power Company LLC, a Delaware limited liability company, and PNMR Development & Management Corporation, a New Mexico corporation, PNM Resources owns a one-third interest in the Luna Energy power generation facility under development near Deming, New Mexico. When complete the project will consist of a 570 MW combined cycle gas-fired generating plant.

PNM Resources' current nonutility activities are conducted through Avistar, Inc. ("Avistar"), a company engaged solely in developing and marketing power system technologies. PNM Resources has the following inactive direct nonutility subsidiaries: EIP Refunding Corporation, PNM Electric & Gas Services, Inc., Sunbelt Mining Co. Inc., Sunterra Gas Gathering Company, and Sunterra Gas Processing Company. PNM Resources also has the following indirect inactive nonutility subsidiaries: Gas Company of New Mexico (directly owned by Sunbelt Mining Co. Inc.), Meadows Resources, Inc. (directly owned by PNM) and its subsidiaries, Bellamah Associates, Ltd., Bellamah Community Development, Bellamah Holding Company, Bellamah Investors Ltd., MCB Financial Group and Republic Holding Company. PNM also factors its receivables through a

[2] A notice in this matter was previously issued by the Commission concerning PNM Resources' proposal to amend its restated articles of incorporation ("Amendment"). In the same release, the Commission also issued an order authorizing PNM Resources to solicit proxies relating to the Amendment. *PNM Resources, Inc.*, Holding Co. Act Release No. 27954 (March 30, 2005).

financing subsidiary, PNM Receivables Corporation, but does not offer the service to non-affiliates.

PNM is subject to the jurisdiction of the NMPRC with respect to its retail electric and gas rates, service, accounting, issuance of securities, construction of major new generation and transmission facilities and other matters regarding retail utility services provided in New Mexico. PNM's principal business segments are wholesale operations and utility operations. Utility operations include Electric Services ("Electric"), Transmission Services ("Transmission") and Gas Services ("Gas"). In addition, PNM owns Merchant Plant (authorized power generation facilities that are not certified by the NMPRC to provide service to New Mexico retail customers and thus are not included in rate base) that is subject to a settlement agreement approved by the NMPRC, described below. PNM serves approximately 471,000 natural gas customers and 413,000 electric customers in New Mexico.

PNM's wholesale operations consist of the generation and sale of electricity into the wholesale market based on three product lines that include long-term contracts, forward sales and short-term sales. The source of these sales is supply created by selling energy not needed at the time by retail customers as well as the capacity of PNM's generating plant investment excluded from retail rates. The "regulated generation" (generation in rate base), "unregulated generation" (certain generation excluded from rate base) and "Merchant Plant" (including certain generation excluded from rate base) are jointly dispatched.

Electric consists of the distribution and generation of electricity for retail electric customers in New Mexico. PNM provides retail electric service to a large area of north central New Mexico, including the cities of Albuquerque and Santa Fe, and certain other areas of New Mexico. PNM owns or leases generation located in the States of Arizona and New Mexico within the Western Electricity Coordinating Council ("WECC") [3] region, a National Electric Reliability Council region including much of the Western United States and portions of Canada and Mexico. PNM is also interconnected with the Southwest Power Pool. PNM experienced a peak electrical demand on its system of 1655 MW in 2004. PNM owns or leases 1729 MW of generating capacity. Additional capacity is purchased from third parties under certain power purchase agreements that may be accounted for as leases, for a total of 2417 MW available capacity.

Transmission consists of the transmission of electricity over transmission lines owned or leased by PNM, interconnected with other utilities in New Mexico and south and east into Texas, west into Arizona and north into Colorado and Utah. PNM owns or leases approximately 2,900 circuit miles of transmission lines. PNM owns and operates in excess of 8400 miles of distribution lines excluding street lighting in New Mexico.

The PNM Gas segment includes the transportation and distribution of natural gas to end users, including end users in most of the major communities in New Mexico, including two of New Mexico's three largest metropolitan areas, Albuquerque and Santa Fe. The Gas Segment operates as an integrated system and includes approximately 11,840 miles of natural gas distribution lines.

Applicants state that the Merchant Plant owned by PNM constitutes utility assets within the meaning of the Act,[4] and will be available through joint dispatch to support service to the retail customers of PNM. PNM's Merchant Plant activities are governed by a Global Electric Settlement Agreement ("Global Settlement") that was entered into on October 10, 2002, among PNM, the NMPRC staff, the New Mexico Attorney General, and other consumer groups.[5]

B. TNP Enterprises and Its Subsidiaries

TNP Enterprises was organized as a holding company in 1983 and transacts business through its subsidiaries. On April 7, 2000, under an Agreement and Plan of Merger among TNP Enterprises, ST Acquisition Corp. ("ST Corp.") and SW Acquisition, the parent of ST Corp., ST Corp. merged with and into TNP Enterprises (the "Merger"). TNP Enterprises is the surviving corporation in the Merger, and is wholly-owned by SW Acquisition.

TNP Enterprises' principal operations are conducted through two wholly-owned subsidiaries: Texas-New Mexico Power Company ("TNMP") and First Choice Power Special Purpose, L.P.[6] TNMP is a state regulated utility operating in Texas and New Mexico. In Texas, TNMP provides regulated transmission and distribution services under legislation that established retail competition in Texas. For the years ending December 31, 2004, TNP reported operating revenues were $718,880,000 and operating income of $109,216,000; TNP Enterprises reported assets of $1,291,937,000 as of December 31, 2004.

In New Mexico, TNMP provides electricity service that includes transmitting, distributing, purchasing, and selling electricity to its New Mexico customers. The TNMP utility assets located in New Mexico are connected with the PNM system and operate as a sub-area of the PNM control area. Wholesale power transactions involving the TNMP New Mexico assets are scheduled through PNM's control center.

TNMP's Texas operations lie entirely within the Electric Reliability Council of Texas ("ERCOT") region. ERCOT is the independent system operator that is responsible for maintaining reliable operations of the bulk electric power supply system in the ERCOT region, which is located entirely within Texas and serves about 85% of the electrical load in Texas. First Choice was organized in 2000 to act as TNMP's affiliated retail electric provider, as required by the Texas restructuring legislation that requires competitive access to electricity supplies.

TNMP has two inactive subsidiaries: Texas Generating Company, LP ("TGC"), a Texas limited partnership, and Texas Generating Company II, LLC ("TGC II"), a Texas limited liability company. TNMP formed TGC and TGC II as Texas corporations to finance construction of TNP One, formerly its sole generation facility. Until May 2001, TNMP owned TNP One together with TGC and TGC II. At that time, TNMP converted TGC and TGC II to their

[3] The WECC was formed on April 18, 2002 by the merger of the Western Systems Coordinating Council, the Southwest Regional Transmission Council and the Western Regional Transmission Association. It coordinates and supports electric system reliability and open power transmission access throughout its service area, encompassing 1.8 million square miles.

[4] PNM Resources to date has no aggregate investment in any exempt wholesale generators or foreign utility companies"), as defined in sections 32 and 33 of the Act, respectively. Applicants state that in *PNM Resources, Inc.*, Holding Co. Act Release No. 27934 (December 30, 2004) ("December Order"), the Commission found the electric utility assets of PNM to constituted an integrated system.

[5] The Global Settlement provides for, among other things, the following: (1) Joint support for the repeal of a majority of the New Mexico Electric Utility Industry Restructuring Act of 1999; (2) PNM's retail electric rates through 2007; (3) generation resources for retail loads; and (4) PNM's participation and financing of Merchant Plant activities and the eventual transfer of Merchant Plant out of PNM.

[6] First Choice Power Special Purpose, L.P. is a bankruptcy remote special purpose entity certificated retail electric provider ("REP") in Texas to which the original REP certificate of First Choice Power, Inc. and its price to beat customers were transferred under the order of the Public Utility Commission of Texas. A new certicate was granted to First Choice Power, Inc., which is now First Choice Power, L.P., also a direct subsidiary of TNP Enterprises. These entities are collectively referred to as "First Choice."

present forms and consolidated the ownership of TNP One into TGC to comply with restructuring legislation. Neither TNMP nor TNP Enterprises any longer owns, directly or indirectly, any interest in generating plants. PNM Resources proposes to retain these subsidiaries in their present inactive status. TNP Enterprises reported a net loss for calendar year 2004 of $75,603 and negative shareholder equity of $29,680,000.

Effective January 1, 2002, Texas restructuring legislation established retail competition in the Texas electricity market. Prior to January 1, 2002, TNMP operated as an electric utility in Texas, generating, transmitting and distributing electricity to customers in its Texas service territory. As required by the Texas restructuring legislation, and in accordance with a plan approved by the Public Utility Commission of Texas ("PUCT"), TNMP separated its Texas utility operations into three components:

Retail Sales Activities. First Choice assumed the activities related to the sale of electricity to retail customers in Texas, and, on January 1, 2002, TNMP's customers became customers of First Choice, unless they chose a different retail electric provider. First Choice and other retail electric providers now perform all activities with Texas retail customers, including acquiring new customers, setting up accounts, billing customers, acquiring power for resale to customers, handling customer inquiries and complaints, and acting as a liaison between the transmission and distribution companies and the retail customers.

Power Transmission and Distribution. TNMP continues to operate its regulated transmission and distribution business in Texas.

Power Generation. TGC became the unregulated entity performing TNMP's generation activities in Texas. However, in October 2002, TNMP and TGC sold TNP One to Sempra Energy Resources. As a result of the sale, TGC and TGC II neither own property nor engage in any operating activities, and neither TNMP nor any of its affiliates are currently in the power generation business.

TNMP serves smaller-to medium-sized communities. TNMP provides electric service, either directly or through retail electric providers, to approximately 256,000 customers in 85 Texas and New Mexico municipalities and adjacent rural areas. Only three of the 85 communities in TNMP's service territory have populations exceeding 50,000. TNMP's service territory is organized into two operating areas: Texas and New Mexico. In most areas that TNMP serves, it is the exclusive provider of transmission and distribution services. First Choice had approximately 219,000 customers in Texas as of December 31, 2004.

TNP Enterprises also wholly-owns several small subsidiaries which are inactive: TNP Technologies, LLC (a Texas limited liability company for real property acquisition in New Mexico); TNP Operating Company (inactive Texas corporation for real property acquisition in Texas and New Mexico); Facility Works, Inc. (inactive Texas corporation formerly engaged in heating, ventilating, and air conditioning service); TNP Enterprises-Magnus, L.L.C. (inactive Texas limited liability company intended for exempt business development). Applicants propose to retain these subsidiaries as inactive subsidiaries solely for winding up their affairs, absent further Commission authorization.

C. Cascade

Cascade is a limited liability company formed under the laws of the State of Washington. Mr. Gates is Cascade's sole member. Cascade was formed in 1995 to make and hold certain investment securities for Mr. Gates. Cascade invests in and holds the securities of numerous publicly and privately held companies; it does not conduct any business operations of its own.

By order dated July 17, 2001 (Holding Co. Act Release No. 27427) (the "Cascade Order"), the Commission authorized Cascade and Mr. Gates to acquire 5% or more (but less than 10%) of the outstanding voting securities of three public utility or holding companies: PNM Resources, Otter Tail Corporation ("Otter Tail"), which provides electric service in portions of Minnesota, North Dakota and South Dakota, and Avista Corporation ("Avista"), which provides electric and gas service in portions of Washington, Idaho, Oregon and California. Cascade currently holds 5,541,150 shares (or approximately 8.68%) of the outstanding common stock of PNM Resources and 2,389,299 shares (or approximately 8.2 %) of the outstanding common stock of Otter Tail. Subsequent to the issuance of the Cascade Order. Cascade reduced its ownership interest in Avista's common stock to below 5% of the total outstanding and is therefore no longer an "affiliate" of Avista.

In connection with the proposed Transaction, Cascade has agreed to purchase $100 million in equity-linked securities of PNM Resources to enable PNM Resources to finance a portion of the purchase price for TNP Enterprises. Applicants state that Cascade and Mr. Gates are joined as Applicants in this Application because they will indirectly acquire 5% or more of the voting securities of TNP Enterprises by virtue of Cascade's existing ownership of common stock in PNM Resources. Applicants state that in all other respects, the terms and conditions of the Cascade Order will remain in effect and undisturbed.

II. Requested Authority

A. TNP Acquisition

, PNM Resources and SW Acquisition, L.P. ("SW Acquisition"),[7] the holder of all of the shares of common stock (no par value per share) of TNP Enterprises, entered into a stock purchase agreement ("SPA") dated as of July 24, 2004. Pursuant to the SPA, PNM Resources agreed to purchase an aggregate of 100 shares of common stock, no par value per share, of TNP Enterprises. These shares constitute all of the issued and outstanding shares of common stock of TNP Enterprises. The closing of the Transaction will occur on the third business day following the receipt of all regulatory approvals and the satisfaction of other conditions precedent.

The aggregate purchase price that PNM Resources is to pay to acquire the TNP Enterprises stock held by SW Acquisition, consisting of all the voting securities of TNP Enterprises, is $189,100,000, subject to certain adjustments specified in the SPA. The purchase price that PNM Resources will pay to SW Acquisition will comprise (i) a cash amount equal to 50% of the purchase price and (ii) a number of shares of common stock, no par value, of PNM Resources by the Per Share Amount (the Per Share Amount is $20.20, subject to certain conditions). No later than five business days prior to the closing, the chief financial officer of TNP Enterprises will deliver to PNM Resources a written statement of the estimated purchase price including all adjustments. It is estimated that the PNM Resources common stock acquired by SW Acquisition will equal 4.7 million newly issued shares, or 6% of

[7] SW Acquisition is a Texas limited partnership that presently holds 100% of the voting securities of TNP Enterprises. The General Partner of SW Acquisition is SWI Acquisition G.P., L.P. SWI Acquisition G.P., L.P. is comprised of Laurel Hill Capital Partners, LLC and SWI II Acquisition, L.C. The Limited Partners of SW Acquisition are: Caravellel Investment Fund, LLC, CIBC WG Argosy Merchant Fund 2, LLC, Co-Investment Merchant Fund 3, LLC, Continental Casualty Company, Laurel Hill Capital Partners, LLC, Carlyle High Yield Partners, LP, 75 Wall Street Associates, LLC, Dresdner Kleinwort Capital Partners 2001, L.P., American Securities Partners II, LP, and American Securities Partners II(B), LP. These entities own all of the beneficial equity interest in TNP Enterprises. The general partner and the limited partners have approved the proposed acquisition, including the compensation that TNP Enterprises' shareholders will receive as a result of the acquisition.

the outstanding voting securities of PNM Resources, which will be held by SW Acquisition in a purely custodial role pending imminent distribution to its constituent partners. Pursuant to the SW Acquisition limited partnership agreement, the consideration for the sale, including the common stock received, will be divided proportionally in accordance with each partners' economic interest. The largest interests, those of Continental Casualty Company and CIBC WG Argosy Merchant Fund 2, L.L.C., account for 35% and 21.93% of the PNM Resources shares received as consideration, respectively. As a result, following the closing of the Transaction, no partner in SW Acquisition will own, with power to vote, 5% or more of the voting securities of PNM Resources.

In order to finance a portion of the acquisition cost, PNM Resources will issue and sell 4,000,000 units of its 6.625% Hybrid Income Term Security Units (the "Units") to Cascade Investment, L.L.C. ("Cascade"), a limited liability company formed under the laws of the State of Washington, in consideration for $100,000,000. Each Unit will have a stated amount of $25.00. The proceeds of the sale of the Units will be used by PNM Resources to finance a portion of the cash consideration paid in the Transaction and for refinancing the debt and preferred securities of TNP Enterprises. The Units will be sold pursuant to the terms of a Unit Purchase Agreement, dated August 13, 2004, between PNM Resources and Cascade (the "UPA").

B. Post-Transaction Operations

In the December Order, the Commission authorized PNM Resources to issue various types of equity and debt securities, including equity-linked securities in the form of stock purchase units. The financing plan that provided the basis for the authority extended by the Commission in the December Order included the acquisition of TNP Enterprises and no new financing authorizations are required.

PNM Resources plans to retain TNP Enterprises; however, TNP Enterprises will exist only as a conduit, with no active operations or financial obligations, and will retain no personnel or operational authority. PNM Resources also proposes to include TNP Enterprises, TNMP and First Choice as client companies of PNMR Services, a subsidiary service company that provides the following support services: Accounting, Audit, Business Ethics and Compliance, Business Excellence (including Business Process Improvement), Corporate Communications, Community Affairs, Corporate Governance, Economic Development, Environmental Management, Environmental Policy, Executive Management, General Services, Governmental Regulations, Health and Safety, Human Resources, Information Technology, Investor Relations, Legal, Organization Development, Purchasing, Regulatory Affairs, Risk Management, and Treasury.

PNM Resources will integrate the support services functions that currently exist at TNMP into Services. Applicants state that the consolidation of the support services functions into Services is expected to result in reduced costs for the affiliate companies through reductions in corporate and headquarters staffing, reduced corporate and administrative programs, and purchasing savings through economies of scale. Services will also establish common processes and systems and centralized expertise.

Under the program of restructuring implemented by the State of Texas pertaining to the ERCOT System of TNP Enterprises, affiliates of TNMP are able to access certain shared services, such as billing, accounting, and payroll systems. Applicants propose to maintain these arrangements in place where such is consistent with economical operations and to comply with both state and Federal Energy Regulatory Commission affiliate transaction regulation and the applicable rules of the Commission, including rules 90 and 91.

First Choice is a firm engaged in domestic energy marketing and Avistar is a firm engaged in the domestic marketing of energy technologies. Applicants maintain that First Choice qualifies as an energy-related company under rule 58 under the Act. PNM Resources proposes to retain FirstChoice. PNM Resources also proposes to retain the nonutility subsidiaries of TNP Enterprises which are currently inactive. PNM Resources also proposes to retain a limited partnership interest in National Corporate Tax Credit Fund XII, an investment qualifying for low income housing tax credits.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1748 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51503; File No. SR–Amex–2004–65]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change, and Amendments No. 1 and 2 Thereto, Relating to Revisions to Amex Rule 21, Appointment of Floor Officials

On August 10, 2004, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Amex Rule 21, Appointment of Floor Officials. On December 22, 2004, the Amex filed Amendment No. 1 to the proposed rule change.[3] On February 3, 2005, the Amex filed Amendment No. 2 to the proposed rule change.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on March 8, 2005.[5] The Commission received no comments on the proposal.

The Exchange proposed the following amendments to Amex Rule 21: (1) Eliminate the requirement that an Exchange Official who is appointed as a senior Floor Official must have previously served as a member of the Exchange's Board of Governors ("Board");[6] (2) provide that an Exchange Official who has been appointed as a Senior Floor Official shall have the same authority and responsibilities as a Floor Governor with respect to matters that arise on the trading floor and require review or action by a Floor Governor or Senior Floor Official;[7] and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1 the Amex revised the text of the proposed rule.

[4] In Amendment No. 2 the Amex further revised the text of the proposed rule.

[5] *See* Securities Exchange Act Release No. 51279 (March 1, 2005), 70 FR 11279.

[6] The proposal would retain the requirement that any such Exchange Official must spend a substantial part of his or her time on the Exchange's floor.

[7] The Exchange has represented that an Exchange Official who makes a ruling on the floor would not be permitted to review such ruling while later acting as a Senior Floor Official or in place of a Floor Governor. Telephone conversation among William Floyd-Jones, Assistant General Counsel, Amex, Susie Cho, Special Counsel, Division of Market Regulation ("Division"), Commission, and Geraldine Idrizi. Attorney, Division, Commission, on January 31, 2005.

A number of Amex rules provide for Floor Governor or Senior Floor Official action or review with respect to matters that arise on the trading floor. The Amex noted that these rules may change

(3) clarify that an Exchange Official who is appointed as a Senior Floor Official may not participate in meetings of the Board unless the Board invites such person to attend its meetings.[8]

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[9] and, in particular, the requirements of Section 6(b) of the Act[10] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[11] in that the proposed rule change, as amended, is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission notes that the proposed rule change, as amended, is designed to facilitate the supervision of trading activity on the Exchange's trading floor. The proposal would expand the pool of Exchange Officials who could be appointed to serve as Senior Floor Officials by eliminating the requirement that such Exchange Officials previously must have served as an Exchange Governor. Further, the proposal specifies that Exchange Officials who are appointed as Senior Floor Officials would have the same authority and responsibilities as a Floor Governor with respect to matters that arise on the floor and require review or action by a Floor Governor or Senior Floor Official. The Commission also notes that the proposed rule change would clarify the status of Exchange Officials who are appointed as Senior Floor Officials by specifying that these officials may not participate in Board meetings except to the extent that they are invited to attend such meetings. The Commission finds that the proposed rule change, as amended, is consistent with Section 6(b) of the Act.[12]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–Amex–2004–65), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated Authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–7435 Filed 4–12–05; 8:45 am]

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with future Amex rule changes. Under the amendment to Amex Rule 21, Exchange Officials appointed as Senior Floor Officials would be able to act in place of Floor Governors with respect to these responsibilities. The following is a list of Amex rules that call for action or review by Floor Governors or Senior Floor Officials: Rule 1 (Hours of Business), Rule 22 (Authority of Floor Officials), Rule 25 (Cabinet Trading of Equity and Derivative Securities), Rule 26 (Performance Committee), Rule 27 (Allocations Committee), Rule 118 (Trading in Nasdaq National Market Securities), Rule 119 (Indications, Openings and Reopenings), Rule 128A (Automatic Execution), Rule 170 (Registration and Functions of Specialists), Rule 590 (Minor Rule Violation Fine System), Rule 904 (Position Limits), Rule 918 (Trading Rotations, Halts and Suspensions), Rule 933 (Automatic Execution of Option Orders), Rule 959 (Accommodation Transactions), Rule 918C (Trading Rotations, Halts and Suspensions), Rule 933–ANTE (Automatic Matching and Execution of Options Orders).

[8] Article II, Section 3 of the Amex Constitution (The Board of Governors—Powers, Duties and Procedures) currently allows the Board to invite persons who are not members of the Board to participate in meetings of the Board. In relevant part, Article II, Section 3 provides: "The Board may invite a person, not a member thereof, to attend its meetings and to participate in its deliberations, but such person shall not have the right to vote."

[9] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30,–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51502; File No. SR–Amex–2005–009]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the American Stock Exchange LLC To Require Members To Complete Systems Training and To Include Violations of This Requirement in Its Minor Rule Violation Plan

April 7, 2005.

On February 1, 2005, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt new Amex Rule 51 to require its members to complete training in such systems as the Exchange may require and to amend its Minor Rule Violation Plan ("Plan") to allow the Exchange to issue minor fines for non-compliance with this rule. The proposed rule change was published for comment in the **Federal Register** on March 8, 2005.[3] The Commission received no comments regarding the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[4] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[5] because a rule that is reasonably designed to require Exchange members to complete necessary systems training should protect investors and the public interest. The Commission also believes that handling violations of Amex Rule 51 pursuant to the Exchange's Plan is consistent with Sections 6(b)(1) and 6(b)(6) of the Act[6] which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. In addition, because existing Amex Rule 590 provides procedural rights to a person fined under the Plan to contest the fine and permits a hearing on the matter, the Commission believes the Plan, as amended by this proposal, provides a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d)(1) of the Act.[7]

Finally, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act[8] which governs minor rule violation plans. The Commission believes that the change to Amex's Plan will strengthen its ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving this proposed rule change, the Commission in no way minimizes the importance of compliance with Amex rules and all other rules subject to the imposition of fines under the Exchange's Plan. The Commission believes that the violation of any self-regulatory organization's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 51294 (March 2, 2005), 70 FR 11282.

[4] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

[7] 15 U.S.C. 78f(b)(7) and 78f(d)(1).

[8] 17 CFR 240.19d–1(c)(2).

rules, as well as Commission rules, is a serious matter. However, the Exchange's Plan provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that Amex will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under the Plan or whether a violation requires formal disciplinary action.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[9] and Rule 19d–1(c)(2) under the Act,[10] that the proposed rule change (SR–Amex–2005–009) be, and hereby is, approved and declared effective.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1742 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 51497; File No. SR–CBOE–2004–54]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Partial Amendment No. 1 Thereto By the Chicago Board Options Exchange, Incorporated To Amend Rules Relating Margin Treatment on Stock Transactions Effected By an Options Market Maker To Hedge Options Positions

April 6, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("the Act")[1] and Rule 19b–4[2] thereunder, notice is hereby given that on July 30, 2004, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On February 22, 2005, the CBOE filed a partial amendment to its proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Chicago Board Options Exchange, Incorporated (the "CBOE" or "Exchange") is proposing to eliminate a rule that essentially disallows favorable margin treatment on stock transactions initiated by options market makers to hedge an option position if the exercise price of the option is more than two standard exercise price intervals above the price of the stock in the case of a call option, or below in the case of a put option. The text of the proposed rule change is available on CBOE's Web site (*http://www.cboe.com*), at the CBOE's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

When options market makers hedge their option positions by taking a long or short position in the underlying security, the underlying security is allowed "good faith" margin treatment,[4] provided the underlying security meets the definition of a "permitted offset."[5] To qualify as a permitted offset, CBOE Rule 12.3(f)(3) requires, among other things, that the transaction price of the underlying security be not more than two standard exercise price intervals below the exercise price of the option being hedged in the case of a call option, or above in the case of a put option. The term "in-or-at-the-money" is used in CBOE Rule 12.3(f)(3) to refer to the two standard strike price interval requirement. Stated another way, "in-or-at-the-money" means the option being hedged cannot be "out-of-the-money" by more than two standard exercise price intervals.[6]

The intent of this requirement was to confine good faith margining of transactions in the underlying security to those that constituted meaningful hedges of an option position. The need to hedge with 100 shares or units of the underlying security diminishes the more the exercise price of a call option is above the price of the underlying security, and the more the exercise price of a put option is below. If these inexpensive, "out-of-the-money" options are offset with a position in the underlying security equivalent in size (that is, units or shares) to that represented by the option, the risk of the combined positions is nearly the same as the underlying security position without the option. The option has very little effect. To prevent inexpensive, "out-of-the-money" options from being used as a means to gain good faith margin for trading in the underlying security, the two standard strike price interval limitation was imposed.

The Exchange is proposing to remove the "in-or-at-the-money" requirement.[7] The Exchange believes that a hedging transaction in the underlying security by an options market-maker can constitute a reasonable hedge, and is deserving of good faith margin, even if the exercise price of the option is out-of-the-money by more than two standard exercise price intervals. The listing of option series is not limited to options that meet the "in-or-at-the-money" requirement and options market-makers are obligated to provide liquidity in such "out-of-the money" options. In today's listed options market, there can be numerous options series that are out-of-the-money, more so than when the idea of an "in-or-at-the-money" requirement was first conceived. Moreover, in today's listed options market, smaller standard exercise price intervals have been introduced in some options (for example, 1 point and 2½ points), in contrast to the earlier days of the listed

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[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 240.19d–1(c)(2).

[11] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(44).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] SR–CBOE–2004–54: Amendment No. 1. Under the partial amendment, the options market maker must be able to demonstrate that it effected its permitted offset transactions for market-making purposes.

[4] Good faith margin is defined in Regulation T of the Board of Governors of the Federal Reserve System ("Regulation T"), the margin setting authority for the securities industry, as the amount of margin a creditor would require in exercising sound credit judgment.

[5] A "permitted offset" is defined in CBOE Rule 12.3(f)(3).

[6] An option is "out-of-the-money" when, based on comparison of the exercise price to the current market price of the underlying security, it makes no economic sense to exercise the option. For example, a call option with the right to purchase the underlying security at $50 per share would not be exercised if the underlying security were trading in the market for $46 per share.

[7] The New York Stock Exchange ("NYSE") also has filed a proposed rule change to remove the "in-or-at-the-money" language from its rules on permitted offsets. Although the language of the NYSE's proposed rule change differs from the language of the CBOE's proposed rule change, the proposed changes from the two exchanges are substantively identical. The Commission is publishing a notice to solicit comments on the NYSE's proposed rule change.

options market when the only standard was a five-point interval.

The need for relief from the "in-or-at-the-money" constraint has been addressed before. Prior to June 1, 1997, "in-or-at-the-money" was defined in Regulation T to mean the price of the underlying security is not more than one standard exercise price interval below the exercise price of the option being hedged in the case of a call option, or above in the case of a put option. Provisions pertaining to market-makers and specialists were removed from Regulation T effective June 1, 1997, due to an exemption for market-makers and specialists that resulted from passage of the National Securities Markets Improvement Act of 1996. The Exchange, as well as the New York Stock Exchange, adopted the provisions of Regulation T applicable to market-makers and implemented them as exchange rules effective June 1, 1997, except for the definition of "in-or-at-the-money." The current definition of "in-or-at-the-money," requiring two standard exercise price intervals, was proposed by the exchanges and approved by the Commission at that time.[8] This was done based upon the recommendation of an industry committee organized by the New York Stock Exchange to review its margin rules. That committee did consider relief in the form of eliminating the "in-or-at-the-money" requirement altogether, but a majority in favor of elimination was not attained at that time.

The Exchange also believes that the "in-or-at-the-money" requirement is not in tune with current options market-maker hedging technique. Options market-makers generally seek to create a risk-neutral hedge when they offset an option with a position in the underlying security. In the case of an "out-of-the-money" option, they cannot create a risk-neutral hedge if they take a full 100 share position per option in the underlying security, because any gain/loss on the option being hedged would be outweighed by the loss/gain in the underlying security position. Therefore, losses on the underlying security position are not equally hedged and pose a risk. Instead, options market-makers will take a less than 100 share position in the underlying security per option being hedged so that any gain/loss on that position in dollar terms closely tracks that of the dollar gain/loss on the option position. When options market-makers hedge in this manner, known as "delta neutral hedging," they cannot benefit from any gain on a position in the underlying security because it is equally offset by a loss in the option being hedged. Therefore, there is no need for a rule provision that was originally intended to guard against options market-makers obtaining good faith credit for trading in the underlying security that is unrelated to the options market-making business.

It should be noted that internal risk control systems at all of the broker-dealers that clear and carry the accounts of options market-makers impose a delta neutral trading standard on options market-makers, monitor options market-makers' compliance with the clearing firm's risk limits, and intervene as necessary to counter any deviation from acceptable risk levels. The internal risk control systems employed by the clearing firms thus provide as good a deterrent against unrelated trading in the underlying security or instrument as the current "in-or-at-the-money" requirement.

Another reason why the Exchange deems the "in-or-at-the-money" requirement unnecessary is the fact that, when a clearing firm extends good faith margin on a security underlying an option, it must reduce its net capital by any amount by which the deduction required by Rule 15c3–1 under the Securities Exchange Act of 1934 (the "haircut") exceeds the amount of equity in the options market maker's account. Thus, the market-maker must post enough margin to cover the haircut requirement or the clearing firm must, in effect, post the margin, or any portion not on deposit in the market-maker's account, by setting aside its capital. In this way there is a safety cushion to cover the credit risk when good faith margin is extended and the good faith requirement is less than the haircut requirement. Thus, when good faith margin is extended, the haircut requirement is a de facto minimum margin requirement.

In further support of eliminating the "in-or-at-the-money" requirement is the fact that, according to each of the options market maker clearing firms, a violation of the "in-or-at-the-money" requirement is very rare. The clearing firms also point out that when the price of an underlying security established for hedging purposes changes in a manner so a to exceed the two standard exercise price interval, the underlying security maintains its permitted offset status, and it becomes impractical to determine which shares are not qualified for permitted offset treatment.

2. Statutory Basis

The proposed rule is intended to eliminate a requirement that impedes options market makers from hedging, on a good faith margin basis, "out-of-the-money" options having standard exercise price intervals of less than five points. As such, the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act, in that it is designated to perfect the mechanisms of a free and open market and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2004–54 on the subject line.

[8] See Securities Exchange Act Release No. 34–38709 (June 2, 1997), 62 FR 31643 (approving SR–CBOE–97–17).

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–CBOE–2004–54. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. 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–CBOE–2004–54 and should be submitted on or before May 4, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–7375 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51504; File No. SR–NASD–2004–033]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto by the National Association of Securities Dealers, Inc. Seeking to Modify the Nasdaq Market Center Execution Service to Add an Optional Routing Feature

April 7, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 25, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On July 15, 2004, Nasdaq submitted Amendment No. 1 to the proposed rule change.[3] On February 23, 2005, Nasdaq submitted Amendment No. 2 to the proposed rule change.[4] On April 7, 2005, Nasdaq submitted Amendment No. 3 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

Nasdaq proposes to modify the Nasdaq Market Center execution service (formerly known as SuperMontage or the Nasdaq National Market Execution System) to provide an optional routing feature that will route orders in Nasdaq-listed securities to other markets accessible by the router when these markets are displaying quotes at prices that are superior to those available on Nasdaq. Pending Commission approval, Nasdaq is scheduled to implement the routing feature on or about May 9, 2005. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized*; proposed deletions are in [brackets].

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4700. NASDAQ MARKET CENTER—EXECUTION SERVICES

4701. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a) The term "active Nasdaq Market Center securities" shall mean those Nasdaq Market Center eligible securities in which at least one Nasdaq Market Maker or ITS/CAES Market Maker is currently active in the Nasdaq Market Center, *or at least one exchange or the Association's Alternative Display Facility is actively quoting the security and Nasdaq has access to the quotes of these markets under Rule 4714. A security will not be considered an "active Nasdaq Market Center security" when trading on Nasdaq has been halted pursuant to Rule 4120 and the interpretations thereunder.*

(b)–(z) No change

(aa) The term "Preferenced Order" shall mean an order that is entered into the Non-Directed Order Process and is designated to be delivered to or executed against a particular Quoting Market Participant's Attributable Quote/Order if the Quoting Market Participant is at the best bid/best offer when the Preferenced Order is the next in line to be executed or delivered. Preferenced Orders shall be executed subject to the conditions set out in Rule 4710(b). *Preferenced Orders shall not be eligible for routing as set out in Rule 4714.*

(bb)–(jj) No change

(kk) The term "Auto-Ex" shall mean, for orders in Nasdaq listed securities so designated, an order that (except when it is displayed or interacts with a displayed Discretionary Order at a price in its discretionary price range) will execute solely against the Quotes/Orders of Nasdaq Market Center Participants that participate in the automatic execution functionality of the Nasdaq Market Center and that do not charge a separate quote access fee to Nasdaq Market Center Participants accessing their Quotes/Orders through the Nasdaq Market Center. An Auto-Ex Order may be designated as "Immediate or Cancel" (an "IOC Auto-Ex Order") or "Day" or "GTC" (a "Postable Auto-Ex Order"). A party entering a Postable Auto-Ex Order may (but is not required to) specify that the order will utilize the functionality associated with Discretionary Orders. *Auto-Ex orders shall not be eligible for routing as set out in Rule 4714.*

(ll) The term "Fill or Return" shall mean for orders in ITS Securities so designated, an order that is to be delivered to or executed by Nasdaq Market Center Participants without delivering the order to an ITS Exchange and without trading through the quotations of ITS Exchanges. *Fill or Return orders shall not be eligible for routing as set out in Rule 4714.*

(mm) The term "Pegged" shall mean, for priced limit orders so designated, that after entry into the Nasdaq Market Center, the price of the order is automatically adjusted by *the* Nasdaq Market Center in response to changes in the Nasdaq Market Center inside bid or offer, as appropriate. The Nasdaq Market Center Participant entering a Pegged Order may specify that the price of the order will either equal the inside quote on the same side of the market (a "Regular Pegged Order") or equal a price that deviates from the inside quote

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced and superseded the originally filed proposed rule change.

[4] Amendment No. 2 replaced and superseded the originally filed proposed rule change, as amended.

[5] Amendment No. 3 replaced and superseded the originally filed proposed rule change, as amended.

on the contra side of the market by $0.01 (*i.e.*, $0.01 less than the inside offer or $0.01 more than the inside bid) (a "Reverse Pegged Order"). The market participant entering a Pegged Order may (but is not required to) specify a cap price, to define a price at which pegging of the order will stop and the order will be permanently converted into an unpegged limit order. Pegged Orders shall not be available for ITS Securities. *Pegged orders shall not be eligible for routing as set out in Rule 4714.*

(nn) The term "Discretionary" shall mean,

(1) for priced limit orders in Nasdaq listed securities so designated, an order that when entered into the Nasdaq Market Center has both a displayed bid or offer price, as well as a non-displayed discretionary price range in which the participant is also willing to buy or sell, if necessary. The displayed price may be fixed or may be pegged to equal the inside quote on the same side of the market. The pegging of the Discretionary Order may be capped in the same manner as that of a Pegged Order. The discretionary price range of a Discretionary Order that is pegged will be adjusted to follow the pegged displayed price. *Discretionary Orders for Nasdaq listed securities shall be eligible for routing as set out in Rule 4714.*

(2) for orders in ITS Securities so designated, an order that when entered into the Nasdaq Market Center has both a displayed bid or offer price, as well as a non-displayed discretionary price range in which the participant is also willing to buy or sell, if necessary. The display price must be fixed. A Discretionary Order in an ITS Security may not result in a quote that locks or crosses the national best bid and offer and shall not be executed at a price that trades through the quotation of an ITS Exchange unless it is designated as a Sweep Order. *Discretionary Orders for ITS Securities shall not be eligible for routing as set out in Rule 4714.*

(oo) The term "Summary" shall mean, for priced limit orders so designated, that if an order is marketable upon receipt by the Nasdaq Market Center, it shall be rejected and returned to the entering party. Summary Orders may only be entered by Nasdaq Order-Delivery ECNs. *Summary orders shall not be eligible for routing as set out in Rule 4714.*

(pp)–(qq) No change

(rr) The term "Sweep Order" shall mean, for orders in ITS Securities so designated, an order that may be delivered to or executed by Nasdaq Market Center Participants at multiple price levels. *Sweep Orders shall not be eligible for routing as set out in Rule 4714.*

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4706. Order Entry Parameters

(a) Non-Directed Orders—

(1) General. The following requirements shall apply to Non-Directed Orders Entered by Nasdaq Market Center Participants:

(A) A Nasdaq Market Center Participant may enter into the Nasdaq Market Center a Non-Directed Order in order to access the best bid/best offer as displayed in Nasdaq *and other markets as set out in Rule 4714.*

(B) A Non-Directed Order must be a market or limit order, must indicate whether it *should be not routed to another market in accordance with Rule 4714, whether it* is a buy, short sale, short-sale exempt, or long sale, and may be designated as "Immediate or Cancel", "Day", "Good-till-Cancelled", "Auto-Ex", "Fill or Return", "Pegged", "Discretionary", "Sweep", "Total Day", "Total Good till Cancelled", or "Total Immediate or Cancel," or "Summary."

(i)–(xiii) No change

(C) The system will not process a Non-Directed Order to sell short if the execution of such order would violate [NASD Rule 3350 or, in the case of ITS Securities,] SEC Rule 10a–1, *in the case of ITS Securities. Non-Directed Orders to sell short shall not be executed in the Nasdaq Market Center if the execution of such order would violate NASD Rule 3350. Non-Directed Orders to sell short that cannot be executed in the Nasdaq Market Center and that have elected to be routed to other markets as set out in Rule 4714 shall be routed to another market and processed in accordance with the short sale restrictions in effect at the destination market.*

(D)–(F) No change

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4707. Entry and Display of Quotes/Orders

(a) Entry of Quotes/Orders—Nasdaq Quoting Market Participants may enter Quotes/Orders into the Nasdaq Market Center, and Order Entry Firms may enter Non-Attributable Orders into the Nasdaq Market Center, subject to the following requirements and conditions:

(1) No change

(2) Upon entry of a Quote/Order into the system, the Nasdaq Market Center shall time-stamp it, which time-stamp shall determine the ranking of the Quote/Order for purposes of processing Non-Directed Orders as described in Rules 4710(b) *and 4714.* For each subsequent size increase received for an existing quote at a given price, the system will maintain the original time-stamp for the original quantity of the quote and assign a separate time-stamp to that size increase. When a Pegged Order (including a Discretionary Order that is pegged) is displayed as a Quote/Order, its time-stamp will be updated whenever its price is adjusted.

(3)–(4) No change

(b) Display of Quotes/Orders in Nasdaq—The Nasdaq Market Center will display [a Nasdaq] Quotes/Orders submitted to the system as follows:

(1)–(2) No change

(3) Exceptions—The following exceptions shall apply to the display parameters set forth in paragraphs (1) and (2) above:

(A)–(C) No change

(D) Non-Directed Orders and Routing—Non-Directed Orders marked for routing as set out in Rule 4714 shall not be displayed in the Nasdaq Market Center while outside the Nasdaq Market Center. Non-Directed Orders marked for routing shall be displayed in the Nasdaq Market Center as set out in Rules 4701 and 4707 while such orders are in the Nasdaq Market Center.

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4710. Participant Obligations in the Nasdaq Market Center

(a) No change

(b) Non-Directed Orders

(1) General Provisions—A Quoting Market Participant in a Nasdaq Market Center eligible security, as well as Order Entry Firms, shall be subject to the following requirements for Non-Directed Orders:

(A) No change

(B) Processing of Non-Directed Orders—Upon entry of a Non-Directed Order into the system, the Nasdaq Market Center will ascertain who the next Quoting Market Participant or Order Entry Firm in queue to receive an order is and shall deliver an execution to Quoting Market Participants or Order Entry Firms that participate in the automatic-execution functionality of the system, or shall deliver a Liability Order to Quoting Market Participants that participate in the order-delivery functionality of the system. Non-Directed Orders entered into the Nasdaq Market Center system shall be delivered to or automatically executed against Quoting Market Participants' or Order Entry Firms' Displayed Quotes/Orders and Reserve Size, in strict price/time priority, as described in the algorithm contained in subparagraph (b)(B)(i) of this rule. The individual time priority of each Quote/Order submitted to *the* Nasdaq Market Center shall be assigned by the system based on the date and time such Quote/Order was received. Remainders of Quote/Orders reduced by execution, if retained by the system,

shall retain the time priority of their original entry. For purposes of the execution algorithms described in paragraphs (i), (ii) and (iii) below, "Displayed Quotes/Orders" shall also include any odd-lot, odd-lot portion of a mixed-lot, or any odd-lot remainder of a round-lot(s) reduced by execution, share amounts that while not displayed in the quotation montage of the Nasdaq Market Center, remain in system and available for execution.

(i) Execution Algorithm—Price/Time—The system will default to a strict price/time priority within Nasdaq, and will attempt to access interest in the system in the following priority and order:

a. Displayed Quotes/Orders of Nasdaq Market Makers, ITS/CAES Market Makers, and Nasdaq ECNs, displayed Non-Attributable Quotes/Orders of Order Entry Firms, and displayed non-attributable agency Quotes/Orders of UTP Exchanges (as permitted by subparagraph (f) of this rule), in time priority between such participants' Quotes/Orders;

b. Reserve Size of Nasdaq Quoting Market Participants and Order Entry Firms, in time priority between such participants' Quotes/Orders; and

c. Principal Quotes/Orders of UTP Exchanges, in time priority between such participants' Quotes/Orders.

(ii) Exceptions—The following exceptions shall apply to the above execution parameters:

a. If a Nasdaq Quoting Market Participant or Order Entry Firm enters a Non-Directed Order into the system, before sending such Non-Directed Order to the next Quoting Market Participants in queue, the Nasdaq Market Center will first attempt to match off the order against the Nasdaq Quoting Market Participant's or Order Entry Firm's own Quote/Order if the participant is at the best bid/best offer in Nasdaq. Nasdaq Quoting Market Participants and Order Entry Firms may avoid any attempted automatic system matching permitted by this paragraph through the use of an anti-internalization qualifier (AIQ) quote/order flag containing the following values: "Y" or "I", subject to the following restrictions:

Y—if the Y value is selected, the system will execute the flagged quote/order solely against attributable and non-attributable quotes/orders (displayed and reserve) of Quoting Market Participants and Order Entry Firms other than the party entering the AIQ "Y" flagged quote/order. If the only available trading interest is that of the same party that entered the AIQ "Y" flagged quote/order, the system will not execute at an inferior price level, and will instead return the latest entered of those interacting quote/orders (or unexecuted portions thereof) to the entering party *or route the quote/order to another market as set out in Rule 4714 if the quote/order is marked for routing*; provided, however, that in the case of a Discretionary Order interacting with a bid/offer entered by the system pursuant to Rule 4710(b)(5), the Discretionary Order (or unexecuted portions thereof) will be returned.

I—if the I value is selected, the system will execute against all available trading interest, including the quote/orders of the Order Entry Firm or Nasdaq Quoting Market Participant that entered the AIQ "I" flagged order, based on the price/time execution algorithm

b. No change

c. No change

d. No change

e. If a Nasdaq Market Center Participant enters a Discretionary Order, the Discretionary Order shall first be executed against (or delivered in an amount equal to) the Quotes/Orders and Reserve Size of Nasdaq Market Center Participants (including displayed Discretionary Orders at their displayed prices) in conformity with this rule and subject to any applicable exceptions. If the full size of the incoming Discretionary Order cannot be executed at its displayed price, the order may also be executed against (or delivered in an amount equal to) the Quotes/Orders and Reserve Size of Nasdaq Market Center Participants within the incoming Discretionary Order's discretionary price range (including displayed Discretionary Orders at their displayed prices), in conformity with this rule and subject to any applicable exception. If the full size of the incoming Discretionary Order cannot be executed in this manner, the order may also be executed by (or receive delivery of) displayed Discretionary Orders with discretionary price ranges that overlap with the incoming Discretionary Order's discretionary price range, in conformity with this rule and subject to any applicable exception. The unexecuted portion of a Discretionary Order will then be retained by the Nasdaq Market Center for potential display in conformity with Rule 4707(b). *To the extent a Discretionary Order designated for routing is not executed in full in accordance with the procedures described above upon submission to the Nasdaq Market Center the order shall be routed as set out in Rule 4714.*

When a Discretionary Order is displayed as a Quote/Order, Non-Directed Orders or Quotes/Orders entered at the displayed price (including incoming Discretionary Orders with a displayed or discretionary price equal to the displayed Discretionary Order's displayed price) may be executed against (or delivered to) the displayed Discretionary Order, and market orders may be executed against (or delivered to) the displayed Discretionary Order when its displayed price is at the inside. Non-Directed Orders or Quotes/Orders (other than Discretionary Orders) entered at a price within the displayed Discretionary Order's discretionary price range may be executed by (or receive delivery of) the displayed Discretionary Order at the price of the incoming Non-Directed Order or Quote/Order if there are no displayed Quotes/Orders at that price or better. Incoming Discretionary Orders with a discretionary price range that overlaps with the displayed Discretionary Order's discretionary price range may be executed by (or receive delivery of) the displayed Discretionary Order at the overlapping price most favorable to the displayed Discretionary Order. A displayed Discretionary Order that may be executed at a price in its discretionary price range will execute against Non-Directed Orders and Quotes/Orders entered by Nasdaq Market Center Participants in the automatic execution functionality of the Nasdaq Market Center, and will be delivered to Non-Directed Orders and Quotes/Orders entered by *Nasdaq* Order-Delivery ECNs.

For purposes of determining execution priority, the price priority of a displayed Discretionary Order will be based on its displayed price when it may be executed at its displayed price. When displayed Discretionary Orders may be executed at prices within their discretionary price ranges, their price priority vis-á-vis one another will be based on their most aggressive discretionary prices, and their price priority vis-á-vis Quotes/Orders that are not Discretionary Orders will be based upon the price at which they are executable.

f. No change

g. Non-Directed Orders marked for routing shall be processed in accordance with Rule 4714.

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(e) UTP Exchanges—*Direct Participation in Nasdaq Market Center*

Direct [P]participation in the Nasdaq Market Center by UTP Exchanges is voluntary. If a UTP Exchange does not participate *directly* in the Nasdaq Market Center, the UTP Exchange's quotes *may nevertheless be accessible in accordance with Rule 4714* [will not be accessed through the Nasdaq Market

Center, and the Nasdaq Market Center will not include the UTP Exchange's quotation for order processing and execution purposes].

A UTP Exchange may voluntarily participate in the Nasdaq Market Center *directly* if it executes a Nasdaq Workstation Subscriber Agreement, as amended, for UTP Exchanges, and complies with the terms of this subparagraph [(e)] *(f)* of this rule. The terms and conditions of such access and participation, including available functionality and applicable rules and fees, shall be set forth in and governed by the Nasdaq Workstation Subscriber Agreement, as amended for UTP Exchanges. The Nasdaq Workstation Subscriber Agreement, as amended for UTP Exchanges may expand but shall not contract the rights and obligations set forth in these rules. Access to UTP Exchanges may be made available on terms that differ from the terms applicable to members but may not unreasonably discriminate among similarly situated UTP Exchanges. The following provisions shall apply to UTP Exchanges that choose to participate in the Nasdaq Market Center.

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4714. Routing—Nasdaq-Listed Securities

If a Non-Directed Order for a Nasdaq-listed security is not executed in its entirety in the Nasdaq Market Center and such order is designated for routing, the order (or the unfilled portion thereof—referred to hereinafter as an "order") shall be processed as follows:

(a) The order shall be routed to those markets accessible through the Nasdaq Market Center router that are displaying quotes priced better than the Quotes/Orders available in the Nasdaq Market Center as a limit order. Routed orders shall be executed pursuant to the rules and regulations of the destination market.

(b) In the event an order routed from the Nasdaq Market Center to another market is not executed in its entirety, the remaining portion of the order shall be returned to the Nasdaq Market Center and shall be eligible for execution, or re-routing, if marketable. A market order that is converted to a limit order for routing will become a market order again upon return to the Nasdaq Market Center.

(c) In the event an order becomes non-marketable while it is in the execution queue, or the order is not marketable upon return to Nasdaq, the order shall be included in the Nasdaq Market Center book (if consistent with the order's time in force condition) in accordance with the time priority established by the time-stamp assigned to the order when it was initially submitted to the Nasdaq Market Center. Once an order is placed in the Nasdaq Market Center book it shall not be routed outside the Nasdaq Market Center.

(d) An order that has been routed to another market shall have no time standing in the Nasdaq Market Center execution queue relative to other orders in the Nasdaq Market Center. A request from a Nasdaq Market Center. Participant to cancel an order while it is outside the Nasdaq Market Center shall be processed subject to the applicable rules of the market to which the order has been routed.

(e) Orders shall not be routed to other markets during the Nasdaq Market Center Opening and Closing Crosses, as described in Rules 4704 and 4709.

(f) Orders shall not be routed to other markets at prices that exceed the execution price governors described in Rule 4710(b)(1)(B)(ii)(c).

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to modify the Nasdaq Market Center execution service to create an optional routing feature that will route orders in Nasdaq-listed securities to other markets when those markets are displaying quotes at prices that are superior to those displayed in Nasdaq and that are accessible through the router.[6] Under the proposal, Nasdaq Market Center Participants will be able to choose on an order-by-order basis whether they want an order routed outside the Nasdaq Market Center.[7] Routed orders would be executed pursuant to the rules and regulations of the destination market. Nasdaq states that there will be no change in the processing of orders not marked for routing; these orders will continue to be processed through the normal Nasdaq Market Center execution service execution algorithm.

According to Nasdaq, the processing of an order marked for routing will differ depending on whether there are quotes on other markets at prices

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[6] Nasdaq states that the routing feature will be optional; members can continue to use other routers to reach other markets. In general, Non-Directed market orders and limit orders will be eligible for routing. In addition, Discretionary Non-Directed Orders will be eligible for routing. Members also will be able to use the following time in force conditions on Non-Directed Orders eligible for routing: Immediate or Cancel, Day, Good-till-Cancelled, Total Day, Total Good till Cancelled, Total Immediate or Cancel, and End of Day. Other unique Non-Directed Order types, such as Pegged orders, are not eligible for routing. Finally, routing will not be available for Directed Orders and Preferenced Orders.

Non-Directed orders will not be routed outside the Nasdaq Market Center during Nasdaq's Opening and Closing Crosses, which are described in NASD Rules 4704 and 4709. Nasdaq believes that routing orders outside Nasdaq during the opening and closing crosses would be inconsistent with the purpose of these auctions, which is to arrive at a single price that is based on the maximum number of shares that can be executed on Nasdaq.

Nasdaq states that it also will not route orders at prices that exceed the execution price governors that limit the prices at which orders can execute in the Nasdaq Market Center (NASD Rule 4710(b)(1)(B)(ii)(c)). The governors prevent large market orders and marketable limit orders priced significantly away from the inside, which in many instances are entered in error, from executing through numerous price levels automatically without any restraint and thus establishing a new inside market and potentially a new historic high or low price for a security that is not truly reflective of current market trading. Nasdaq adopted the governors to balance the goals of rapid execution and price discovery against the need to protect investors from excessive volatility and market confusion that can result from these orders. For these very same reasons, Nasdaq believes it should not route orders to other markets at prices that exceed these price limitations.

[7] By default, eligible Non-Directed Orders will be marked for routing. Members, however, will be able to override the default by indicating that an order should not be routed.

While Nasdaq initially expects to access through its router those quotes that would qualify as "automated quotations" as under Regulation NMS, Nasdaq may route to non-automated quotations as appropriate. Nasdaq will access the quotes of exchanges through its broker-dealer subsidiary, Brut, which may not be a member of all exchanges (Brut's quotes are displayed in the Nasdaq Market Center, thus the liquidity in the Brut ECN will be accessible as part of the liquidity in the Nasdaq Market Center). Routing done by Brut for the Nasdaq Market Center is conducted separately from routing the Brut Facility performs for its subscribers. Nasdaq also will route orders to exchanges in which Brut is not a member, to the extent Brut has access to the market participants displaying quotes in these other markets. For example, one national securities exchange's quotes can be accessed indirectly by routing orders to the ECN that is the predominant, if not sole, market participant displaying quotes on that exchange. In addition, Nasdaq also may route orders to market centers that display their quotes through the NASD's Alternative Display Facility ("ADF") and market centers that do not display their quotes through exchanges or the ADF.

superior to those displayed on Nasdaq and such quotes are accessible by Nasdaq. For each order flagged for routing, the Nasdaq Market Center will determine whether Nasdaq is at the best price vis-à-vis other markets that are accessible through Nasdaq's router. If Nasdaq is displaying the best prices, the order will be executed in full or up to the maximum amount of shares available in Nasdaq at the price levels that are superior to the prices at these other markets. Nasdaq would route any unfilled portion of the order to one of the other markets that are displaying superior quotes and that is accessible by the Nasdaq router. If more than one market is at a price level that is superior to Nasdaq's displayed price, the computer algorithm of the Nasdaq Market Center router will determine the market, or markets, to which the order will be sent, based on several factors including the number of shares being displayed, response time, likelihood of undisplayed trading interest, and the cost of accessing the market.

If other markets accessible through the router have prices superior to those on Nasdaq when an order is next in line to be processed, the order will by-pass the Nasdaq Market Center execution algorithm and will be routed to a market or markets displaying the superior priced quotes.[8] If an order (or a portion of the order) remains unfilled after being routed, it will be returned to Nasdaq where, if the order is marketable, it will be returned to the Non-Directed Order processing queue, where it can be executed in Nasdaq, or routed again, if Nasdaq is not at the best price when the order is next in line in the processing queue.[9] Once a routed limit order is no longer marketable, whether it becomes non-marketable upon return to Nasdaq or while in the execution queue, it will be placed on the Nasdaq Market Center book, if consistent with the order's time in force condition.[10] Once on the book, however, an order will not be routed out of the Nasdaq Market Center, even if it becomes marketable against the quotes of another market.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with Section 15A of the Act,[11] in general, and furthers the objectives of Section 15A(b)(6),[12] in particular, in that Section 15A(b)(6) requires the NASD's rules to be designed, among other things, to protect investors and the public interest. In addition, Nasdaq believes its proposal is consistent with Section 11A(a)(1)(C)(ii) of the Act,[13] which states that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure, among other things, fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets. Finally, Nasdaq believes its proposal is consistent with the Commission's Regulation NMS, which supports the concept of self-regulatory organizations ("SROs") accessing the quotes of other SROs through broker-dealers.[14]

Nasdaq believes this proposal is consistent with the NASD's obligations under Section 15A of the Act because it would enable members to use the Nasdaq Market Center to access other markets that are displaying prices superior to those available on Nasdaq. In addition, Nasdaq also believes that the proposal is consistent with Section 11A because it should allow Nasdaq to compete with a national securities exchange that offers a similar routing feature through its broker-dealer subsidiary. Further, Nasdaq believes that the proposal would allow Nasdaq to implement the method envisioned by the Commission in Regulation NMS for accessing other SROs' quotes.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change, as amended, 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

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Nasdaq consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–033 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–NASD–2004–033. 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

[8] Nasdaq states that when a member submits a market order to the Nasdaq Market Center and has chosen to have the order routed, if routed, the market order will be routed to another market as a limit order. An order that has been routed to another market shall have no time standing in the Nasdaq Market Center execution queue relative to other orders in the Nasdaq Market Center.

[9] Nasdaq states that a market order that is converted to a limit order when it is routed to another market will become a market order again upon return to Nasdaq. However, if after being placed back in the order execution queue the order is routed yet again, it will be re-converted to a limit order.

[10] Nasdaq states that orders returned to Nasdaq will be placed on the Nasdaq Market Center book on the basis of the time-stamp assigned to the order when it was originally submitted to the Nasdaq Market Center.

[11] 15 U.S.C. 78*o*–3.

[12] 15 U.S.C. 78*o*–3(b)(6).

[13] 15 U.S.C. 78k–1(a)(1)(C)(ii).

[14] Securities Exchange Act Release Nos. 49325 (Feb. 26, 2004), 69 FR 11126 (Mar. 9, 2004); 49749 (May 20, 2004), 69 FR 30142 (May 26, 2004); 50870 (Dec. 16, 2004), 69 FR 77424 (Dec. 27, 2004).

provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. 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–NASD–2004–033 and should be submitted on or before May 4, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1743 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51498; File No. SR-NASD–2005–038]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Modify the Pricing for Non-NASD Members Using Nasdaq's Brut Facility

April 6, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on March 28, 2005, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and at the same time is granting accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to modify the pricing for non-NASD members using Nasdaq's Brut Facility. Nasdaq requests approval to implement the proposed rule change retroactively as of April 1, 2005. The text of the proposed rule change is available on the NASD's Web site (http://www.nasd.com), at the NASD's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. Nasdaq has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose On March 28, 2005, Nasdaq filed with the Commission SR-NASD–2005–035, modifying the fee structure applicable to NASD members using the Nasdaq Market Center ("NMC") or Nasdaq's Brut Facility ("Brut"). This filing seeks to impose, effective April 1, 2005, that exact same fee structure on non-NASD members using Brut. As set forth in SR-NASD–2005–035, fees in both the NMC and Brut are based upon multiple volume-based usage tiers that take into account the volume of a market participant across both systems. Currently, market participants must provide more than 500,000 shares of average daily liquidity each month to reduce their per-share execution costs or routing charges. In order to receive a higher liquidity provider credit, users must provide in excess of 1,000,000 shares of average daily liquidity each month in Nasdaq and/or Brut.

Just like the fees applicable to NASD members in SR-NASD–2005–035, for non-NASD members, Nasdaq proposes in this filing to: [1] Increase to just over 2,000,000 shares the amount of average daily liquidity needed to be provided by a market participant to have its per-share execution or routing costs reduced; and [2] increase to 2,000,000 shares the number of shares of average daily liquidity needed to be provided each month before a market participant becomes eligible for an increased liquidity provider credit. The resulting modified fee structure is summarized below:

Charge to member entering order:	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:.	
Greater than 10 million	$0.0027 per share executed (but no more than $108 per trade for trades in securities executed at $1.00 or less per share).
Greater than 2,000,000 but less than or equal to 10,000,000	$0.0028 per share executed (but no more than $112 per trade for trades in securities executed at $1.00 or less per share).
2,000,000 or less	$0.0030 per share executed (but no more than $120 per trade for trades in securities executed at $1.00 or less per share).
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:.	
Greater than 20 million	$0.0025 per share executed (but no more than $100 per trade for trades in securities executed at $1.00 or less per share).
Greater than 2,000,000 but less than or equal to 20,000,000	$0.0022 per share executed (but no more than $88 per trade for trades in securities executed at $1.00 or less per share).
Less than or equal to 2,000,000	$0.0020 per share executed (but no more than $80 per trade for trades in securities executed at $1.00 or less per share).

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

Routed orders	
Any order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility and that does not attempt to execute in Nasdaq's Brut Facility prior to routing.	$0.004 per share executed.
Any other order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility.	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month and average daily shares accessed through and/or routed from the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month (excluding orders routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility that do not attempt to execute in Nasdaq's Brut Facility prior to routing):	
Greater than 20 million shares of liquidity provided and greater than 50 million shares accessed or routed	$0.0025 per share executed
Greater than 10 million but less than or equal to 20 million shares of liquidity provided and any amount accessed or routed, OR greater than 20 million shares of liquidity provided and 50 million or fewer shares accessed and/or routed.	$0.0027 per share executed.
Greater than 2,000,000 but less than or equal to 10,000,000 shares of liquidity provided and any amount accessed and/or routed.	$0.0028 per share executed.
Less than or equal to 2,000,000 shares of liquidity provided and any amount accessed and/or routed	$0.0030 per share executed.

Nasdaq believes that the proposed changes to its fee structure are reasonable, and draw an appropriate balance between the value-added benefits provided to the users by the Nasdaq Market Center and Brut systems and the fees imposed for such services.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[3] in general, and with Section 15A(b)(5) of the Act,[4] in particular, in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Nasdaq states that written comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2005–038 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–NASD–2005–038. 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 office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2005–038 and should be submitted on or before May 4, 2005.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.[5] Specifically, the Commission believes the proposed rule change is consistent with Section 15A(b)(5) of the Act,[6] which requires that the rules of the self-regulatory organization provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facilities or system which it operates or controls.

The Commission notes that this proposal, which permits the retroactive application of the pricing and rebate schedule for non-NASD members that covers activity both on the NMC and Brut and is effective as of April 1, 2005, would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that was effective as of April 1, 2005 pursuant to SR–NASD–2005–035. The Commission believes that the fees are scaled according to objective criteria applied across-the-board to all categories of users, *i.e.*, the pricing and rebate schedule will now apply equally to non-members as well as members, and is based on the volume of business they conduct on the NMC and Brut.

The Commission finds good cause for approving the proposed rule change prior to the 30th day of the date of publication of notice of filing thereof in

[3] 15 U.S.C. 78*o*3.

[4] 15 U.S.C. 78*o*3(b)(5).

[5] The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78*o*–3(b)(5).

the **Federal Register**. The Commission notes that the proposed pricing and rebate schedule for non-NASD members are identical to those in SR–NASD–2005–035, which implemented a new pricing and rebate schedule for NASD members and which became effective as of April 1, 2005. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing and rebate schedule with the same date of effectiveness for both NASD members and non-NASD members. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,[7] to approve the proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR–NASD–2005–038) be approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1746 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51499; File No. SR–NASD–2005–035]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. to Modify Pricing for NASD Members Using the Nasdaq Market Center and Nasdaq's Brut Facility

April 6, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 28, 2005, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii)[3] of the Act and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to modify the pricing for NASD members using the Nasdaq Market Center and Nasdaq's Brut Facility. Nasdaq states that it will implement the proposed rule change on April 1, 2005. The text of the proposed rule change is available on the NASD's Web site (*http://www.nasd.com*), at the NASD's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change 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. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Nasdaq Market Center and Brut Facility combined fee structure is based upon multiple volume-based usage tiers that take into account the volume of a market participant across both systems. Currently, market participants must provide more than 500,000 shares of average daily liquidity each month to reduce their per-share execution costs or routing charges. In order to receive a higher liquidity provider credit, users must provide in excess of 1,000,000 shares of average daily liquidity each month in Nasdaq and/or Brut.

Nasdaq stated that, in this filing, it proposes to: (1) Increase to just over 2,000,000 shares the amount of average daily liquidity needed to be provided by a market participant to have its per-share execution or routing costs reduced; and (2) increase to 2,000,000 shares the number of shares of average daily liquidity needed to be provided each month before a market participant becomes eligible for an increased liquidity provider credit. The resulting modified fee structure[5] is summarized below:

Charge to member entering order:	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:	
Greater than 10 million	$0.0027 per share executed (but no more than $108 per trade for trades in securities executed at $1.00 or less per share).
Greater than 2,000,000 but less than or equal to 10,000,000	$0.0028 per share executed (but no more than $112 per trade for trades in securities executed at $1.00 or less per share).
2,000,000 or less	$0.0030 per share executed (but no more than $120 per trade for trades in securities executed at $1.00 or less per share).

[7] 15 U.S.C. 78s(b)(2).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The fees currently in Rule 7010(i) are applicable to non-members that use Nasdaq's Brut Facility. Nasdaq will seek to apply the same fee schedule proposed here for non-members that use Brut. Accordingly, Nasdaq is submitting a separate filing (SR–NASD–2005–038) to make the proposed rule changes contained in this filing applicable to non-members.

Charge to member entering order:	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month:	
Greater than 20 million	$0.0025 per share executed (but no more than $100 per trade for trades in securities executed at $1.00 or less per share).
Greater than 2,000,000 but less than or equal to 20,000,000	$0.0022 per share executed (but no more than $88 per trade for trades in securities executed at $1.00 or less per share).
Less than or equal to 2,000,000	$0.0020 per share executed (but no more than $80 per trade for trades in securities executed at $1.00 or less per share).

Routed orders	
Any order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility and that does not attempt to execute in Nasdaq's Brut Facility prior to routing.	$0.004 per share executed.
Any other order entered by a member that is routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility.	
Average daily shares of liquidity provided through the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month and average daily shares accessed through and/or routed from the Nasdaq Market Center and/or Nasdaq's Brut Facility by the member during the month (excluding orders routed outside of both the Nasdaq Market Center and Nasdaq's Brut Facility that do not attempt to execute in Nasdaq's Brut Facility prior to routing):	
Greater than 20 million shares of liquidity provided and greater than 50 million shares accessed or routed	$0.0025 per share executed.
Greater than 10 million but less than or equal to 20 million shares of liquidity provided and any amount accessed or routed, OR greater than 20 million shares of liquidity provided and 50 million or fewer shares accessed and/or routed.	$0.0027 per share executed.
Greater than 2,000,000 but less than or equal to 10,000,000 shares of liquidity provided and any amount accessed and/or routed.	$0.0028 per share executed.
Less than or equal to 2,000,000 shares of liquidity provided and any amount accessed and/or routed	$0.0030 per share executed.

Nasdaq believes that the proposed changes to its fee structure are reasonable, and draw an appropriate balance between the value-added benefits provided to the users by the Nasdaq Market Center and Brut systems and the fees imposed for such services.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[6] in general, and with Section 15A(b)(5) of the Act,[7] in particular, in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Nasdaq states that written comments were neither solicited nor received.

[6] 15 U.S.C. 78*o*–3.

[7] 15 U.S.C. 78*o*–3(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The forgoing rule change is subject to Section 19(b)(3)(A)(ii) of the Act[8] and subparagraph (f)(2) of Rule 19b–4[9] thereunder because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2005–035 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–NASD–2005–035. 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 office of the NASD. All comments received will be posted without change; the Commission does

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] 15 U.S.C. 78s(b)(3)(C).

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–NASD–2005–035 and should be submitted on or before May 4, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1747 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51478; File No. SR–NSX–2005–01]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Stock Exchange Relating to the Exchange's Regulatory Transaction Fee

April 5, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 31, 2005, the National Stock Exchange℠ ("NSX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NSX. The Exchange filed this proposal 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. 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

NSX proposes to amend Exchange Rule 11.10(A)(q), which pertains to the transaction fee that NSX assesses to members and uses to help fund the Exchange's fee obligations to the Commission under Section 31 of the Act.[5] NSX proposes to amend the title and text of the rule to make clear the distinction between the Exchange's Section 31 fee obligations and the transaction fee the Exchange assesses members to fund those obligations, and to amend the text to explicitly reference that the NSX Rule 11.10(A)(q) fee will change in tandem with Section 31 rate changes announced by the Commission. Proposed new language is underlined. Proposed deletions are in brackets.

* * * * *

RULES OF NATIONAL STOCK EXCHANGE

* * * * *

CHAPTER XI

Trading Rules

* * * * *

Rule 11.10 National Securities Trading System Fees

A. Trading Fees

(a)–(p) No change.

(q) [SEC]*Regulatory Transaction* Fee. [-] *Under Section 31 of the Act, the Exchange must pay certain fees to the Commission. To help fund the Exchange's obligations to the Commission under Section 31, this Regulatory Transaction Fee is assessed to members. To the extent there may be any excess monies collected under this Rule, the Exchange may retain those monies to help fund its general operating expense.* Each member engaged in executing transactions on the Exchange shall pay, in such manner and at such times as [the Treasurer of] the Exchange shall direct, a *Regulatory Transaction F*[f]ee equal to [1/300th of one percent of the aggregate dollar amount] *(i) the rate determined by the Commission to be applicable to covered sales occurring on the Exchange in accordance with Section 31 of the Act* [of the sales on the Exchange] *multiplied by (ii) the member's aggregate dollar amount of covered sales occurring on the Exchange during any computational period* [of such securities (other than bonds, debentures and other evidences of indebtedness and any sale or any class of sales of securities which the Securities and Exchange Commission may, by rule, exempt from the imposition of the fee) executed by such member].

(r) No change.

B. No change.

C. 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, NSX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSX 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

Section 31 of the Act requires NSX, other national securities exchanges, and NASD to pay transaction fees and assessments to the Commission that are designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. On June 28, 2004, the Commission established new procedures governing the calculation, payment, and collection of fees and assessments on securities transactions owed by national securities exchanges and national securities associations pursuant to Section 31 of the Act.[6] The new procedures became effective August 6, 2004. In accordance with the new procedures, NSX must now provide the Commission with trade data on covered sales[7] occurring on the Exchange, which the Commission uses to calculate the amount of fees due from NSX. Accordingly, the calculation of fees owed by NSX pursuant to Section 31 of the Act is now performed by the Commission.

To recover the costs of NSX's Section 31 obligation, NSX assesses a transaction fee on its members under Exchange Rule 11.10(A)(q). The Exchange has determined to modify the text of Exchange Rule 11.10(A)(q) in response to statements made by the Commission in its Adopting Release that "it is misleading to suggest that a customer or [a self-regulatory organization] member incurs an obligation to the Commission under Section 31."[8] While NSX notes that it

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] 15 U.S.C. 78ee.

[6] *See* Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060 (July 7, 2004) ("Adopting Release").

[7] "Covered sale" means "a sale of a security, other than an exempt sale or a sale of a security future, occurring on a national securities exchange or by or through any member of a national securities association otherwise than on a national securities exchange." 17 CFR 240.31(a)(6).

[8] *See* Adopting Release, 69 FR at 41072. The Exchange has also reviewed the rounding convention it had previously utilized in assessing the NSX Rule 11.10(A)(q) fee to its members. Prior to that review, the Exchange calculated the fee based on the sell-side value per trade multiplied by the Commission's current rate. This number was

Continued

has previously filed amendments Exchange Rule 11.10(A)(q) with the Commission,[9] to avoid any possible confusion as discussed in the Adopting Release, the Exchange is revising the title and text of Exchange Rule 11.10(A)(q). Specifically, in conformity with the Adopting Release, NSX is changing the name of the rule and related references from "SEC Fee" to "Regulatory Transaction Fee." The rule is also being amended to make clear that, to the extent the Exchange may collect more from members under Exchange Rule 11.10(A)(q) than is due from the Exchange to the Commission under Section 31 of the Act for covered sales occurring on the Exchange, for example due to rounding differences, the excess monies collected may be used by the Exchange to fund its general operating expense. The Exchange is also revising the text to explicitly reference that the Regulatory Transaction Fee rate applicable to each member's aggregate amount of covered sales occurring on the Exchange will continue to be set, as it is today, in accordance with Section 31 of the Act.[10]

Though the requirements of Section 31 of the Act, including the new procedures established by the Commission, apply directly to NSX and other self-regulatory organizations, and not their membership, the requirements will affect the obligations of members under Exchange Rule 11.10(A)(q). Therefore, NSX has issued a Regulatory Circular to inform members of the new procedures relating to Section 31 of the Act to remind members of their continuing obligation to pay the transaction fees assessed by NSX pursuant to Exchange Rule 11.10(A)(q) so that it can recover the costs of its Section 31 obligation, and to clarify the manner in which the Exchange would use rounding to calculate each member's applicable NSX Rule 11.10(A)(q) fee.[11]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(4) of the Act,[13] in particular, in that it provides for the equitable allocation of dues, fees, and other charges among its members.

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 foregoing proposed rule change has become immediately effective pursuant to Section 19(b)(3)(A)(ii) of the Act[14] and subparagraph (f)(2) of Rule 19b–4 thereunder,[15] because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–NSX–2005–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NSX–2005–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2005–01 and should be submitted on or before May 4, 2005.

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then rounded, and the rounded amount for each of the member's monthly sell-side transactions was then added up to arrive at the total amount due from the member for a given month. The Exchange then used the monies collected to fund the Exchange's payment of the amount due the Commission under Section 31 of the Act. After its review and after consultation with the Commission staff, the Exchange has determined to round the applicable fees due on a per-member basis and not on a per-transaction basis and announced this change in rounding convention to its membership through a regulatory circular. *See* NSX Regulatory Circular 04–11. As of August 2, 2004, the fee is now calculated based on each member's overall sell-side transaction value multiplied by the Commission's applicable Section 31 fee rate.

[9] *See, e.g.*, Securities Exchange Act Release No. 37586 (August 20, 1996), 61 FR 45467 (August 29, 1996) (notice of filing and immediate effectiveness of File No. SR–CSE–96–04). The Exchange recently changed its name and was formerly known as the Cincinnati Stock Exchange or "CSE." *See* Securities Exchange Act Release No. 48774 (November 12, 2003), 68 FR 65332 (November 19, 2003) (notice of filing and immediate effectiveness of File No. SR–CSE–2003–12).

[10] The Exchange is also amending Rule 11.10(A)(q) to reflect that the applicable fee rate is periodically adjusted in accordance with Section 31. In the past, NSX has notified members, through regulatory circulars and other means, of any periodic adjustments to the fee rate made by the Commission. NSX will continue to notify members of any such adjustments in the future since NSX seeks to recover the costs of its Section 31 obligation from its members. Because these amendments are similar to those proposed in another rule proposal pending with the Commission, File No. SR–CSE–2003–07, the Exchange plans to file amendment 3 to File No. SR–CSE–2003–07 to reflect these revisions.

[11] *See* NSX Regulatory Circular 04–011 (August 2, 2004).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–1744 Filed 4–12–05; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Delegation of Authority No. 145–19]

Delegation of Authority to the Global AIDS Coordinator Under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Superseding Delegation of Authority 145–18 and Delegation No. 279)

By virtue of the authority vested in me by the laws of the United States including by the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 *et seq.*), section 1 of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 2651a), Executive Order 12163, as amended, including by Executive Order 13361 of November 16, 2004 (Assignment of Functions under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003), and Delegation of Authority Number 245 of April 23, 2001, State Department Delegation of Authority No. 145 of February 4, 1980, as amended, is hereby further amended as follows:

Section 1. Section 1(p) is restated as follows:

"(p) To the Global AIDS Coordinator: Those functions in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (P.L. 108–25)(Act), as amended, except amendments made by that Act, that were conferred upon the President and delegated to the Secretary of State."

Section 2. Section 2(a) is amended in paragraph (1) by adding before the semicolon at the end the following:

": *Provided,* That the functions under section 104A of the Act shall be exercised subject to the authorities and duties of the Global AIDS Coordinator as contained in section 1(f) of the State Department Basic Authorities Act of 1956".

Section 3. Notwithstanding any provision of this Delegation of Authority, the Secretary of State and the Deputy Secretary of State may at any time exercise any function delegated by this delegation of authority.

Section 4. This delegation supersedes (1) Delegation of Authority No. 145–18 of February 23, 2004, amending State Department Delegation of Authority No. 145 of February 4, 1980, as amended, and (2) the Delegation of Authority to the Global AIDS Coordinator of November 17, 2004.

This delegation shall be published in the **Federal Register.**

Dated: December 22, 2004.

Richard L. Armitage,

Deputy Secretary of State, Department of State.

Editorial Note: This document was received at the Office of the Federal Register on April 8, 2005.

[FR Doc. 05–7415 Filed 4–12–05; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Delegation of Authority No. 279]

Delegation of Authority to the Global AIDS Coordinator Under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Subsequently Superseded by Delegation No. 145–19)

By virtue of the authority vested in me as Deputy Secretary of State, including the authority delegated to me by the Secretary of State in Delegation of Authority Number 245 of April 23, 2001, and by the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 *et seq.*), and section 1 of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 2651a), I hereby re-delegate the authorities conferred upon the President by the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Pub. L. 108–25) and delegated to the Secretary of State pursuant to the Executive Order of November 16, 2004, (Assignment of Functions under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003), amending Executive Order 12163 of September 29, 1979 (Administration of Foreign Assistance and Related Functions).

Notwithstanding any provision of this Delegation of Authority, the Secretary of State and the Deputy Secretary of State may at any time exercise any function delegated by this delegation of authority.

This delegation shall be published in the **Federal Register.**

Dated: November 17, 2004.

Richard L. Armitage,

Deputy Secretary of State, Department of State.

Editorial Note: This document was received at the Office of the Federal Register on April 8, 2005.

[FR Doc. 05–7416 Filed 4–12–05; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF TRANSPORTATION

[Docket No. OST–2004–19172]

Office of Small and Disadvantaged Business Utilization; Notice of Request for New Data Collection

AGENCY: Office of the Secretary, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for approval and comment. The ICR describes the nature of the information collection and its expected cost and burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on December 30, 2004 [Volume 69, Number 250] and January 7, 2005 [FR Vol. 70, No. 5, page 1501] (correction). No comments were received.

DATES: Comments must be submitted on or before May 13, 2005. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number OST–2004–19172 by 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 plaza level of the Nassif Building, 400 Seventh Street, SW, Washington DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking process; Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act heading under Regulatory Notes.

Docket: For access to the docket to read background documents or

[16] 17 CFR 200.30–3(a)(12).

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: Nancy Strine, Office of Small and Disadvantaged Business Utilization and Minority Resource Center, U.S. Department of Transportation, 400 Seventh Street, SW., Room 9414, Washington, DC 20590, 202–366–5343/ 1–800–532–1169, ext. 65343.

SUPPLEMENTARY INFORMATION:

Title: Short-term Loan Program Online Application.

OMB Control Number: n/a Agency Form Number: DOT 4640.1.

Affected Public: Disadvantaged Business Enterprises (DBEs) businesses who have an interest in our business-related concerns.

Annual Estimated Burden: 50 hours.

Abstract: In accordance with 49 U.S.C. 332(b)(3)(4)(5), the Office of Small and Disadvantaged Business Utilization and Minority Resource Center is authorized to facilitate, encourage, promote, and assist minority entrepreneurs and businesses in getting transportation-related contracts, subcontracts, and projects related to those business opportunities. In response to developmental need, the U.S. Department of Transportation (DOT) Short Term Lending Program (STLP) was developed by the Office of Small and Disadvantaged Business Utilization and Minority Resource Center to offer certified Disadvantaged Business Enterprises (DBEs) the opportunity to obtain short-term working capital at prime interest rates for transportation-related contracts.

DBE firms participating in the STLP program will submit loan applications on-line to participating DOT Preferred Bank Lenders (PBL). The cumulative data collected will be analyzed by the Office of Small and Disadvantaged Business Utilization and Minority Resource Center and PBLs to determine the eligibility of DBEs for lines of credit to finance accounts receivable arising from transportation-related contracts. The information will also be used to increase uniformity among participating PBLs.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval.

Issued in Washington, DC, on April 7, 2005.

Michael A. Robinson,

Information Technology Program Management, United States Department of Transportation.

[FR Doc. 05–7373 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

[Docket No. OST–2004–20004]

Office of Small and Disadvantaged Business Utilization; Notice of Request for New Data Collection

AGENCY: Office of the Secretary, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for approval and comment. The ICR describes the nature of the information collection and its expected cost and burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January 7, 2005 [FR Vol. 70, No. 5, page 1500–1501]. No comments were received.

DATES: Comments must be submitted on or before May 13, 2005. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number OST–2004–19172 by 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 plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking process. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading under Regulatory Notes.

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: Arthur D. Jackson, Office of Small and Disadvantaged Business Utilization, U.S. Department of Transportation, 400 Seventh Street, SW., Room 9414, Washington, DC 20590, 202–366–5344/ 1–800–532–1169, ext. 65344.

SUPPLEMENTARY INFORMATION:

Title: Counseling Information Form; Regional Center Intake Form; and Monthly Report of Operations.

OMB Control Number: N/A.

Agency Form Number: DOT 4640.1.

Affected Public: Representatives of DOT Regional Centers and Disadvantaged Business Enterprises (DBE), women-owned and certified minority businesses, who have an interest in our business-related concerns.

Annual Estimated Burden: 4,311 hours.

Abstract: In accordance with (Pub. L. 95–507), an amendment to Small Business Act and Small Business Investment Act of 1958 and 49 U.S.C. 332(b)(2), (5), the Minority Resource Center (MRC) is authorized to facilitate, encourage, promote, and assist minority entrepreneurs and businesses in getting contracts, subcontracts, and projects related to those business opportunities. Moreover, the provision authorizes MRC to carry out market research, planning, economic and business analyses, and feasibility studies to identify those business opportunities. The cumulative data collected will be analyzed by MRC to determine the effectiveness of counseling and services provided as well as a description of the Disadvantaged Business Enterprise (DBE).

DOT Regional Center will collect information on a Disadvantaged Business Enterprise (DBE), such as type of business & services they seek from DOT Regional Centers. Services provided include business plan, marketing, sales, financial analysis, etc. Such data will be analyzed by OSDBU to determine agency effectiveness in assisting DBEs obtain government contracts and subcontracts.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval.

Issued in Washington, DC, on April 7, 2005.

Michael A. Robinson,

Information Technology Program Management, United States Department of Transportation.

[FR Doc. 05–7374 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending April 1, 2005

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. Sections 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2005–20854.

Date Filed: March 31, 2005.

Parties: Members of the International Air Transport Association

Subject: PTC2 ME–AFR 0130 dated 8 March 2005. TC2 Middle East-Africa Resolutions r1–r14. Minutes: PTC2 ME–AFR 0131 dated 24 March 2005. Tables: PTC2 ME–AFR Fares 0069 dated 18 March 2005. Intended effective date: 1 May 2005.

Renee V. Wright,

Acting Program Manager, Docket Operations, Alternate Federal Register Liaison.

[FR Doc. 05–7370 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending April 1, 2005

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2005–20828.

Date Filed: March 29, 2005.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: April 19, 2005.

Description: Application of ASTAR Air Cargo, Inc., requesting that its U.S.—Mexico certificate authority for Route 725, segments 1 through 9, be amended to add the terminal point Wilmington, OH in the U.S. and to add, Sautillo, as a point in Mexico.

Renee V. Wright,

Acting Program Manager, Docket Operations, Alternate Federal Register Liaison.

[FR Doc. 05–7371 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Order Adjusting the Standard Foreign Fare Level Index

AGENCY: Department of Transportation.

ACTION: Notice of Order Adjusting The Standard Foreign Fare Level Index (Docket OST–05–20332).

SUMMARY: The Department revises the Standard Foreign Fare Level (SFFL) to reflect the latest available fuel and non fuel cost changes experienced by carriers, as required by 40 U.S.C. 41509(e).

FOR FURTHER INFORMATION CONTACT: Mr. John Kiser or Ms. Diane Z. Rhodes, Pricing & Multilateral Affairs, Division (X–43, Room 6424), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, 202 366–1065.

Dated: April 7, 2005.

Karan K. Bhatia,

Assistant Secretary for Aviation and International Affairs.

[FR Doc. 05–7369 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Change 1 to AC 23–15A, Small Airplane Certification Compliance Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: This notice announces the issuance of change 1 to AC 23–15A, Small Airplane Certification Compliance Program. Change 1 to AC 23–15A deletes the fourth sentence in paragraph 5n(2)(e) and deletes "fatigue properties" in fifth sentence in paragraph 5n(2)(e). This change is required since the paragraph was misinterpreted by some, to mean that no fatigue testing is required for composites. A parallel was drawn between the failure phenomenon (at a micro level) of wood and composites. Since the comparison created confusion, all mention of composites is eliminated.

DATES: Change 1 to Advisory Circular (AC) 23–15A was issued by the Manager, Small Airplane Directorate on March 15, 2005.

How to Obtain Copies: A paper copy of change 1 to AC 23–15A may be obtained by writing to the U.S. Department of Transportation, Subsequent Distribution Office, DOT Warehouse, SVC–121.23, Ardmore East Business Center, 3341Q 75th Avenue, Landover, MD 20785, telephone 301–322–5377, or by faxing your request to the warehouse at 301–386–5394. The AC will also be available on the Internet at *http://www.airweb.faa.gov/AC.*

Issued in Kansas City, Missouri on April 1, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7437 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability of Draft Environmental Impact Statement (DEIS), Notice of Public Comment Period for the DEIS and Schedule of Public Information Meetings and Public Hearings for Proposed Development Activities at the Juneau International Airport, Juneau, AK

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT). The U.S. Army Corps of Engineers (USACE), U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Services (NMFS) and Alaska Department of Fish and Game (ADF&G) are cooperating agencies, by virtue of their jurisdictional authority and/or resources management responsibilities.

ACTION: Notice of availability, notice of comment period, notice of public information meeting and public hearing.

SUMMARY: The Federal Aviation Administration is issuing this notice to advise the public that a Draft Environmental Impact Statement (DEIS) for Proposed Development Activities at the Juneau International Airport (JNU) has been prepared and is available for public review and comment. Written requests for the DEIS and written comments on the DEIS can be submitted to the individual listed in the section **FOR FURTHER INFORMATION CONTACT.** Public information meetings and public hearings will be held on June 1 and June 2, 2005. The public comment period will commence on April 29, 2009 and will close on June 30, 2005.

Public Comment and Information Meetings/Public Hearings: The start of the public comment period on the DEIS will be April 29, 2005 and will end on June 30, 2005. Two combined public Information meetings and public hearings will be held on June 1 and June 2, 2005, at different times to accommodate differences in availability of interested parties. The public information meeting on Wednesday, June 1 will begin at 3 p.m. (ADT) and will last until 5 p.m. (ADT). The public hearing on that date will begin shortly after the public information meeting, at 5:30 p.m. (ADT). The public information meeting on Thursday, June 2 will begin at 5 p.m. (ADT) and will last until 7 p.m. (ADT). The public hearing on that date will begin shortly after the public information meeting, at 7:30 p.m. (ADT). The location for both of the Public Information Meetings/Public Hearings is Centennial Hall, 101 Egan Drive, Juneau, AK 99801.

DEIS Availability and Review

Copies of the DEIS may be viewed during regular business hours at the following locations:

1. Federal Aviation Administration, Airports Division, 222 W. 7th Avenue #14, Anchorage, AK 99513–7504. (907) 271–5454 or (907) 271–3813.
2. Juneau International Airport, Airport Managers Office, 1873 Shell Simmons Drive, Juneau, AK (907) 789–7821.
3. Valley Branch Public Library, Mendenhall Mall, Juneau, AK 99801. (907) 789–0125.
4. Downtown Juneau Public Library, 292 Marine Way, Juneau, AK 99801. (907) 586–5249.

The Juneau International Airport, Airport Managers Office has a limited number of CDs of the entire DEIS and Executive Summaries available for public distribution. Please contact the Airport Managers office at (907) 789–7821 for a copy.

Comments from interested parties on the DEIS are encouraged and may be presented verbally at the public hearings. Written comments may be submitted to the FAA during the public information meetings and hearings and at the address listed in the section entitled **FOR FURTHER INFORMATION CONTACT.** On-line comments may be submitted using the form provided at the project Web site *http://www.jnu-eis.org* by following the links to Public Comment Form.

FAA encourages all interested parties to provide comments concerning the scope and content of the Draft EIS. Comments should be as specific as possible and address the analysis of potential environmental impacts and the adequacy of the proposed action or merits of alternatives and the mitigation being considered. Reviewers should organize their participation so that it is meaningful and makes the agency aware of the viewer's interests and concerns using quotations and other specific references to the text of the Draft EIS and related documents. Matters that could have been raised with specificity during the comment period on the Draft EIS may not be considered if they are raised later in the decision process. This commenting procedure is intended to ensure that substantive comments and concerns are made available to the FAA in a timely manner so that the FAA has an opportunity to address them.

SUPPLEMENTARY INFORMATION: This DEIS discloses the environmental consequences associated with proposed development activities at the Juneau International Airport (JNU). JNU and the FAA have proposed a number of actions designed to enhance operational safety, facilitate aircraft alignment with Runway 26, and improve Airport facilities, including:

- Bring the Airport into compliance with FAA standards for runway safety area,
- Improve navigational alignment with Runway 26 at night and during poor weather,
- Construct and use a new, larger snow removal equipment and maintenance facility,
- Developed an improved, safer, and more secure access route to the fuel farm,
- Construct new aircraft parking and storage facilities to meet existing and future demands, and
- Implement an improved wildlife hazard management program that will reduce potential for aircraft collisions with wildlife.

The proposed Airport improvements would be completed during the 2005–2015 time period and, depending on the alternatives implemented, may result in temporary or long-term impacts to wetlands, water quality, wildlife habitat, vegetation, essential fish habitat, visual quality, socioeconomics, air, noise and two DOT 4(f) properties, the Dike Trail and the Mendenhall Wetlands State Game Refuge.

The purpose and need for these improvements is reviewed in the DEIS. All reasonable, prudent and feasible alternative are being considered, including the no-action alternative.

FOR FURTHER INFORMATION CONTACT: Patti Sullivan, Environmental Specialist, Federal Aviation Administration, Alaskan Region, Airports Division, 222 W. 7th Avenue #14, Anchorage, AK 99513–7504. Ms. Sullivan may be contacted during business hours at (907) 271–5454 (phone) and (907) 271–2851 (facsimile).

The comment period will close on June 30, 2005.

Issued in Anchorage, Alaska on April 5, 2005.

David G. Wahto,

Acting Manager, Airports Division, Alaskan Region.

[FR Doc. 05–7429 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Key Field Airport, Meridian, MS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Key Field Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before May 13, 2005.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address:

Jackson Airports District Office, 100 West Cross Street, Jackson, MS 39208.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Tom Williams, Executive Director of the Meridian Airport Authority at the following address: Post Office Box 4351, Meridian, MS 39304–4351.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Meridian Airport Authority under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: David Shumate, Program Manager, Jackson Airports District Office, 100 West Cross Street, (601) 664–9882. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Key Field Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On April 7, 2005, the FAA determined that the application to impose and use the revenue from a PFC submitted by Meridian Airport Authority was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than July 21, 2005.

The following is a brief overview of the application.

PFC Application No.: 05–07–C–00–MEI.

Level of the proposed PFC: $4.50.

Proposed charge effective date: June 1, 2005.

Proposed charge expiration date: March 31, 2008.

Total estimated net PFC revenue: $489,473.

Brief description of proposed project(s): Build Terminal Building; Survey and Clear runway approaches; Rehabilitate and improve drainage.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: None.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Meridian Airport Authority.

Dated: Issued in Jackson, MS on April 7, 2005.

Rans Black,

Manager, Jackson Airports District Office, Southern Region.

[FR Doc. 05–7426 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2005–20936]

Civilian Use of, and Requirements for, the Next Generation of GPS for Automotive Safety

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Request for comments.

SUMMARY: The U.S. Department of Transportation (DOT) is working closely with the U.S. Department of Defense (DOD) in modernizing the Global Positioning System (GPS). In this document, the National Highway Traffic Safety Administration (NHTSA) is requesting comments and information to help us determine the civilian specifications for the next generation of the GPS (GPS III) based on future automotive safety needs that could be enhanced by a modernized GPS.

DATES: Comments must be received on or before May 31, 2005.

ADDRESSES: You may submit comments identified by the DOT DMS Docket Number above 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, S.W., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided.

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: Arthur Carter, Office of Vehicle Safety Research, NVS–332, 400 Seventh Street, SW., Washington, DC 20590 (telephone: (202) 366–5669, fax: (202) 366–7237).

SUPPLEMENTARY INFORMATION: The U.S. Department of Transportation (DOT) is working closely with the U.S. Department of Defense (DOD) in modernizing the GPS. This next generation of GPS will be available beginning in approximately 2012, and in use for approximately two decades. Examples of use include the enhanced vehicle positioning information that could be provided by a modernized GPS that would improve the performance of various automotive safety systems such as intersection collision avoidance and road departure prevention. Many of these applications are being developed today based on the existing GPS complemented by inertial sensors and other technologies. The potential for improved performance over the existing GPS could bring new safety applications to save lives and improve efficiency.

To obtain information that will assist it in this process, NHTSA is publishing this document requesting comments and information about automotive safety and other initiatives related to the automotive safety impact of GPS.

Researchers and technical experts from automotive original equipment manufacturers (OEMs), suppliers, and other interested parties are invited to submit technical information that

focuses on new or improved safety applications and describes how future GPS specifications would enable or enhance these applications. Overviews of ongoing research programs and descriptions of industry practices related to GPS are also welcome.

In particular, NHTSA requests the specifications for such an upgraded and modernized GPS and discussions of advanced driver assistance systems, postcrash medical attention and other new safety applications that would take advantage of such a system. Some possibilities include how the next generation of GPS could be used for automotive safety purposes, approaches for evaluating the safety impacts of such systems, and what new research and other safety initiatives might be envisioned with an upgraded or modernized GPS system. NHTSA requests the details of specifications for such an upgraded GPS system. Specifications could include coverage, signal strength, accuracy, signal integrity, signal availability, continuity, additional signals in space, changes to orbital parameters, and additional data broadcast from the satellite constellation.

NHTSA will utilize the information in discussions between DOT and DOD to finalize the requirements for the next generation of GPS. The goal of this request is to generate recommendations for the performance capability of the next generation of GPS.

Background. The current GPS consists of three major segments. These are a Space Segment (SS), a Control Segment (CS), and a User Segment (US). GPS is a dual use, military and civil system whose mission is to provide Position, Navigation and Time (PNT) services. GPS provides ranging signals that enable users equipped with properly designed GPS receivers to precisely determine time and their three-dimensional position and velocity.

The increasing utilization of advanced technologies in automobiles brings the promise of enhanced safety and security. GPS, plus other vehicle technologies, could provide safety benefits, such as automatic crash notification directly to emergency medical services, and holds out the promise of additional future safety benefits.

NHTSA has been interested in the potential safety impact of the GPS system on advanced, in-vehicle technologies for a number of years. For example, one project just completed is the Enhanced Digital Mapping (EDMap) project. The goal of the EDMap project was to accelerate the development and deployment of a range of digital map databases or enhancements to existing databases that have sufficient accuracy and reliability to enhance or enable new vehicle safety applications or improve the performance of driver assistance systems under development or consideration by U.S. automakers. GPS was an integral part of this project for both map generation and vehicle positioning within the driver assistance systems.

The potential value of GPS to efficient and effective emergency response has been demonstrated through numerous initiatives, such as the Federal Communication Commission's (FCC) requirements for wireless Enhanced 911 (E911). FCC, requires wireless carriers, upon appropriate request by a local Public Safety Answering Point (PSAP), to provide the PSAP with the telephone number of a wireless 911 caller and the caller's location information, within 50 to 300 meters, using network or handset (GPS) solutions.

Things to Consider: How is GPS used today by the Original Equipment Manufacturers (OEMs) and their suppliers for product development and by the consumer while operating the vehicle? What limitations does GPS have? How are these limitations overcome by the OEMs? How could the satellites and the signals transmitted by them, be redesigned, or upgraded to overcome these limitations or add additional capabilities? How is GPS III envisioned to be used by the OEMs and suppliers in the future?

Written Statements, Presentations, and Comments: The agency has established Docket No. NHTSA–2005–20936 as a repository for information, statements, and comments on issues related to the automotive safety use of GPS. Written or electronic submissions may be made to this docket at any time.

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

For written materials, two copies should be submitted to Docket Management at the address given at the beginning of this document. The materials must not exceed 15 pages in length (49 CFR 553.21). Necessary attachments may be appended to the submissions without regard to the 15-page limit. This limitation is intended to encourage commenter to detail their information in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential business information, should be submitted to the Chief Counsel, NHTSA, at 400 Seventh Street, SW., Washington, DC 20590. Additionally, two copies of the above document from which the purportedly confidential information has been deleted should be submitted to Docket Management. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation, 49 CFR part 512.

How Can I Read Comments Submitted by Other People?

You may read the comments received by Docket Management at the address given above under **ADDRESSES.** The hours of the Docket are indicated above in the same location.

You may also review filed public comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Docket Management System (DMS) Web page of the Department of Transportation (*http://dms.dot.gov/*).

(2) On that page, click on "search."

(3) On the next page (*http://dms.dot.gov/search/*), type in the four-digit docket number shown at the beginning of this document. (*Example:* If the docket number were "NHTSA–2002–1234," you would type "1234.") After typing the docket number, click on "search."

(4) On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Furthermore, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

Privacy Act. Please note that 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.*

Issued: April 7, 2005.

Joseph N. Kanianthra,

Associate Administrator for Vehicle Safety Research.

[FR Doc. 05–7434 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Innovative Technology Administration

Agency Information Collection; Activity Under OMB Review; Report of Financial and Operating Statistics for Small Aircraft Operators

AGENCY: Research and Innovative Technology Administration (RITA), Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of currently approved collections. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 30-day comment period soliciting comments on the following collection of information was published on December 17, 2004 (69 FR 75601).

DATES: Written comments should be submitted by May 13, 2005.

FOR FURTHER INFORMATION CONTACT: Bernie Stankus, Office of Airline Information, RTS–42, Room 4125, RITA, BTS, 400 Seventh Street, SW., Washington, DC 20590–0001, Telephone Number (202) 366–4387, Fax Number (202) 366–3383 or e-mail *bernard.stankus@dot.gov.*

SUPPLEMENTARY INFORMATION:

Bureau of Transportation Statistics (BTS)

Title: Report of Financial and Operating Statistics for Small Aircraft Operators.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2138–0009.

Forms: BTS Form 298–C.

Affected Public: U.S. commuter and small certificated air carriers.

Abstract: Part 298 requires small certificated and commuter air carriers to submit, quarterly financial and operational reports to DOT.

Estimated Annual Burden Hours: 1,920 hours.

The Confidential Information Protection and Statistical Efficiency Act of 2002 (44 U.S.C. 3501), requires a statistical agency to clearly identify information it collects for non-statistical purposes. BTS hereby notifies the respondents and the public that BTS uses the information it collects under this OMB approval for non-statistical purposes including, but not limited to, publication of both respondent's identity and its data, submission of the information to agencies outside BTS for review, analysis and possible use in regulatory and other administrative matters.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention BTS Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department concerning consumer protection. Comments should address whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on April 7, 2005.

Donald W. Bright,

Assistant Director, Office of Airline Information.

[FR Doc. 05–7372 Filed 4–12–05; 8:45 am]

BILLING CODE 4910–FE–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34682]

Union Pacific Railroad Company—Temporary Trackage Rights Exemption—BNSF Railway Company

BNSF Railway Company (BNSF) has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company (UP) between BNSF milepost 4.8 near Kansas City, KS, and BNSF milepost 213.2 near Wichita, KS, on the one hand, and BNSF milepost 345.6 near Ft. Worth, TX, on the other,[1] a distance of approximately 595.8 miles.

The transaction was scheduled to be consummated on April 1, 2005, and the temporary trackage rights will expire on or about April 23, 2005. The purpose of the temporary trackage rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employees affected by the acquisition of the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), and any employee affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

This notice is filed under 49 CFR 1180.2(d)(8). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34682, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Robert T. Opal, 1400 Douglas Street, STOP 1580, Omaha, NE 68179.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: April 6, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–7378 Filed 4–12–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form SS–4 and SS–4PR

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this

[1] The trackage rights involve BNSF track segments with non-contiguous mileposts. As such, total mileage does not correspond to the milepost designation of the endpoints.

opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form SS–4, Application for Employer Identification Number, and Form SS–4PR, Solicitud de Numero de Indentification Patronal (EIN).

DATES: Written comments should be received on or before June 13, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn Kirkland Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Larnice Mack at Internal Revenue Service, room 6512, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at (*Larnice.Mack@irs.gov*).

SUPPLEMENTARY INFORMATION:

Title: SS–4, Application for Employer Identification Number, and Form SS–4PR, Solicitud de Numero de Identification Patronal (EIN).

OMB Number: 1545–0003.

Form Number: Forms SS–4 and SS–4PR.

Abstract: Taxpayers who are required to have an identification number for use on any return, statement, or other document must prepare and file Form SS–4 or Form SS–4PR (Puerto Rico only) to obtain a number. The information is used by the Internal Revenue Service and the Social Security Administration in tax administration and by the Bureau of the Census for business statistics.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, not-for-profit institutions, farms, Federal government and state, local or tribal governments.

Estimated Number of Respondents: 2,419,064.

Estimated Time Per Respondent: 1 hr, 37 minutes.

Estimated Total Annual Burden Hours: 3,919,265.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 6, 2005.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–1749 Filed 4–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[EE–45–93]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Currently, the IRS is soliciting comments concerning an existing final regulation, EE–45–93, Electronic Filing of Form W–4 (§ 31.3402(f)(5)–1).

DATES: Written comments should be received on or before June 13, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Electronic Filing of Form W–4.

OMB Number: 1545–1435.

Regulation Project Number: EE–45–93.

Abstract: Information is required by the Internal Revenue Service to verify compliance with regulation section 31.3402(f)(2)–1(g)(1), which requires submission to the Service of certain withholding exemption certificates. The affected respondents are employers that choose to make electronic filing of Forms W–4 available to their employees.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not for-profit institutions, and Federal, state, local or tribal governments.

Estimated Number of Respondents: 2,000.

Estimated Time Per Respondent: 20 hours.

Estimated Total Annual Burden Hours: 40,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the

information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 7, 2005.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–1750 Filed 4–12–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0408]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine claim payment due to holders of foreclosed VA guaranteed manufactured home unit and combination loans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 13, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to "OMB Control No. 2900–0408" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Manufactured Home Loan Claim Loan Guaranty (Manufactured Home Unit Only), (Section 3720, Chapter 37, Title 38 U.S.C.), VA Form 26–8629.

b. Manufactured Home Loan Claim Under Loan Guaranty (Manufactured Home Unit and Lot or Lot Only), (Section 3712, Chapter 37, Title 38 U.S.C.), VA Form 26–8630.

OMB Control Number: 2900–0408.

Type of Review: Extension of a currently approved collection.

Abstract: Holders of foreclosed VA guaranteed manufactured home unit and guaranteed combination manufactured home complete VA Forms 26–8629 and 26–8630 as a prerequisite payment of claims. The holder record accrued interest, various expenses of liquidation and claim balance on the forms to determine the amount claimed and submit with supporting documentation to VA. VA uses the data to determine the proper claim payment due to the holder.

Affected Public: Business or other for-profit and Individuals or households.

Estimated Annual Burden: 36 hours.

a. Manufactured Home Loan Claim Loan Guaranty (Manufactured Home Unit Only), (Section 3720, Chapter 37, Title 38 U.S.C.), VA Form 26–8629—33 hours.

b. Manufactured Home Loan Claim Under Loan Guaranty (Manufactured Home Unit and Lot or Lot Only), (Section 3712, Chapter 37, Title 38 U.S.C.), VA Form 26–8630—3 hours.

Estimated Average Burden Per Respondent:

a. Manufactured Home Loan Claim Loan Guaranty (Manufactured Home Unit Only), (Section 3720, Chapter 37, Title 38 U.S.C.), VA Form 26–8629—20 minutes.

b. Manufactured Home Loan Claim Under Loan Guaranty (Manufactured Home Unit and Lot or Lot Only), (Section 3712, Chapter 37, Title 38 U.S.C.), VA Form 26–8630—20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 110.

Dated: March 30, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. E5–1738 Filed 4–12–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0153]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before May 13, 2005.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0153."

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316.

Please refer to "OMB Control No. 2900–0153" in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Disability Benefits Questionnaire, VA Forms 29–8313 and 29–8313–1.

OMB Control Number: 2900–0153.

Type of Review: Extension of a currently approved collection.

Abstract: Policyholders that were granted a waiver of premium or income benefits based on total permanent disability must furnish proof that the condition still exist. If the policyholder fails to furnish such proof, all payments of monthly installments based on total permanent disability will cease. The data collected on VA Forms 29–8313 and 29–8313–1 is used to determine the policyholder's continuous entitlement to total disability benefits.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 18, 2004, at page 67626.

Affected Public: Individuals or households.

Estimated Annual Burden: 15,000 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 60,000.

Dated: March 31, 2005.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. E5–1739 Filed 4–12–05; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register
Vol. 70, No. 70
Wednesday, April 13, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TREASURY

Office of the Secretary

31 CFR Part 10

[TD 9165]

RIN 1545–BA70

Regulations Governing Practice Before the Internal Revenue Service

Correction

In rule document 04–27678 beginning on page 75839 in the issue of Monday, December 20, 2004, make the following correction:

§10.37 [Corrected]

On page 75845 in §10.37, in the second column, in the second paragraph, in the third line, "June 20, 2004" should read "June 20, 2005".

[FR Doc. C4–27678 Filed 4–12–05; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Wednesday,
April 13, 2005

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT42

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for the arroyo toad (*Bufo californicus*) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately 11,695 acres (ac) (4,733 hectares (ha)) fall within the boundaries of the critical habitat designation. The critical habitat is located in Santa Barbara, Ventura, Los Angeles, San Bernardino, and Riverside, Counties, California.

DATES: *Effective Date:* May 13, 2005.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003 (telephone 805/644–1766). The final rule, economic analysis, and maps will also be available via the Internet at *http://Ventura.fws.gov or http://Carlsbad.fws.gov.*

FOR FURTHER INFORMATION CONTACT: For information about Monterey, San Luis Obispo, Santa Barbara, and Ventura Counties, northern Los Angeles County, and the desert portion of San Bernardino County, contact Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, at the address given above (telephone 805/644–1766; facsimile 805/644–3958). For information about Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties, contact Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address given above (telephone 760/431–9440; facsimile 760/431–9624).

SUPPLEMENTARY INFORMATION:

Designation Of Critical Habitat Provides Little Additional Protection To Species.

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 470 species or 38 percent of the 1,253 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat.

We address the habitat needs of all 1,253 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that two courts found our definition of adverse modification to be invalid (March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit, *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, F.3d 434 and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United State Fish and Wildlife Service*). In response to these decisions, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

Background information on the arroyo toad can be found in our previous final designation of critical habitat for this

species, published in the **Federal Register** (FR) on February 7, 2001 (66 FR 9414). Additional background information is also available in our recent proposal of critical habitat for the arroyo toad, published on April 28, 2004 (69 FR 23253). That information is incorporated by reference into this final rule. This rule, which becomes effective on the date listed under *Effective Date* at the beginning of this document, replaces the February 7, 2001, critical habitat designation for this species.

Previous Federal Actions

We designated a total of approximately 182,360 acres (ac) (73,780 hectares (ha)) of critical habitat for the arroyo toad on February 7, 2001 (66 FR 9414). On November 6, 2001, the Building Industry Legal Defense Foundation, Foothill/Eastern Transportation Corridor Agency, National Association of Home Builders, California Building Industry Association, and Building Industry Association of San Diego County filed a lawsuit in the District of Columbia against the Service challenging the designation of arroyo toad critical habitat and alleging errors by the Service in promulgating the final rule. *Building Industry Legal Defense Foundation, et al.* v. *Gale Norton, Secretary of the Interior, et al.* Civ. No. 01–2311 (JDB) (D.D.C.). On October 30, 2002, the court set aside the designation and ordered us to publish a new critical habitat designation final rule for the arroyo toad by July 30, 2004. On April 28, 2004, we published a proposed rule to designate approximately 138,713 acres (ac) (56,133 hectares (ha)) of critical habitat in Monterey, Santa Barbara, Ventura, Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties, California (69 FR 23253). On June 25, 2004, the Court granted a motion by the Service to extend the deadline for the final rule to March 31, 2005. On February 14, 2005, we published a notice announcing the availability of the draft economic analysis (DEA), revisions to the proposed rule, and reopening of the public comment period (70 FR 7459).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the arroyo toad in the proposed rule published on April 28, 2004 (69 FR 23253). We also contacted the appropriate Federal, State, and local agencies, Tribes, scientific organizations, and other interested parties and invited them to comment on the proposed rule. In addition, we invited public comment through the publication of notices in the Monterey Herald on May 1, Ventura County Star on May 4, the Orange County Register on May 7, the San Diego Union Tribune on May 8, and the Santa Barbara News Press on May 12, 2004. We did not receive any written requests for a public hearing prior to the published deadline. The initial comment period ended May 28, 2004. A second comment period was open from February 14, 2005 to March 16, 2005 (70 FR 7459). All comments and new information received during the two comment periods have been incorporated into this final rule as appropriate.

A total of 60 commenters responded during the two comment periods, including 5 Federal agencies, 3 Tribes, 11 local agencies, 9 local organizations, 10 businesses and 5 individuals. Ten commenters submitted two separate sets of comments. During the comment period that opened on April 28, 2004, and closed on May 28, 2004, we received 42 comments directly addressing the proposed critical habitat designation: 2 from peer reviewers, 5 from Federal agencies, and 3 from Tribes. Of the 42 parties responding to the proposal during the first comment period, 12 supported the proposed designation, 30 were opposed (including those who thought we should have proposed more areas for critical habitat designation), and a few commenters simply provided additional information. During the second comment period that opened on February 14, 2005, and closed on March 16, 2005, we received 18 comments directly addressing the proposed critical habitat designation and DEA. Of these latter comments, 2 were from a Federal agency, 1 from a Tribe, 5 from local jurisdictions, 7 from businesses, and 3 from organizations or individuals. During the second comment period a total of 4 commenters supported the designation of critical habitat for the arroyo toad, and 14 opposed the designation. We reviewed all comments for substantive information and new data regarding the arroyo toad and its critical habitat. Comments have been grouped together by issue and are addressed in the following summary. All comments and information have been incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from at least three knowledgeable individuals who have expertise with the species, with the geographic region where the species occurs, and/or familiarity with the principles of conservation biology. Of the five individuals contacted, three responded. The peer reviewers that submitted comments generally supported the proposal and provided us with comments, which are included in the summary below and incorporated into the final rule, as appropriate. Unless otherwise noted, the peer review comments were on our proposed rule published April 28, 2004; subsequent changes to our proposal published in the **Federal Register** on February 14, 2005 (70 FR 7459) and in this final rule did not receive peer review comment.

Peer Review Comments

(1) *Comment:* A peer reviewer who conducts research on a variety of toad species at an academic institution found our proposal to be based on natural history studies that range in quality from perfectly adequate to superior. He commended us for basing much of our proposed rule on competent, truly scientific research. It was his opinion that the basic biology of the arroyo toad had been adequately reviewed and competently applied to the selection, delimitation, and designation of proposed sites. He endorsed the proposal and found it to be based on adequate research.

Our Response: As noted by the peer reviewer, we have considered and applied every important study involving arroyo toads that is relevant to its ecology and protection that we could obtain.

(2) *Comment:* A peer reviewer who has extensive experience studying the dispersal of arroyo toads, and has conducted studies within nearly one-third of the critical habitat units across the range of the species, commented that our proposed critical habitat units are accurately characterized, appropriately referenced, do not exclude any local arroyo toad populations in the specific units he is familiar with, and include all breeding and upland habitats necessary for the long-term survival of the local populations.

Our Response: We have identified all habitats that have the essential features, or primary constituent elements (PCEs) (see Primary Constituent Element section below), necessary for the conservation of the species. A portion of these essential areas are included in this final designation of critical habitat for the arroyo toad. Some essential areas have been excluded from critical habitat designation under section 4(b)(2) of the Act, primarily for economic reasons (see Application of Section 3(5)(A) and

4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion). After receipt of public and peer review comments, we revised the model we used to delineate essential and critical habitat, which is outlined in the February 14, 2005, **Federal Register** Notice (70 FR 7459) and this final rule (see Summary of Changes and Criteria Used to Identify Critical Habitat sections).

(3) *Comment:* A peer reviewer expressed concern that our choice of words in the Background section might imply that arroyo toads located at higher elevations move shorter distances than those found at lower elevations near the coast.

Our Response: The studies we cited in the proposed rule (*e.g.*, Griffin 1999; Holland and Sisk 2000; Ramirez 2002a, 2002b, 2002c, 2003) indicate that arroyo toads found along streams with broad floodplains in coastal areas move farther into the uplands than those found along streams away from the coast with steeper slopes bordering the stream corridor. Although coastal areas may be at lower elevations, we suspect that it is the moderating effect of the ocean on coastal climates, including frequent fog, that may allow arroyo toads to disperse farther from a source of water without dehydrating, and that moderate slopes adjacent to a coastal stream corridor do not inhibit dispersal. More extreme temperatures and arid conditions away from the coast may inhibit dispersal by arroyo toads from a water source. Although arroyo toads can ascend and descend rather steep slopes, a sustained, steep gradient would likely inhibit dispersal. The elevation at which arroyo toads are found should have no influence on their willingness or ability to disperse from a water source.

(4) *Comment:* A peer reviewer suggested that we clarify our use of critical habitat regional classification units (northern, southern, and desert regions).

Our Response: We have organized the critical habitat units for the arroyo toad into three regions (northern, southern, and desert regions) that reflect both the range of the species and the distinct ecological environments in which the species is found, similar to the system used in the recovery plan for the arroyo toad (Service 1999).

(5) *Comment:* A peer reviewer suggested that we clarify our statement about the use of areas with compact soils by arroyo toads.

Our Response: Arroyo toads typically dig their own burrows in sandy soils or soft substrates where they remain underground during periods of inactivity (Service 1999). However, they have also been found in areas with harder, compact soils where they cannot burrow. In these cases, arroyo toads are likely using preexisting mammal burrows, or they are temporarily using these areas for foraging and dispersal at night and returning to areas where they can burrow prior to sunrise.

(6) *Comment:* A peer reviewer suggested that, in addition to agricultural fields, toads are found in orchards.

Our Response: Although toad may use orchards, the likelihood of long-term persistence in this altered habitat is unknown and would depend on the level of agricultural activity. To the extent that heavy equipment and pesticides are used in an orchard, along with periods of intense human activity, mortality rates could exceed reproductive rates in and around a stream segment bordered by orchards. However, it is possible that resident toads may be able to survive in orchard areas set back from the floodplain that do not require intensive management or harvest practices.

(7) *Comment:* A peer reviewer stated that our discussion concerning the value of designating critical habitat, and the procedural and resource difficulties involved, should be addressed in a different forum, not in a critical habitat rule.

Our Response: As discussed in the sections "Designation of Critical Habitat Provides Little Additional Protection to Species," "Role of Critical Habitat in Actual Practice of Administering and Implementing the Act," and "Procedural and Resource Difficulties in Designating Critical Habitat" and other sections of this and other critical habitat designations, we believe that, in most cases, conservation mechanisms provided through section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, the section 10 incidental take permit process, and cooperative programs with private and public landholders and tribal nations provide greater incentives and conservation benefits than does the designation of critical habitat.

(8) *Comment:* After examining the changes to our proposal published in the **Federal Register** on February 14, 2005 (70 FR 7459), one peer reviewer stated that the training activities of the military at Fort Hunter Liggett may have resulted in riparian habitat modifications that may be beneficial to the arroyo toad. The peer reviewer further noted that the military also prevents nonmilitary personnel from visiting the area which helps prevent the introduction of nonnative predatory aquatic vertebrates.

Our Response: We agree that although some toads would be killed outright by ordinance, crushing by vehicles, prescribed burning, channel clearing, or other actions undertaken by the military, in some instances the resulting habitat modifications may enhance arroyo toad habitat, which favor more open habitats. It is unclear to what extent habitat modifications resulting from military actions have affected arroyo toad numbers at Fort Hunter Liggett, either positively or negatively. We also agree that minimizing human access to arroyo toad habitat is generally beneficial and can prevent the introduction of nonnative predatory aquatic vertebrates. However, certain nonnative predatory aquatic vertebrates have already become established at Fort Hunter Liggett, including bullfrogs. All military actions affecting arroyo toad habitat at Fort Hunter Liggett have been addressed in the Army's Endangered Species Management Plan for the arroyo toad at Fort Hunter Liggett, which is one of the primary reasons why we have excluded Fort Hunter Liggett from critical habitat designation (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section).

Comments Related to Previous Federal Actions, the Act, and Implementing Regulations

(9) *Comment:* One commenter stated that, according to the Tenth Circuit Court of Appeals finding in *Catron County Board of Commerce, New Mexico* v. *United States Fish and Wildlife Service*, 75F.3d 1429 (10th Cir 1996) (*Catron* v. *FWS*), we are required to prepare an environmental assessment or environmental impact statement before designating critical habitat.

Our Response: The commenter is correct in that the Tenth Circuit Court of Appeals determined that an environmental assessment or environmental impact statement as part of NEPA should be prepared before designating critical habitat. However, it is our position that, outside the jurisdictional area of the Tenth Circuit Court, we do not need to comply with NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Ninth Circuit Court (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

(10) *Comment:* Several commenters stated that the arroyo toad is everywhere in California and Mexico and that there is not enough scientific evidence proving that this species is really endangered, and therefore does not need protection under the Act.

Our Response: The commenters may be confusing the arroyo toad with several other species of toads in the genus Bufo occurring in California and Mexico. The arroyo toad is just one species of toad, and the distribution of the arroyo toad is limited to central and southern California and northwestern Baja California, Mexico. While our knowledge of the arroyo toad's distribution in southern California has increased since it was listed in 1994, the species continues to be threatened by habitat destruction and alteration, over-collection, predation by introduced predatory fish, and inadequacy of existing regulatory mechanisms (59 FR 64859).

(11) *Comment:* One commenter stated that critical habitat will unnecessarily burden the regulated public and has overloaded Service staff.

Our Response: Critical habitat designations do not by themselves constitute a burden in terms of Federal laws and regulations on private landowners carrying out private activities, but in California they may trigger additional State regulatory reviews and other requirements under the California Environmental Quality Act and other State laws and regulations. When a Federal approval or permit is required, or Federal funds are involved with a project proposed on private property, the critical habitat designation does impose a Federal regulatory burden for private landowners; absent this, the designation should not affect farming and ranching activities on private lands. Similarly, a Federal nexus could result in the designation affecting future land use plans, and the designation may trigger State requirements which could impact such plans.

Comments Related to Critical Habitat, Primary Constituent Elements, and Methodology

(12) *Comment:* Two commenters questioned the scientific evidence used to determine critical habitat.

Our Response: In designating critical habitat for the arroyo toad, we have used the best available scientific and commercial information, including results of numerous surveys, peer-reviewed literature, unpublished reports by scientists and biological consultants, potential habitat maps developed by the Forest Service (Forest Service 2000), and expert opinion from biologists with extensive experience studying the arroyo toad. Further, information provided in comments on the proposed designation and the draft economic analysis were evaluated and taken into consideration in the development of this final designation, as appropriate. Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the Ventura Fish and Wildlife Office (see **ADDRESSES** section above).

(13) *Comment:* One commenter stated that at least 24 additional habitat areas should be designated as critical habitat in the final rule, including all populations and metapopulations identified in Table 1 of the arroyo toad recovery plan.

Our Response: The Act states, at section 3(5)(C), that except in particular circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. It is not the intent of the Act to designate critical habitat for every population and every documented historic location of a species. We have designated habitat that contain features essential for the conservation of the species.

(14) *Comment:* One commenter stated that the proposed designation of critical habitat was overly broad and that we included areas that are not essential to the conservation of the species. Another commenter expressed a similar concern and stated that we proposed more areas than what is suitable for the toad in an attempt to make up for the limited precipitation in southern California.

Our Response: As a result of revisions to the methodology used to delineate critical habitat, areas that do not contain the features essential to the conservation of the species have been removed from the final designation (see Summary of Changes and Criteria Used to Identify Critical Habitat sections below). Only areas that contain features essential to the conservation of the species were designated critical habitat; precipitation levels did not directly effect this designation.

(15) *Comment:* One commenter stated that the Service failed to identify the physical or biological features essential to the conservation and recovery of the species or the methods that would be used in the identification of such features.

Our Response: In our "Primary Constituent Elements" section we have outlined as specifically as possible all of the physical and biological features essential to the conservation of the species. In our "Methods" and "Criteria Used to Identify Critical Habitat" sections we outlined the methods we used to identify and delineate critical habitat.

(16) *Comment:* Several commenters stated that we included areas where the arroyo toad and their primary constituent elements were absent, such as roads, developed areas, and particular natural features (*i.e.*, steep slopes), or where their status is uncertain. Another commenter acknowledged our attempts to remove these types of areas, but requested that we examine the units even more closely, particularly in San Diego County, and more finely remove areas that do not contain primary constituent elements.

Our Response: As described below, we have revised the methodology used to determine critical habitat, and therefore have removed areas that did not contain features essential to the conservation of the species (see Summary of Changes and Criteria Used to Identify Critical Habitat sections below). We made an effort to exclude all developed areas, such as towns, housing developments, and other lands unlikely to contain primary constituent elements essential for arroyo toad conservation. However, as it is not possible to remove each and every one of these features, even at the refined mapping scale used, the maps of the proposed designation may still include areas that do not contain primary constituent elements (see Criteria Used to Identify Critical Habitat below). These areas are not being designated as critical habitat.

As to the comment about units in San Diego County, all units in San Diego County have been excluded under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for detailed discussion of exclusions).

(17) *Comment:* One commenter stated that the revised criteria used to identify upland use by arroyo toads, which resulted in the reduction of the maximum distance from the stream to which critical habitat extended from 4,921 feet to 1,640 feet, is not supported in the proposed rule. Other commenters expressed opposition to our reduction in the amount of upland habitat included in our revised model and expressed concern that some of the upland habitat used by arroyo toads has been removed from consideration as critical habitat. In contrast, one commenter stated that the proposed designation of upland habitat was overly broad in mountainous areas away from the coast and we should have used

a shorter upland movement distance than 4,921 ft (1,500 m).

Our Response: We based our decision to revise the model of what constitutes essential upland habitat on the best available science and data on arroyo toad upland habitat use. The study by Holland and Sisk (2000) demonstrated that 88% of the adult and subadult arroyo toad population was found within the riparian wash area. Of the remaining 12% of the arroyo toads in the upland areas, 68% of the arroyo toads were found within 1,640 ft (500 m) of the riparian wash area. Although some upland habitats shown to be used by arroyo toads in coastal areas are no longer within the critical habitat boundary, we believe the amount of upland habitat included in this final rule is enough to allow for the long-term persistence of the arroyo toad population in a given area and captures all areas essential for the conservation of the species.

(18) *Comment:* One commenter stated that in light of a recent court decision regarding the Alameda whipsnake final critical habitat, *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Service, 268 F. Supp. 2d*, we did not sufficiently explain why the designation of unoccupied linkage areas are essential for the conservation of the arroyo toad pursuant to 16 U.S.C. 1532(5)(A)(ii). The commenter stated that this approach threatens to eliminate the distinction between "areas within the geographic area occupied by the species at the time it is listed," and "specific areas outside the geographic area occupied by the species at the time it is listed that are essential to the conservation of the species."

Our Response: We have not designated any critical habitat units outside the geographical area currently or historically occupied by the species. Arroyo toad breeding habitat is patchily distributed along stream courses. Linkage areas between breeding habitat are essential for the conservation of the species because they provide habitat for toads moving to and from breeding areas and habitat for foraging, breeding, and burrowing. Since these linkage areas are occupied by the species during some period of their life cycle, they were designated as critical habitat (see Summary of Changes from the Proposed Rule section for the definition of "occupied").

(19) *Comment:* Several commenters generally stated that we should not rely on survey efforts when they are funded by landowners with an interest in obtaining negative results.

Our Response: As per section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, we used the best available scientific and commercial information available in the designation of critical habitat for the arroyo toad, which includes information from all valid survey efforts by all qualified biologists. If we receive evidence that survey results have been falsified or survey methods were unacceptable, we would not use those results. We have no evidence that any of the data we have referenced or used in formulating this rule has been falsified or based on unacceptable survey methods.

(20) *Comment:* One commenter stated that our 30-day comment period following the proposed rule was inadequate to allow the public to understand and comment meaningfully on the proposed rule and that this should have been extended to no less than 60 days.

Our Response: The proposed critical habitat rule for the arroyo toad was available to the public for review and comment for 60 days. The first 30-day comment period opened on April 28, 2004 (60 FR 23254). On February 14, 2005, we reopened the public comment period for the proposed rule for an additional 30-day period upon publication of the Notice of Availability of the Draft Economic Analysis (70 FR 7459). We believe these two public comment periods provided adequate opportunity for public comment.

(21) *Comment:* One commenter stated that the Service did not adequately notify landowners where proposed critical habitat was located. Another commenter expressed concern that the revisions we made to critical habitat proposed for the arroyo toad (70 FR 7459) were not accompanied by revised maps, nor were revised maps available on any website. Without maps showing where revisions were made, the description of the changes made to the proposed rule was difficult to understand. This made it difficult for the public to adequately comment on the proposed revisions.

Our Response: We issued a widely disseminated news release regarding our proposal and published legal notices in all major newspapers within the range of the species in California, including the Monterey Herald on May 1, Ventura County Star on May 4, the Orange County Register on May 7, the San Diego Union Tribune on May 8, and the Santa Barbara News Press on May 12, 2004. General maps delineating the boundaries of critical habitat were included in the April 28, 2004, proposed rule. Due to operational time constraints and a looming court-ordered deadline, we were unable to produce maps of the subsequent revisions and make them available to the general public. However, points of contact were given in the proposed rule for landowners needing assistance in determining whether their property was within designated critical habitat were able to contact the Ventura or Carlsbad Fish and Wildlife Office, and specific maps were provided upon request. We attempted to carefully describe in the **Federal Register** (70 FR 7459) all of the ways in which revisions were made to the proposed rule.

Comments Related to Site-Specific Areas

(22) *Comment:* One commenter stated that local land use controls provide sufficient protection for the arroyo toad in Santa Barbara County.

Our Response: Although there are other State, local, and Federal laws that offer some protection to endangered species and their habitats (e.g., Clean Water Act and California Environmental Quality Act), none provide the same level of protection and review for threatened and endangered species as does the Endangered Species Act. These laws are not redundant and work in concert to provide protection for environmental resources.

(23) *Comment:* One commenter stated that Rancho Sisquoc (unit 2) has not been surveyed for arroyo toads and the Service does not know that arroyo toads occupy this portion of the Sisquoc River.

Our Response: We agree that much of the Sisquoc River as it flows through the privately-owned Sisquoc Ranch has not been surveyed for arroyo toads. However, there are two reports of arroyo toads occupying the Sisquoc River within the Sisquoc Ranch; arroyo toads were observed there by M. Hanson in 1992 (CNDDB 1992) and also by LSA associates in 1993 (LSA Associates, Inc. 2000). Arroyo toads have also been reported along the Sisquoc River both upstream and downstream from the Sisquoc Ranch (CNDDB 1992, 1994).

(24) *Comment:* One commenter stated that the Service failed to explain its rationale regarding the need for special management considerations and protection on lands proposed for designation as critical habitat in unit 2. Specifically, it did not consider those already in place in the Mining and Reclamation Plan for mining activities on the Sisquoc River.

Our Response: The Mining and Reclamation Plan for mining activities on the Sisquoc River outlines measures to reduce harm to the arroyo toad and its habitat, but it was written prior to the

designation of critical habitat for this species. Thus, neither designated, nor proposed, critical habitat for the arroyo toad is addressed in the Mining and Reclamation Plan. Additionally, the Mining and Reclamation Plan pertains only to those areas contemplated for sand and gravel mining, but does not cover a large portion of the Sisquoc River upstream from the mining area, which we have designated as critical habitat.

(25) *Comment:* Several commenters stated that the Santa Clara River is occupied by arroyo toads and should be protected as critical habitat.

Our Response: Critical habitat was proposed along portions of the Santa Clara River known to be occupied by the arroyo toad (subunits 6b and 6c). However, unit 6 is excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for detailed discussion of exclusions).

(26) *Comment:* One commenter stated that the Army Corps of Engineers 404 permit granted to Valencia Company and associated Natural River Management Plan does not adequately protect arroyo toad habitat along the Santa Clara River in and around Valencia (subunit 6b), and therefore should not be excluded from the critical habitat designation.

Our Response: Although we believe the Natural River Management Plan does protect arroyo toad habitat (see 70 FR 7459 for a detailed discussion), unit 6 is excluded from critical habitat under section 4(b)(2) of the Act for economic reasons.

(27) *Comment:* One commenter stated that land within subunit 6b is already, or will be, protected through conservation easements and other management measures. This commenter also stated that this area is not truly essential to the conservation of the species due to limited arroyo toad observations, and would generate considerable costs for private landowners, and therefore should be excluded. During the second comment period this commenter offered support for our proposed exclusion of subunit 6b.

Our Response: Although this area currently contains a small arroyo toad population, arroyo toad numbers likely were much larger in the past, and the number of arroyo toads has the potential to greatly increase once again throughout suitable habitat in this subunit. Therefore, we believe it is essential habitat for the arroyo toad. Although we agree that the protection provided by the conservation easements conveyed or proposed on lands within this subunit will benefit the arroyo toad, unit 6 is excluded under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(28) *Comment:* One commenter stated that we should have included the portion of the Santa Clara River downstream of proposed subunit 6b between Castaic Creek and Piru Creek.

Our Response: Although much of the habitat may be suitable for arroyo toads, they have never been reported from this portion of the Santa Clara River despite surveys (San Marino Environmental Associates 1995; RECON 1999; Impact Sciences 2002; Compliance Biology 2004). Habitat within the river corridor along this reach appears to be suitable for arroyo toads, but much of the upland habitats adjacent to the river corridor are unsuitable for arroyo toads because they consist of intensive agriculture. Also, most of the river corridor in the Los Angeles County portion of this reach will be or is proposed to be protected by a conservation easement associated with the Newhall Ranch Specific Plan.

(29) *Comment:* One commenter supported our inclusion of Castaic Creek and the Santa Clara River in the vicinity of the Castaic Creek confluence with the Santa Clara River. However, they felt that we should have also included the portion of Castaic Creek that is just downstream of the Castaic Dam and lagoon.

Our Response: We have determined that this area should not be designated as critical habitat for the following reasons: (1) Surveys have indicated that arroyo toads do not occupy this portion of Castaic Creek; (2) suitable habitat extends along Castaic Creek for only a short distance (perhaps less than a mile) in this area; (3) it is isolated from upper Castaic Creek by Castaic Dam, which serves as a geographic barrier; and (4) it is isolated from suitable habitat along lower Castaic Creek by several miles of rather dry, marginal habitat lacking sufficient cover for upland migrating arroyo toads.

(30) *Comment:* Two commenters asserted that there is insufficient evidence to support our conclusion that the upper portion of the Santa Clara River (Soledad Canyon) supports a breeding population of arroyo toads. Another commenter stated just the opposite, that there is a breeding population of arroyo toads in this area.

Our Response: Although it does not appear to be a large population, the best available science and survey results indicate arroyo toad presence and evidence of successful reproduction in the upper Santa Clara River (subunit 6b in this rule). As stated in a letter to the City of Santa Clarita by Frank Hovore & Associates (F. Hovore, in litt. 2001, p. 1), "There can be no doubt whatsoever that the arroyo toad maintains a breeding metapopulation unit on the TMC site, and that the upland areas around the river are essential to its out-of-channel biology, and ultimately, survival." At least 70 arroyo toad tadpoles have been documented from the upper Santa Clara River in three different locations (N. Sandburg, in litt. 2001). We are also aware of at least three metamorphosed arroyo toads observed in two separate locations. These arroyo toad tadpoles and juveniles were observed and identified by at least five qualified biologists on a number of different occasions, although all sightings were made in the spring of 2001. The presence of arroyo toad tadpoles is, by itself, evidence of breeding. Arroyo toads in this area may have been missed prior to 2001 due to the lack of night surveys, surveys being conducted during a drought year when reproduction may not have taken place (1990), and because surveys were conducted late in the season (July of 1994) when this portion of the Santa Clara River may have already dried.

(31) *Comment:* A commenter further stated that the tadpoles and recently metamorphosed arroyo toads ("metamorphs") found within the upper Santa Clara River [subunit 6c] are equivalent to "lone wolves" dispersing through an area, and do not constitute a population. The commenter cited the 2000 10th Circuit Court case, *Wyoming Farm Bureau Federation* v. *Babbitt* (199 F.3d 1224, 1234), which ruled that lone wolves do not constitute a population.

Our Response: Movements of arroyo toad tadpoles, and even adults, are limited as they cannot disperse across the landscape like wolves. The nearest observations of the upper Santa Clara River arroyo toads would be those found at least 12 miles (mi) (19.3 kilometers (km)) downstream. According to the best available information, this is beyond the upstream dispersal capability of an adult arroyo toad. Given that most of the intervening habitat along the Santa Clara River between these two populations is typically dry, like adults, small, recently transformed individuals are certainly not capable of dispersing 12 miles upstream. Tadpoles do not disperse far from the pool where they were deposited as eggs, except for the possibility of being washed downstream during a flood event. We

are unaware of any arroyo toads existing in the Santa Clara River watershed upstream of this subunit (6c). Even if there was a population further upstream, it would be unlikely for the 70 arroyo toad tadpoles to have been washed downstream as a group to this point in Soledad Canyon and be found in good condition.

(32) *Comment:* Two commenters generally asserted that the upper Santa Clara River does not contain the primary constituent elements for arroyo toad and constitutes poor habitat for this species. In direct contrast to these comments, two other commenters stated that this area does contain suitable habitat and is important for the preservation of the arroyo toad.

Our Response: Direct observations by Service biologists and that of other biologists conducting arroyo toad surveys show that the upper Santa Clara River within proposed subunit 6c does contain all of the primary constituent elements of arroyo toad critical habitat. Sandburg (in litt. 2001, p.3) states, "* * * the stream channel [of the Santa Clara River] widens with flat terraces, cottonwood overstory, extensive alluvial deposits and stream velocities suitable for arroyo toad clutches * * * A side tributary, referred to as Bear Creek, delineates another large area of optimal arroyo toad habitat with slower water velocities and wide alluvial terraces devoid of dense vegetation." Thus, observations by the Service and independent biologists confirm the presence of arroyo toad habitat and the species' primary constituent elements.

(33) *Comment:* One commenter asserted that the upper Santa Clara River does not meet any of our criteria to be designated as critical habitat.

Our Response: In the proposed rule we stated that the criteria we used to identify critical habitat are identical to the criteria outlined in the final designation previously published in the **Federal Register** on February 7, 2001 (66 FR 9414). In that rule, we outlined five criteria, which if any is found on a site, would warrant it to be designated as critical habitat. The second of those five criteria states that, if a site "supports at least a small toad population and possesses favorable habitat conditions for population expansion and persistence," then this area would be considered critical habitat. Subunit 6c along the upper Santa Clara River meets this criterion. However, unit 6 is excluded under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(34) *Comment:* Two commenters referenced a letter from the Service stating that a project area on Rasmussen Company land in Soledad Canyon along the upper Santa Clara River has little habitat value for the arroyo toad. These commenters are concerned that this area, which lacks suitable habitat for the arroyo toad, has been proposed as critical habitat.

Our Response: Unit 6, where the land referenced by the commenters is located, is excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(35) *Comment:* One commenter stated that our revisions to proposed critical habitat in subunit 6c (70 FR 7459) are unwarranted. The commenter argued that we should have included the entire original Santa Clara River channel (below Agua Dulce Canyon) as critical habitat, as originally proposed, rather than removing the portion north of the railroad tracks, which traverse portions of the original river channel in some locations. The commenter stated that water extraction wells installed for mining purposes might now be installed in these areas resulting in adverse impacts to surface flows in the Santa Clara River.

Our Response: We removed the areas in question north of the railroad tracks from critical habitat designation because some of these areas have been degraded by past mining activities. Also, the railroad tracks, which are often raised on rather steep banks, pose a likely barrier to arroyo toad movements in these areas. Thus, although arroyo toads may be able to cross the railroad tracks in some locations, both access and quality of these areas is limited. Therefore, we determined their inclusion into critical habitat was not warranted at this time. Additionally, any effects to the surface hydrology of the Santa Clara River from water withdrawal projects involving a federal nexus that adversely affect the arroyo toad or its critical habitat, whether they originate outside of critical habitat or not, would be subject to the section 7 consultation process under the Act.

(36) *Comment:* Two commenters opposed the designation of critical habitat on Rancho Las Flores Planned Community (Rancho Las Flores) land in Summit Valley, San Bernardino County, which surrounds the West Fork of the Mojave River. They pointed out that many acres in this area will be designated as open space or protected by conservation easement to protect the toad. They also stated that two biological opinions have been issued for projects in this area and a Habitat Conservation Plan (HCP) is being developed to cover lands not addressed in the biological opinions. Additionally, one of the commenters expressed concern that new housing, jobs, and other social benefits provided by the planned community may be jeopardized or constrained by a critical habitat designation.

Our Response: We agree that greater conservation benefits to arroyo toad habitat on private property can result from carefully designed plans formulated cooperatively between the Service and private conservation partners. However, unit 22, which is the only proposed unit that includes Rancho Las Flores lands, is excluded under section 4(b)(2) of the Act for economic reasons under (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section).

(37) *Comment:* One commenter stated that we should have included the following additional areas in the critical habitat designation, which are listed in Table 1 of the recovery plan for the arroyo toad (Service 1999) and are found in the Northern Recovery Unit. These areas are the following: Upper Salinas River; Agua Caliente Creek in the upper Santa Ynez River Basin; and Agua Blanca, Bouquet, and Castaic Creeks in the Santa Clara River Basin.

Our Response: We are unaware of any recent observations of arroyo toads in the upper Salinas River watershed or anywhere within San Luis Obispo County. Many of the other areas not considered for designation as critical habitat, which are identified in Table 1 of the recovery plan, are tributaries to larger streams where arroyo toads occur. We do not currently have information suggesting that these tributaries are occupied by arroyo toad or that these tributaries contribute a significant amount of habitat that would be used by the toads. Although arroyo toads are not known to occupy Agua Caliente Creek and we have not included Agua Caliente Creek as part of the critical habitat designation for the toad, we have included the confluence of Agua Caliente Creek and the Santa Ynez River because arroyo toads occupy the Santa Ynez River. Agua Blanca Creek is a tributary to Piru Creek; the portion of Agua Blanca Creek occupied by arroyo toads is included in critical habitat. When the recovery plan was published, it was thought that habitat suitable for the arroyo toad may be found along Bouquet Creek. However, more recent surveys have found Bouquet Creek to be

largely unsuitable for arroyo toads, and they have never been observed in this tributary.

(38) *Comment:* One commenter requested that their First and Second San Diego Aqueducts and proposed Moreno Lakes pipeline right-of-ways (ROWs) in the San Luis Rey River (Unit 14) and San Diego River (Unit 17c), respectively, be excluded from critical habitat so that their mission of providing water to their member agencies is not hindered. They state that their permits for facility operations would need to be modified to address a critical habitat designation.

Our Response: After closer review of available information and comments, we have determined that areas on the San Diego River downstream from El Capitan Reservoir (Subunit 17c) are not essential to the conservation of the toad and are therefore removed from critical habitat. Accordingly, the Moreno Lakes ROW in Subunit 17c is no longer in critical habitat. Unit 14, the location of the First and Second aqueduct of concern to the commenter, is excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(39) *Comment:* The same commenter asked whether their existing Section 7 permit that covers the coastal California gnatcatcher could be amended to cover the arroyo toad critical habitat for Units 14 and 17c.

Our Response: Assuming the Federal agency that was subject to consultation under section 7 of the Act for another listed species still retains discretionary jurisdiction over the action, the Federal agency must reinitiate section 7 consultation if its action "may affect" designated critical habitat for the arroyo toad. See *Section 7 Consultation* below.

(40) *Comment:* One commenter stated several reasons why they believe that arroyo toad critical habitat rule improperly includes portions of Pardee's Meadowbrook project site north of Highway 76 along the San Luis Rey River in Unit 14. They state that this area does not contain suitable habitat, is not, and will never be occupied by toads because of the barrier created by Highway 76, that we did not provide special management considerations for Unit 14, and Unit 14 is outside the geographic area occupied by the species.

Our Response: As a result of revisions to our methodology to delineate critical habitat (see the Criteria Used to Identify Critical Habitat section below), more than half of the critical habitat located north of Highway 76 was removed. The remaining areas were reevaluated using the best available information, including an upland habitat pitfall study in 2003. The results of this study indicate that the primary constituent elements, including soil type, are marginal on the property north of the highway. Based on these results and the spatial relation of this area to nearby areas of critical habitat, we are removing Pardee's Meadowbrook project site north of Highway 76 from critical habitat. The remainder of unit 14 is excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(41) *Comment:* A couple of commenters stated that the portion of Whitewater River downstream of the Colorado River Aqueduct lacks the primary constituent elements, and therefore should be removed as essential habitat for the arroyo toad.

Our Response: We have reevaluated all the available information and have concurred with the commenters that this area does not contain essential habitat.

(42) *Comment:* One commenter stated that lands owned by the Sweetwater Authority, Helix Water District, and Padre Dam Municipal District in San Diego County (portions of Units 17 and 18) should be excluded from designated critical habitat for the arroyo toad because the benefits of exclusion based on economic considerations far outweigh the benefits of inclusion.

Our Response: We have excluded these essential areas from critical habitat based on economic considerations (see the Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). Lands downstream of El Capitan Reservoir in subunit 17b and 17c were removed from critical habitat because they were not known to be occupied, and therefore were not considered to be essential for the conservation of the species (see the Summary of Changes and Criteria Used to Identify Critical Habitat sections for detailed discussions).

(43) *Comment:* One commenter stated that the Service failed to identify special management considerations related to lands owned by the Sweetwater Authority, Helix Water District, and Padre Dam Municipal District in San Diego County in Units 17 and 18.

Our Response: We disagree with commenters and did identify special management considerations for these Units in the proposed arroyo toad critical habitat rule published on April 28, 2004 (69 FR 23254). We cited threats from development, exotic predators, timing and amount of water transfer as some of the threats that require special management considerations.

(44) *Comment:* One commenter stated that we should reconsider revising essential upland habitat in San Juan Creek for the arroyo toad to only capture the floodplain because adjacent alluvial flats and uplands are of questionable suitability for toad use, some upland areas included industrial land uses and are beyond busy paved roads that are not accessible to toads.

Our Response: Even though all essential areas in San Juan Creek have been excluded from designated critical habitat due to economic reasons (see the Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion), we still believe that upland areas containing primary constituent elements adjacent to riparian habitat are essential for the conservation of the toad. It has been well documented that the use upland areas by arroyo toads for burrowing, foraging, and aestivating is a normal part of their life history (Sweet 1993; Griffin and Case 2001; Holland and Sisk 2001). Therefore, protecting these upland areas is necessary for adequate conservation of the arroyo toad. In some cases, we agreed with the commenter and removed upland areas where there was heavy industrial land uses. We also examined whether all areas beyond paved roads were essential and removed areas where toads did not have stream undercrossings.

(45) *Comment:* A couple of commenters stated that we should reconsider revising the essential reach of San Juan Creek for the arroyo toad because we did not provide evidence that certain portions of the Creek are occupied, it lacks primary constituent elements, such as breeding pools, and contains exotic predators. One of these commenters also stated that some portions of San Mateo Watershed should be removed because they lack primary constituent elements, such as suitable sandy friable soils and contain exotic predators.

Our Response: Even though all essential areas in San Juan Creek have been excluded from designated critical habitat due to economic reasons (see the Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion), we still believe that all essential reaches of San Juan Creek are occupied because of several reports of toad occurrences in these

areas in the past 15 years as well the possibility for tadpoles to be washed downstream into less densely occupied areas (P. Bloom in litt. 1998). We agree that the density of occupancy along the Creek varies, but low density areas are still essential for arroyo toad conservation because they contain the primary constituent elements, are occupied, and contain special management considerations, such as exotic predator and plant control. If these special management considerations were applied, it would be likely that population densities would increase. All essential reaches of San Juan Creek and San Mateo Watershed in Units 10 and 11 have the primary constituent elements, which may include stream channels and upland areas adjacent to riparian areas that allow for migration between foraging, burrowing, or aestivating sites.

Comments Related to Military Lands

(46) *Comment:* The Army submitted several comments relating to the exclusion of Fort Hunter Liggett from critical habitat. They state that: (1) We have essentially approved an Integrated Natural Resource Management Plan (INRMP) for the installation; (2) the arroyo toad and its habitat are already being protected at Fort Hunter Liggett by the Army's Endangered Species Management Plan (ESMP) for the arroyo toad; (3) the INRMP and ESMP together provide a greater level of protection for the arroyo toad and its habitat than a designation of critical habitat would provide; and (4) that the designation of critical habitat at Fort Hunter Liggett would interfere with its mission of training soldiers. In contrast, a commenter unaffiliated with the military stated that the benefit of including Fort Hunter Liggett lands in the critical habitat designation outweighed the benefits of exclusion.

Our Response: All lands essential to the conservation of the arroyo toad at Fort Hunter Liggett have been excluded under section 3(5)(A) and/or 4(b)(2) of the Act from the final designation of critical habitat because of alternative protective measures provided by the Army (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for detailed discussion of our exclusions below).

(47) *Comment:* One commenter stated that they oppose the designation of critical habitat for the arroyo toad on Naval Weapons Station, Seal Beach, Detachment Fallbrook (Detachment Fallbrook) because of the existence of an Integrated Natural Resources Management Plan (INRMP), potential complications in conservation efforts with other listed species, and adverse impacts on national security.

Our Response: We have reviewed Detachment Fallbrook's Fire Management Plan and INRMP. The Secretary determined, in writing, that Detachment Fallbrook's INRMP provides a benefit to the arroyo toad and therefore, consistent with Public Law 108–136 (Nov. 2003): Nat. Defense Authorization Act for FY04 and Section 4(a)(3) of the Act, the Department of Defense's Detachment Fallbrook lands are exempt from critical habitat based on the adequacy of their legally operative INRMP (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion of this exemption below).

(48) *Comment:* A couple of commenters stated that the Service should exclude all essential lands on Camp Pendleton, including State lease lands and cantonment areas because of their Integrated Natural Resource Management Plan (INRMP).

Our Response: We agree with the commenter and have excluded all essential areas, including State lease lands and cantonment areas, from designated critical habitat on Camp Pendleton based on their INRMP (see the Exemptions Under Section 4(a)(3) section for a detailed discussion).

(49) *Comment:* One commenter strongly supported the designation of critical habitat for the arroyo toad within those portions of Camp Pendleton that are leased to the State (San Onofre State Beach) because this area supports large numbers of arroyo toads and primary constituent elements.

Our Response: We agree with the commenter that this area is very important for the conservation of the arroyo toad. However, we have excluded these lands that are leased to the State because they are within the area covered by Camp Pendleton's INRMP (see the Exemptions Under Section 4(a)(3) section for a detailed discussion).

Comments Related to Tribal Lands

(50) *Comment:* A few commenters stated that the Service needs to work more closely to meaningfully contact the Bureau of Indian Affairs and/or Tribes to fully meet the tenet of Executive Order 13175 and Secretarial Order 3206.

Our Response: We agree that we need to work more closely with Tribes potentially impacted by the designation of critical habitat. We increased our efforts to work with the Tribes following the proposed rule by holding several meetings with various Tribes. We intend to keep improving our relationships with the Tribes and the Bureau of Indian Affairs following the tenets of Secretarial Order 3206 and Executive Order 13175.

(51) *Comment:* One commenter stated that no portion of the Soboba Indian Reservation should be designated as critical habitat for the arroyo toad.

Our Response: We did not propose or designate any portions of the Soboba Indian Reservation as critical habitat for the arroyo toad.

(52) *Comment:* One commenter stated that the Service failed to provide a meaningful analysis required by Secretarial Order #3206 prior to designating Indian Lands because of the first paragraph in the benefits of inclusion analysis in the proposed critical habitat rule that was implied as meaning that there was a threat of loss of arroyo toad habitat on Tribal lands in the absence of critical habitat.

Our Response: All essential areas proposed on Tribal lands are excluded from critical habitat for economic considerations (see the Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). However, we did not intend for our statement to imply that there was a threat of loss of arroyo toad habitat on Tribal lands in the absence of critical habitat. We were simply stating the significance of these areas as essential for the conservation of the species.

(53) *Comment:* One commenter stated that there are no special management considerations and protections on the Rincon Indian Reservation because of their Tribal Resource Conservation and Management Plan.

Our Response: All lands on Rincon Indian Reservation are being excluded from designated critical habitat for the arroyo toad because of economic considerations. We agree with the commenter that their Tribal Resource Conservation and Management Plan will address special management considerations for the arroyo toad.

Comments Related to HCPs, NCCP Program, Section 7, and Section 404

(54) *Comment:* Several commenters were supportive of the policy that lands covered by approved and nearly completed HCPs that provide take authorization for the arroyo toad should be excluded from critical habitat. Several of these commenters also requested that HCP exclusions should also apply to draft HCPs, lands enrolled in the NCCP program, and lands covered by the Joint Water Agency (JWA) draft plan.

Our Response: While we trust that jurisdictions will attempt to fulfill their commitment to complete conservation plans, this voluntary enrollment does not assure that such plans will be finalized. Protections for arroyo toad habitat provided through participating jurisdiction's enrollment in the NCCP processes are temporary and are not assured; such protections may be lost if the jurisdiction elects to withdraw from the NCCP program. Guidelines for the NCCP program direct habitat loss to areas with low long-term conservation potential that will not preclude the development of adequate NCCP plans and ensure that connectivity between areas of high habitat value will be maintained. We will consider excluding lands within pending HCP areas where we have received a permit application from the participants and an environmental analysis has been completed and released for public review and comment under the authority of NEPA. By completing these criteria, jurisdictions demonstrate their intent to finalize their HCP/NCCPs.

(55) *Comment:* Several commenters stated that the designation of critical habitat removes incentives to participate in NCCP and HCP processes, in part because of added regulatory uncertainty, increased costs to plan development and implementation, weakened stakeholder support, delayed approval and development of the plan, and greater vulnerability to legal challenge.

Our Response: HCPs are one of the most important tools for reconciling land use with the conservation of listed species on non-Federal lands. We look forward to working with HCP applicants to ensure that their plans meet the issuance criteria and that the designation of critical habitat on lands where an HCP is in development does not delay the approval and implementation of their HCP.

(56) *Comment:* Some commenters stated that our policy to exclude the pending Western Riverside Multiple Species Habitat Conservation Plan (MSHCP), but not other pending HCPs or NCCPs, may amount to arbitrary and capricious administrative conduct.

Our Response: As stated above, we will consider excluding lands within pending HCPs where we have received a permit application from the participants and an environmental analysis has been completed and released for public review and comment under the authority of NEPA. The Western Riverside MSHCP, for which a section 10(a)(1)(B) permit was issued on June 22, 2004, was proposed for exclusion in the proposed rule because it met these criteria.

(57) *Comment:* One commenter asked whether the designation of critical habitat would be considered a changed and unforeseen circumstance with respect to the various subarea plans presently approved or pending.

Our Response: All approved or pending HCPs that were determined to provide a benefit to the conservation of the arroyo toad were excluded from the critical habitat designation (see Application of Sections 3(5)(A), 4(a)(3), and Exclusions Under Section 4(b)(2)of the Act). Therefore, there would be no changed or unforeseen circumstance resulting from this designation.

(58) *Comment:* One commenter stated multiple reasons for why essential arroyo toad habitat within several HCPs (including a draft HCP) and military installations should not be excluded from critical habitat. They stated that the benefit of designating these areas as critical habitat outweighs excluding them because exclusions are based partly on speculative and unproven future activities and critical habitat provides a greater benefit than measures contained in draft and approved conservation plans. They also stated that the Service unlawfully predetermined the benefits of excluding essential habitat because our determination was made prior to soliciting public review.

Our Response: We agree that critical habitat designation is only one part—often the least important element—in the conservation of a species. In many cases, partnerships with individual landowners and conservation agreements with a variety of stakeholders can provide a much greater conservation benefit for arroyo toad and other species, as they offer positive management actions that cannot be achieved through a critical habitat designation. We have determined that the exclusion of lands covered by HCPs or INRMPs from critical habitat designation will not result in the extinction of the arroyo toad and that the HCPs and INRMPs we evaluated for exclusion will provide a greater benefit to the toad than critical habitat (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

However, we did not reach this conclusion prior to receipt of public comment as contended in this comment; areas excluded from the draft proposal because of their inclusion in HCPs or coverage by INRMPs were identified as such, proposed justifications offered for public review, and notice was provided that these areas might be included in the final designation based on public comments.

(59) *Comment:* One commenter asked whether areas covered under existing Section 7 permits can be excluded from critical habitat in manner similar to areas under existing Section 10 permits.

Our Response: Consultation under Section 7 of the Act does not result in the issuance of a Section 7 "permit" per se. Federal actions that we conclude are not likely to jeopardize the continued existence of a listed species are exempted from the prohibition against take of listed animal species under Section 9 of the Act so long as the Federal agency and any permittee comply with the terms and conditions of the incidental take statement accompanying the Service's biological opinion. Typically HCPs provide greater conservation benefits to a covered species by assuring the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5-Point Policy for HCPs (64 FR 35242), the HCP No Surprises regulation (63 FR 8859), and relevant regulations governing the issuance and implementation of HCPs, such as those requiring the permittee to minimize and mitigate the taking to the maximum extent practicable. However, such assurances are typically not provided in connection with Federal projects subject to section 7 consultations which, in contrast to activities on non-Federal lands covered by HCPs, often do not commit to long-term special management or protections. Thus, a consultation unrelated to an HCP typically does not accord the lands it covers the extensive benefits an HCP provides. However, some landowners have agreed to provide extensive, permanent protection of arroyo toad habitat in conjunction with a section 7 consultation. In cases where we have determined that a conservation strategy agreed to by a private landowner provides a substantial, long-term benefit to the species, we have excluded these private lands from the critical habitat designation (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below).

(60) *Comment:* One commenter stated that all Coachella Valley Water District (CVWD) lands be excluded from critical habitat designation within the draft Coachella Valley MSHCP boundaries.

Our Response: The draft Coachella Valley MSHCP has been in development for several years. In contrast to other HCPs under development, which contain essential arroyo toad habitat, the Coachella Valley MSHCP is near its

completion. As a result, the Service is very close to taking final action on the Coachella Valley Association of Government's incidental take permit application. On November 5th, 2004, the Service published a Notice of Availability of a Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the draft MSHCP. Although not yet completed, the draft Coachella Valley MSHCP plans on conserving 96% of the modeled arroyo toad habitat in the Whitewater River, acquiring private lands from willing sellers, minimize activities on public lands that threaten toads, and conserve other areas of potential habitat outside of Whitewater River. This plan will provide some level of conservation benefit to the arroyo toad and the habitat that it is known to occupy. CVWD is one of the permittees to the draft Plan. As result, we have excluded all CVWD lands within the draft Coachella Valley MSHCP from designated critical habitat for the arroyo toad. (see the Relationship of Critical Habitat to the Draft Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP)—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(61) *Comment:* One commenter asked whether on-going activities, such as routine inspections, road grading, and construction adjacent to designated critical habitat are considered to appreciably decrease habitat values or quality through indirect effects.

Our Response: The effects of any such activities on critical habitat must be considered by the Federal agency planning to conduct such activities. The action agency determines whether their action(s) "may affect" the arroyo toad or its primary constituent elements within the adjacent critical habitat based on their analyses. If so, the action agency would enter into consultation with us under Section 7.

Comments Related to Economic Impacts and Analysis; Other Relevant Impacts

(62) *Comment:* Several commenters expressed concern that commercial activities, such as mining, mineral prospecting, agriculture, and new home construction would be prohibited or severely restricted by a designation of critical habitat. Similarly, other commenters felt that critical habitat is a good way to stop activities that they do not agree with, such as some of the activities mentioned above.

Our Response: Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or result in the destruction or adverse modification of critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat. Section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, and critical habitat designation would not provide any additional protections under the Act for private or non-Federal activities. Critical habitat does not prohibit private or commercial activities from occurring.

(63) *Comment:* Some commenters stated that critical habitat should not have been proposed before an analysis of economic and other relevant impacts was completed.

Our Response: Pursuant to 50 CFR 424.19, we are not required to conduct an economic analysis at the time critical habitat is initially proposed. We evaluated and used comments received on the April 28, 2004, proposed critical habitat designation to develop the draft economic analysis, as appropriate. On February 14, 2005 (70 FR 7459), we published a notice in the **Federal Register** announcing the availability of the draft economic analysis and reopening the public comment period for 30 days. In making this final critical habitat designation, we used the economic analysis and considered all comments and information submitted during the public comment periods.

(64) *Comment:* Several private property owners commented that their property should be removed from critical habitat because the economic burden to them would be too great.

Our Response: Extensive exclusions have been made for economic reasons (See Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act).

(65) *Comment:* A couple of commenters stated that the Service should exclude all essential lands subject to the Rancho Mission Viejo Ranch Plan because the plan provides a conservation benefit to the arroyo toad.

Our Response: We have excluded these essential areas from critical habitat based on economic considerations (see the Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(66) *Comment:* One commenter stated that the Service should exclude all essential lands where the proposed Foothill-South Transportation Corridor may be developed in southern Orange County because of the importance of the Corridor as a regional transportation solution and as a component of the Air Quality Management Plan.

Our Response: We have excluded these essential areas from critical habitat based on economic considerations (see the Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

(67) *Comment:* Several commenters questioned the accuracy of the 1.25-to-1 offsetting compensation ratio used by the draft economic analysis to estimate the amount of land that would potentially be set-aside due to arroyo toad conservation activities.

Our Response: The Service has conducted four formal consultations concerning real estate development effects on the arroyo toad and arroyo toad habitat. The draft economic analysis relies on the average offsetting compensation ratio requested by the Service as part of these four historical consultations. The draft economic analysis notes that actual offsetting compensation ratio used in any particular case will depend on a variety of factors unique to the circumstance at hand. The 1.25-to-1 factor is used in the draft economic analysis as an average for the purpose of forecasting future set-aside acres across all proposed critical habitat. Given that this estimate is based on the full population of formal consultations concerning residential development and the arroyo toad, it represents the best information available during the preparation of the draft economic analysis.

(68) *Comment:* A number of comments state that the draft economic analysis does not rely on appropriate real estate values to estimate land value losses from critical habitat designations.

Our Response: The draft economic analysis estimates the per-acre value of raw, unimproved, and residentially zoned land at 11 percent of the built value. The Service recognizes that the value of raw land as a percent of home price will depend on a variety of factors and can differ significantly by region. In general, raw land values for single-family homes of equal density are higher in areas with high land supply constraints. However, raw land values as a percent of home price also declines as density and development costs increase.

The draft economic analysis calculates residual land value based on an analysis that subtracts hard and soft real estate development costs from home prices in Southern California counties. The average home prices per county is based on data from Rand in

2002, the most recent year available, and inflated to 2004 dollars. Development cost estimates are based on data from Square Foot Costs by RSMeans. Rand reports the median price per square foot for single-family homes by county calculated from California Association of Realtors transaction records. Residential values are assumed to appreciate at a rate of 3.4 percent per year in real terms (*i.e.*, adjusted for inflation) over the next 21 years, or through 2025. To the extent that actual residual land values are higher or lower than those projected, the economic impacts will change accordingly.

(69) *Comment:* One commenter stated that the draft economic analysis fails to account for the limited supply of developable land and the corresponding impact on the Southern California housing market.

Our Response: The draft economic analysis evaluates the potential for critical habitat designation to reduce consumer surplus by increasing real estate market prices. The analysis concludes that critical habitat designation will not affect regional real estate markets or prices, and thus consumer surplus, because the total reduction in land supply is expected to represent a very small component of total future market demand in the region. Specifically, the estimated amount of developable acres of habitat set-aside within critical habitat designation is estimated at about 0.7 percent of future market growth through 2025 in the eight counties where arroyo toad critical habitat designation is proposed. Supply adjustments by developers, including increased density and/or project reconfigurations, are likely to further cancel the market impact of the relatively small land supply reduction created by critical habitat designation.

(70) *Comment:* One commenter stated that the draft economic analysis should consider costs at the census tract level.

Our Response: The draft economic analysis relies on the official real estate growth projections provided by SCAG, SANDAG and other regional agencies supported by the governmental jurisdictions located within arroyo toad critical habitat designation. These projections reflect economic and demographic trends at the county and regional level and incorporate local zoning and land use data at the census tract level. The draft economic analysis assumes that county-wide economic and demographic trends are the primary determinant of real estate prices. The draft economic analysis also acknowledges that the regional land supply is scarce relative to projected growth in several counties within the critical habitat designation. However, since the reduction in land supply resulting from critical habitat designation represents such a small fraction of the total market, the draft economic analysis assumes that it will not alter these regional market dynamics, or increase market prices resulting in consumer surplus losses.

(71) *Comment:* One commenter stated that the draft economic analysis focuses solely on the losses experienced by landowners as a result of critical habitat designation for the arroyo toad. In reality, housing projects generate a considerable amount of consumer surplus, and the temporary loss of this surplus is a major adverse effect of delay.

Our Response: The draft economic analysis does not calculate consumer surplus losses associated with delay for a variety of reasons. First, it is possible that consumers will not experience any delay in the consumption of housing given the negligible effect arroyo toad critical habitat designation is expected to have on overall housing markets (*i.e.*, a variety of housing options exist and consumers may substitute between locations). Second, even if the real estate purchases of consumers are delayed, only a very small proportion of consumer surplus is likely to be lost as the delay period (estimated at six months in the first year after designation) is likely to be a small proportion of the ownership time horizon. Finally, consumer surplus losses due to delay, if any, are difficult to quantify.

(72) *Comment:* Several comments question the draft economic analysis estimates regarding the amount of land within arroyo toad critical habitat designation that would be developed absent arroyo toad conservation activities.

Our Response: The draft economic analysis relies primarily on development projections generated by SCAG and SANDAG to determine the number of acres slated for real estate development. The draft economic analysis only evaluates the impact of the proposed designation on land that is within the critical habitat designation and forecasted (by SCAG or SANDAG) to be developed by the year 2025. These projections suggest that absent critical habitat designation a significant portion of the proposed critical habitat designation will not be developed by 2025.

Though SCAG and SANDAG projections do rely on general plan and zoning information, these projections may not reflect very recent amendments and changes. In reality, specific projects not anticipated in the SCAG and SANDAG forecasts may be developed, just as other projects included in these forecasts may never materialize. An evaluation of every local land use plan or proposal that could potentially affect arroyo toad critical habitat designation, and its probability of success, is beyond the scope of the draft economic analysis and would not likely lead to more accurate results. SCAG and SANDAG represent the best publicly available data sources reporting future land development within the proposed arroyo toad critical habitat designation.

In addition, it is important to note that the draft economic analysis estimates future offsetting compensation (*i.e.*, land set-aside) for arroyo toad impacts based on development projections and an offsetting compensation ratio. The estimated compensation for impacts to the arroyo toad is not in addition to specific measures already negotiated by regulators and project proponents. That is, in some cases, the draft economic analysis may estimate offsetting compensation when compensation has already been agreed upon by regulators and project proponents. The impacts estimated in the draft economic analysis should not be added to these existing agreements.

(73) *Comment:* One commenter stated that the draft economic analysis does not consider cumulative effects of the proposed rule.

Our Response: The draft economic analysis only evaluated potential effects of the rulemaking, however, we did take into consideration the potential efffects of overlaping designations while evaluating potential exclusions from the designation under section 4(b)(2) of the Act.

(74) *Comment:* One commenter stated that the draft economic analysis ignores arroyo toad-related delay impacts associated with transportation projects.

Our Response: Major road projects generally occur over a very long time horizon and require interaction with and support from variety of local, State, and Federal agencies, including environmental review (i.e., CEQA/NEPA). Arroyo toad critical habitat designation is one of many issues that will need to be addressed and resolved during the long time frame associated with the project approval, entitlement, and funding process. Although arroyo toad critical habitat designation may increase the costs associated with the construction or completion of a major road project, it is not expected to extend the normal time frame for a project of

this nature. Consequently, the draft economic analysis does not estimate project delay costs associated with road construction projects.

(75) *Comment:* One commenter stated that the draft economic analysis ignores impacts on the Foothill Eastern Transportation Corridor Agency (TCA).

Our Response: While the draft economic analysis does not refer to TCA projects explicitly, the draft economic analysis does estimate future costs associated with road projects in critical habitat designation Units 10 and 11. These costs reflect estimated economic impacts borne by major road projects occurring within those areas. The costs of arroyo toad conservation activities on local (non-arterial) roads construction projects are not estimated separately in the draft economic analysis. Rather, these costs are assumed to be captured in the reduced land-value estimates.

The estimate of future road projects is based on an extrapolation of SANDAG transportation planning data to the entire study area. This approach was developed based on the best readily available data at the time of the draft economic analysis, given the resources allotted to the study. While it is possible that detailed information on specific planned or proposed road projects may be missed given this methodology, it is also possible that the draft economic analysis includes costs for projects that may in fact never materialize as projected. Overall, the Service believes that the approach utilized in the draft economic analysis represents a reasonable estimate of future road project costs.

The draft economic analysis also assumes that arroyo toad conservation activities are unlikely to have an appreciable affect on regional mobility. Consequently, the draft economic analysis does not attempt to measure the economic cost associated with reduced transportation accessibility.

(76) *Comment:* One commenter stated that the draft economic analysis should consider the implications of the Gifford Pinchot Task Force v. US Fish and Wildlife Service litigation.

Our Response: The draft economic analysis acknowledges that a recent Ninth Circuit judicial opinion, Gifford Pinchot Task Force v. United States Fish and Wildlife Service, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. The Service is currently reviewing the decision to determine what effect it (and to a limited extent Center for Biological Diveristy v. Bureau of Land Management (Case No. C–03–2509–SI, N.D. Cal.)) may have on the outcome of consultations pursuant to section 7 of the Act.

(77) *Comment:* One commenter stated that the draft economic analysis fails to estimate economic impacts of critical habitat designation on tribal reservation lands.

Our Response: The draft economic analysis estimates economic impacts attributable to arroyo toad critical habitat designation on tribal land. For example, development projections covering tribal lands are relied upon to estimate real estate development costs, infrastructure costs and road construction costs. However, due to data limitations, the impacts to tribal entities are not presented separately.

(78) *Comment:* The Service fails to use the proper baseline for the analysis.

Our Response: The draft economic analysis estimates the total cost of species conservation activities without subtracting the impact of pre-existing baseline regulations (*i.e.*, the cost estimates are fully co-extensive). That is, the draft economic analysis complies with direction from the U.S. 10th Circuit Court of Appeals.

(79) *Comment:* One commenter refuted the draft economic analysis assumption that land contained within the 100-year floodplain is the most likely to be undevelopable even in the absence of arroyo toad conservation activities.

Our Response: FEMA defines floodplains as Special Flood Hazard Areas and places special requirements on development. The lowest floor of all new residential buildings in the floodplain must be at or above the level of the 100-year flood, in order to qualify for FEMA-backed insurance. Non-residential buildings must be at or above the level of the 100-year flood, or be flood-proofed to that level. FEMA defines minimum requirements; local jurisdictions may place additional restrictions on construction. Given these requirements, floodplain development is more expensive than development outside the floodplain making it more likely to be set aside to compensate for impacts to arroyo toad habitat.

As noted in the draft economic analysis, development rarely occurs on 100 percent of the project area assembled by a developer regardless of what degree of arroyo toad protection is in place. A development site will naturally include a relatively large portion of undeveloped acres set aside for a variety of factors, including slope, avoidance of hydrologic features (*e.g.*, flood areas, wetlands, drainage channels), parcel configuration, and creation of "amenity features" such as landscaping, parks, and open space. The draft economic analysis uses the 100-year flood plain as a proxy for the "low quality" land that would not have been developed in the absence of arroyo toad habitat. In reality, some 100-year flood plain land will be developed while other areas outside the flood plain will not, due to other natural or geological factors. Nonetheless, GIS-based 100-year flood plain data represents the best available data upon which to estimate the proportion of "high-quality" to "low-quality" land within critical habitat.

(80) *Comment:* One commenter stated that the draft economic analysis fails to consider whether floodplain land might carry a development premium due to its proximity to rivers and streams.

Our Response: The draft economic analysis relies on land values calculated at the county level. While there may be a land value premium associated with proximity to a variety of different amenities, estimation of such a premium is beyond the scope of the draft economic analysis.

(81) *Comment:* One commenter points out that floodplain boundaries change over time.

Our Response: While floodplain boundaries are likely to change over time, it is impossible to accurately predict specific changes a-priori. The draft economic analysis relies on the most recent FEMA floodplain boundary data available.

(82) *Comment:* One commenter stated that the draft economic analysis does not consider land use conversion from grazing to vineyard.

Our Response: No publicly available data projects future vineyard development (or other agricultural production) in specific geographic areas. In addition, no historical formal biological opinions address the effect on the arroyo toad of land conversion to agriculture. Thus, the draft economic analysis does not address potential economic effects from agricultural development. If arroyo toad critical habitat designation does affect the feasibility of proposed agriculture conversion activities, the economic impacts would be in addition to those estimated by the draft economic analysis.

(83) *Comment:* One commenter stated that the draft economic analysis should consider the potential economic loss from closure of the Rancho Sisquoc cattle operation.

Our Response: The draft economic analysis estimates that project modifications requested for the arroyo toad conservation on the Sisquoc grazing allotment would have cost about $422,000. Because the allotment was

abandoned, the draft economic analysis assumes that project proponents found the project modifications cost prohibitive. This suggests that the value of the ranching activity on the Sisquoc allotment is less than the $422,000 impact reported by the draft economic analysis.

(84) *Comment:* Several commenters stated that the draft economic analysis incorrectly reports that the Soledad Canyon sand and gravel mining project has been denied local permits by Los Angeles County, when in fact the project has been approved.

Our Response: Local permits for the mining project was denied in 2002 due to a variety of factors, including environmental review procedures, water quality, and proximity to urban development. At the time research was conducted for the draft economic analysis, the project remained unapproved. However, during the public comment period, project proponents informed the Service that the project was approved in June of 2004. The project is likely to result in additional costs associated with arroyo toad conservation that are not included in the draft economic analysis.

(85) *Comment:* Several commenters stated that the draft economic analysis does not consider the potential for critical habitat designation to reduce the size of the Soledad Canyon sand and gravel mining project.

Our Response: The draft economic analysis relies on historical biological opinions addressing mining projects in order to forecast conservation activities associated with similar projects in the future. In the case of the Soledad Canyon sand and gravel mining project, the Service issued a biological opinion in 2001 that requested various arroyo toad conservation activities. However, the biological opinion did not explicitly request a reduction in the size of the mining project. While the designation of critical habitat may trigger the reinitiation of the project consultation and result in additional measures to protect the arroyo toad, it is difficult to predict whether the additional measures will include a reduction in the size of the project. Furthermore, because no historical biological opinions addressing mining projects have resulted in a significant reduction in project size exclusively for the protection of the arroyo toad, there is no data or basis for forecasting such impacts. To the extent that reinitiation of the Soledad Canyon consultation results in a reduction in the size of the project due to the arroyo toad, there will be economic costs associated with the foregone mining opportunity that are not included in the draft economic analysis.

(86) *Comment:* Several commenters stated that the designation does not adequately estimate costs associated with delays in permitting of mining projects.

Our Response: The draft economic analysis assumes that given sufficient knowledge of the regulatory environment, the various administrative activities associated with the Act can generally be coordinated with other regulatory processes and do not necessarily increase the time to obtain approvals.

(87) *Comment:* One commenter stated that critical habitat designation may create an additional administrative burden on mining projects due to increased litigation.

Our Response: The draft economic analysis only considers costs that are reasonably foreseeable. While critical habitat designation may stimulate additional legal actions, there is no data to support this theory or estimate impacts. The number, scope and timing of potential legal challenges associated with the rulemaking would be difficult to quantify.

(88) *Comment:* One commenter stated that the draft economic analysis is unclear regarding the basis of impacts to water management at Loveland and Cuyamaca Reservoir and how impacts are calculated.

Our Response: In the future, the Service may request specific water management changes within arroyo toad critical habitat designation. The draft economic analysis assumes that the Service will request that the managers of the Loveland and Cuyamaca Reservoirs forego water releases during the arroyo toad breeding season to avoid impacts. The draft economic analysis calculates economic impacts based on the assumption that the Service will request that these water managers not conduct major water releases water during the arroyo toad breeding season (*i.e.*, March 15 through June 15). The draft economic analysis conservatively estimates that 50 percent of the foregone release volume will require replacement due to losses from percolation and evaporation. To calculate the expected water release volume during the breeding season, the analysis relies on historical water release data provided by the Sweetwater Authority and the Helix Water District. Expected water releases in the future are calculated based on historical averages.

(89) *Comment:* Several commenters stated that the draft economic analysis adjusts water losses resulting from foregone releases using an arbitrary percentage.

Our Response: In some cases, water releases may be conducted during winter months rather than during the breeding season. This operational flexibility may allow water managers to avoid cost impacts associated with arroyo toad conservation. The adjustment of water losses is intended to reflect the potential for operational flexibility in water system management. Due to uncertainty concerning the degree of operational flexibility, the draft economic analysis presents a sensitivity analysis addressing this assumption.

(90) *Comment:* One commenter stated that the draft economic analysis fails to recognize that if more imported water is used, then less water will be available for water purveyors and water dependent species.

Our Response: Water used (or lost) as a result of arroyo toad conservation activities will be a small proportion of total water demands, as discussed on page 58 of the draft economic analysis. While there may be localized supply impacts, the location and economic implication of such constraints are difficult to determine. Overall, these impacts are not expected to be significant.

(91) *Comment:* One commenter stated that the draft economic analysis fails to recognize that water supplies are limited, especially during drought conditions. The commenter suggests that supply constraints will increase the economic burden on water agencies.

Our Response: The draft economic analysis estimates costs to water managers based on average conditions. In reality, some years are wetter or dryer than others. Special operational constraints affecting water managers in dry years or drought years are not analyzed by the draft economic analysis. Development of an economic analysis evaluating all water-year types for each water agency and district affected by critical habitat designation is beyond the scope of the draft economic analysis. Dry-year constraints may create an additional economic burden for water managers.

(92) *Comment:* One commenter stated that the draft economic analysis relies upon incorrect water replacement prices.

Our Response: EPS contacted water managers to determine water replacement costs in areas expected to be affected by arroyo toad conservation efforts. The draft economic analysis relies on these reported costs. If the actual cost of water is higher (or lower) than the reported cost, the economic impacts will also be higher (or lower).

(93) *Comment:* One commenter stated that the draft economic analysis fails to consider operational constraints related to dam safety and other protected species at Cuyamaca Reservoir.

Our Response: The draft economic analysis assumes that the Service will request that water managers forego major water releases from Cuyamaca Reservoir during the arroyo toad breeding season. However, in reality the Service may need to alter this request to account for site-specific factors. This level of detail is beyond the scope of the draft economic analysis. The economic implications of site specific constraints on arroyo toad conservation are unknown.

(94) *Comment:* One commenter stated that the draft economic analysis fails to consider economic impacts borne by Helix Water District due to potential management changes at El Capitan Reservoir.

Our Response: The draft economic analysis estimates costs associated with potential management changes at El Capitan Reservoir. It is possible that some of these estimated costs will be passed on to the Helix Water District, affecting the distribution of economic impacts rather than the total economic impact.

(95) *Comment:* One commenter stated that the draft economic analysis fails to include significant additional costs to water managers attributable to additional consultations and increased scrutiny from the California Department of Fish and Game and the Army Corps of Engineers.

Our Response: While it is possible that critical habitat designation will increase scrutiny of water operations, any associated economic impacts are primarily administrative and not reasonably foreseeable. The draft economic analysis does not estimate these impacts due to their speculative nature.

(96) *Comment:* One commenter stated that pipeline construction costs do not consider economic effects from potential mitigation measures, delay or uncertainty.

Our Response: Because pipeline construction is intended to benefit the arroyo toad, the Service is unlikely to request additional mitigation. The historical record for arroyo toad protection by the Service supports this assumption. Consequently, the draft economic analysis does not estimate additional impacts associated with pipelines intended to improve habitat for the arroyo toad.

Summary of Changes From the Proposed Rule

In developing the final designation of critical habitat for the arroyo toad, we reviewed public comments received on the proposed designation of critical habitat published on April 28, 2004, and revisions to proposed critical habitat and the draft economic analysis published on February 14, 2005 (70 FR 7459); conducted further evaluation of lands proposed as critical habitat; refined our mapping methodologies; and excluded additional essential habitat from the final designation. Table 1, included at the end of this section, outlines changes in acreages for each subunit. Specifically, we are making the following changes to the final rule from the proposed rule published on April 28, 2004:

(1) We mapped critical habitat more precisely by eliminating habitat areas of marginal quality that we do not expect to be used by arroyo toads. In certain upland locations, we determined that busy, paved roads and railroads constituted barriers to toad movement into the uplands. These roads and railroads were found in areas of relatively steep slopes and were supported by steeply-constructed embankments. Where marginal upland habitat was found behind these barriers, it was removed from critical habitat because we did not consider it essential to the arroyo toad population. This more precise examination of essential areas led to a modest reduction in total designated critical habitat acreage from the proposed rule.

(2) Although we attempted to remove as many developed areas (areas that have no value as arroyo toad habitat) as possible before publishing the proposed rule, we were not able to eliminate all developed areas. Since publication of the proposed rule, we were able to further eliminate a small amount of developed area, which has resulted in a more precise delineation of essential habitat containing one or more of the primary constituent elements. This resulted in a minor reduction in the total acreage published in the proposed rule. However, it is not possible to remove each and every one of these developed areas even at the refined mapping scale used: therefore, the maps of the designation still include areas that do not contain primary constituent elements. These areas are not being designated as critical habitat.

(3) In some cases, the 82-foot (ft) (25-meter (m)) elevation criteria in the model used to determine the extent of the essential upland habitat for arroyo toads extended the upstream or downstream critical habitat boundary beyond the starting and ending points of the essential stream segment (*i.e.*, into areas containing habitat of lower quality). These areas were not intended to be included as critical habitat and were removed from the designation, leading to a minor reduction in the total acreage published in the proposed rule.

(4) We revised the criteria used to identify essential upland habitat. We modified the model to capture upland habitat up to a 1,640 ft (500 m) distance from the essential stream, rather than a 4,921 ft (1,500 m) distance, if the 82-ft (25-m) elevation limit had not yet been reached. In a majority of the stream reaches, the model reached the 82-ft (25-m) elevation limit before it reached the 1,640 ft (500 m) distance from the essential stream, and therefore the distance limit was often not a factor.

We based this 1,640 ft (500 m) distance limit on the results of an arroyo toad study on Marine Corps Base, Camp Pendleton (Camp Pendleton) in San Diego County (Holland and Sisk 2000), which is the most indepth, complete study of the distribution and use of upland habitat by arroyo toads. Holland and Sisk (2000) used extensive pitfall trap arrays at various distances from a riparian wash area to document toad use of adjacent upland areas. They captured approximately 12 percent of their toads in the upland areas, while the rest were caught in the riparian wash. Of the toads caught in uplands areas, 68 percent of the toads were captured within 1,640 ft (500 m) of the riparian wash. Although the absolute maximum distance toads may travel cannot be determined by the pitfall trapping method, a few toads were caught at distances greater than 3,281 ft (1,000 m) from the riparian wash area. Since it is not our intent to capture the maximum distance that toads have been recorded to travel from riparian areas as critical habitat, we have determined that upland habitat up to 1,640 ft (500 m) from riparian areas is habitat that is essential for the arroyo toad.

(5) We revised the criteria used to identify essential stream reaches. Upstream areas from known occupied sites were removed from the designation. Under the Act, the Secretary of the Interior may only include lands if she finds that those lands are essential to the conservation of the species. In the case of the arroyo toad, and based on the best scientific data available, it was not possible for the Secretary at this time to make such a determination for upstream areas that were not known to be occupied by the arroyo toad. We defined essential occupied areas as those areas within

approximately 0.7 miles (1.1 km) up and down stream from where the species is known to have occurred at the time of listing or subsequently. The arroyo toad was listed as an endangered species in 1994, and we define "at the time of listing" for the arroyo toad as the period from 1974 to 1994. The 0.7 mile (1.1 km) movement distance was selected from a variety of studies demonstrating that arroyo toads will move this distance over the course of a year or so (Sweet 1993; Griffin 1999; Holland and Sisk 2001; Ramirez 2002a; Hitchcock et al. 2004). The upper-bounds of essential streams were defined by the uppermost toad occurrence in a stream with its corresponding 0.7 mile (1.1 km) movement distance. Any proposed critical habitat areas not known to be occupied that were upstream from this were removed from designated critical habitat. This resulted in the removal of several upstream areas previously proposed as critical habitat in a number of units, but was greatest in (sub) units 2, 5a, 6c, 8, 10a, 11a, 12b, 13a and b, 16c and d, 17a, 17d, 18a, 19a and d, 20, 21, 22a, and 23. (Sub)units 7a, 17b, 17c, and 18d were completely removed from critical habitat because these (sub)units were not known to be occupied. We did not truncate or remove any critical habitat downstream from known observations because toads, particularly tadpoles, have been known to be washed downstream, particularly during rain events, into suitable habitat.

(6) In subunit 6b, we have determined that San Francisquito Creek above the Newhall Ranch Road bridge does not contain the primary constituent elements of arroyo toad critical habitat. It is drier than we had originally thought and lacks surface water for a sufficient duration during the spring time of most years to allow for arroyo toad tadpole development. Thus, this portion of San Francisquito Creek, which was included in the proposed rule, does not provide breeding habitat for arroyo toads and we no longer consider it to be essential for the conservation of the species. This resulted in a reduction of 1,463 acres in subunit 6b. Below the Newhall Ranch Road bridge, arroyo toads inhabiting the Santa Clara River may disperse into lower San Francisquito Creek to forage and aestivate; we still consider this reach of San Francisquito Creek to be essential habitat.

(7) We no longer consider the arroyo toad habitat within subunit 22b, a stretch of the Mojave River running through Victorville in San Bernardino County, to be essential to the conservation of the species and have therefore removed this subunit from the final designation. Although we do not have new data concerning arroyo toads in this area, we further analyzed and reevaluated the existing data (and lack thereof) to arrive at this decision. This subunit runs through the relatively urbanized area of Victorville and involves numerous private landowners. Much of the upland habitats along the Mojave River in this area have been developed, and even areas within the floodplain have been developed, which are protected by levees. Exotic predators of the arroyo toad have also invaded this portion of the river. Additionally, the occupancy of subunit 22b by arroyo toads is questionable at best. Arroyo toads were rumored to occur in the Victorville area sometime during the 1990s, probably associated with the last significant El Niño event; however, there have been no confirmed reports from this area since 1982. The recovery plan (Service 1999) states that arroyo toads are presumed extinct in this reach.

(8) We excluded several areas under Section 4(b)(2) of the Act and exempted several areas under section 4(a)(3) of the Act from the final critical habitat designation (see the Application of Sections 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). This is the primary source of reduction in total designated critical habitat acreage that was identified in the proposed rule. Exemptions under section 4(a)(3) included portions of Units 11 and 12 on Marine Corps Base, Camp Pendleton and portions of Unit 12 on Naval Weapons Station, Seal Beach, Detachment Fallbrook based on their approved INRMPs. Exclusions pursuant to section 4(b)(2) based on economic considerations included all of Units 3, 5, 6, 7, 10, 13, 14, 15, 16, 17, 18, 19, and 22 and portions of Units 11 and 12. Other exclusions pursuant to section 4(b)(2) based on approved HCPs included Unit 8 (Orange County Central-Coastal Subregional HCP/NCCP) and portions of Unit 9 (Western Riverside MSHCP) and based on a nearly completed HCP included portions of Unit 23 (pending Coachella Valley MSHCP). Several portions of units that were formerly excluded in the proposed rule for being under approved HCPs or in the revised proposed rule for private lands covered under special management plans that were beneficial to the arroyo toad were changed in the final rule to be solely excluded for economic considerations pursuant to section 4(b)(2). This change included portions of Units 6, 13, 16, 17, 18, 19, and 22.

TABLE 1.—CRITICAL HABITAT UNITS FOR THE ARROYO TOAD

Critical habitat units/subunits	County	Proposed rule (April 28, 2004) ac; ha	Final rule ac; ha
1. San Antonio River	Monterey	6,546; 2,649	0
2. Sisquoc River	Santa Barbara	6,574; 2,660	4,800; 1,942
3. Upper Santa Ynez River Basin	Santa Barbara	4,414; 1,786	0
4. Sespe Creek	Ventura	4,138; 1,675	4,008; 1,622
5. Piru Creek	Ventura, L.A	3,966; 1,6050	0
6. Upper Santa Clara River Basin	Los Angeles	7,398; 2,994	0
7. Upper Los Angeles River Basin	Los Angeles	4,213; 1,705	0
8. Black Star and Baker Creeks	Orange	172; 69	0
9. San Jacinto River Basin/Bautista Creek	Riverside	683; 277	700; 283
10. San Juan Creek Basin	Orange, Riverside	6,285; 2,543	0
11. San Mateo Basin	Orange, San Diego	4,580; 1,853	0
12. Lower Santa Margarita Basin	San Diego	1,840; 744	0
13. Upper Santa Margarita Basin	Riverside, San Diego	3,628; 1,468	0
14. Lower and Middle San Luis Rey Basin	San Diego	15,376; 6,222	0
15. Upper San Luis Rey Basin	San Diego	11,725; 4,745	0
16. Santa Ysabel Creek	San Diego	11,080; 4,484	0
17. San Diego River Basin	San Diego	2,309; 934	0
18. Sweetwater River Basin	San Diego	9,235; 3,737	0

TABLE 1.—CRITICAL HABITAT UNITS FOR THE ARROYO TOAD—Continued

Critical habitat units/subunits	County	Proposed rule (April 28, 2004) ac; ha	Final rule ac; ha
19. Cottonwood Creek Basin	San Diego	15,800; 6,394	0
20. Upper Santa Ana River Basin/Cajon Wash	San Bernardino	1,263; 511	1,119; 453
21. Little Rock Creek	Los Angeles	941; 381	734; 297
22. Upper Mojave River Basin	San Bernardino	14,550; 5,848	0
23. Whitewater River	Riverside	1,997; 808	333; 135
Totals		138,713; 56,133	11,695; 4,733

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time of listing must first have features that are "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Specific areas within the geographic area occupied by the species at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species at the time of listing. An area currently occupied by the species but was not known to be occupied at the time of listing will likely be essential to the conservation of the species and, therefore, included in the critical habitat designation.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and our associated Information Quality Guidelines, provides criteria and guidance, and establishes procedures to ensure that our decisions represent the best scientific and commercial data available. Our biologists are required, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are designated as critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include a recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties or other entities that develop HCPs, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that are essential to the conservation of the arroyo toad. Our methods for identifying the arroyo toad critical habitat included in this final designation are those methods we used to make our final designation for this species on February 7, 2001 (66 FR 9414) and in our subsequent proposal of critical habitat for the arroyo toad, published on April 28, 2004 (69 FR

23253) as modified in accordance with our discussion in the Summary of Changes section above. In addition, we used information and data (such as newly obtained survey results; San Marino Environmental Associates 1995, RECON 1999, Compliance Biology 2004) received during the public comment periods following both the April 28, 2004, proposed rule and the February 14, 2005, revisions to proposed critical habitat and notice of availability of the draft economic analysis, and communications with individuals inside and outside the Service who are knowledgeable about the species and its habitat needs.

We have also reviewed available information that pertains to the habitat requirements of this species, including material received since completion of the recovery plan. The material included data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed articles and presented in academic theses and agency reports; regional Geographic Information System (GIS) coverages; occupied and potential habitat maps developed by the Forest Service (Forest Service 2000); habitat evaluation models for the San Diego County Multiple Species Conservation Program (MSCP), the North San Diego County Multiple Habitat Conservation Program (MHCP), and the North County Subarea of the MSCP for Unincorporated San Diego County; and a predictive habitat suitability map for San Diego County (Barto 1999).

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations and protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs required for the arroyo toad are derived from the biological needs of the arroyo toad as described in the Background section of the proposed rule (69 FR 23253). These specific biological and physical features, or PCEs, which are essential to the conservation of the arroyo toad are described below. Identified lands provide aquatic and terrestrial habitat containing the essential PCEs supporting the maintenance of self-sustaining populations and metapopulations (a set of local populations or breeding sites within an area, where typically migration from one local population or breeding site to other areas containing suitable habitat is possible, but not routine) of arroyo toads throughout its range.

Space for Individual and Population Growth, and for Normal Behavior

The arroyo toad is found along medium-to-large-sized streams in coastal and desert drainages in central and southern California and Baja, Mexico. It occupies aquatic, riparian (areas near a source of water), and upland habitats within its range. Suitable habitat for the arroyo toad is created and maintained by the fluctuating hydrological, geological, and ecological processes operating in riparian ecosystems and the adjacent uplands. Periodic flooding that modifies stream channels, redistributes channel sediments, and alters pool location and form, coupled with upper terrace stabilization by vegetation, is required to keep a stream segment suitable for all life stages of the arroyo toad. Periodic flooding helps maintain areas of open, sparsely vegetated, sandy stream channels and terraces (Sweet 1992; Griffin and Case 2001).

Eggs and tadpoles require aquatic habitat, as described below under "Sites for Breeding, Reproduction and Rearing of Offspring." Juvenile and adult arroyo toads require and spend much of their lives in riparian and upland habitats adjacent to breeding locations. Riparian habitats used by subadults and adults for foraging and burrowing year round include sand bars, alluvial terraces, and streamside benches that lack vegetation, or are sparsely to moderately vegetated (Sweet 1992; Holland and Sisk 2001). Upland habitats used by arroyo toads during both the breeding and nonbreeding seasons include alluvial scrub, coastal sage scrub, chaparral (shrubby plants adapted to dry summers and moist winters), grassland, and oak woodland (Griffin and Case 2001). Arroyo toads also have been found in agricultural fields (Griffin 1999), but these lands may constitute sinks (areas where mortality rates are higher than reproduction rates) over the long-term, due to tilling, pesticide and fertilizer applications, and heavy equipment use (Griffin and Case 2001).

The substrate in habitats preferred by arroyo toads consists primarily of sand, fine gravel, or pliable soil, with varying amounts of large gravel, cobble, and boulders. Areas that are damp and have less than 10 percent vegetation cover provide the best conditions for juvenile survival and rapid growth (Sweet 1992). Arroyo toads must be able to move between the stream and upland foraging sites, as well as up and down the stream corridor. Holland and Sisk's (2001) study on arroyo toad habitat use in coastal San Diego County revealed toads traveling considerable distances (up to at least 0.71 mi (1.14 km)) from the edge of the upland/riparian ecotone (*i.e.*, boundary or interface). In all study areas, they found that toads were captured as far out as the pitfall trap arrays were set for them: 0.71 mi (1.14 km) at Cristianitos Creek (east side), 0.56 mi (0.9 km) at Cristianitos Creek (west side), and 0.37 mi (0.6 km) at Santa Margarita River. Given the contiguous nature of the habitat beyond where the traps were set, toads may have traveled farther from the riparian area had the pitfall arrays been set further back and not limited in distribution. Arroyo toads use a wide range of upland vegetation types, including chaparral, coastal sage scrub, oak woodland, grasslands, agricultural lands, and ruderal/disturbed areas for foraging, burrowing, and aestivating (Griffin and Case 2001; Holland and Sisk 2001). Friable or readily crumbled soils that allow toads to burrow are oftentimes patchily distributed in the upland areas. Upland areas not containing friable soils are still important for toads because they may still contribute as foraging grounds where toads can hunt for their prey or migration areas between foraging, burrowing, or aestivating areas; toads may also occupy the burrows of other animals in areas where the soils are too hard for them to burrow into (Griffin 1999).

Within stream and river movements by arroyo toads is another important aspect of their life history. Arroyo toads move within streams and rivers to find suitable breeding and foraging habitats as well as potential mating partners. In some situations, arroyo toad larvae swim or are flushed down stream due to heavy currents (Griffin 1999). Several radio telemetry studies by Ramirez (2002a, 2002b, 2002c) documented toads moving on several occasions around 0.7 miles. In one instance, a toad was recorded moving 0.6 mile within one week. These studies were never

more than approximately 5 months in duration and therefore it is possible that lifetime toad movements could be even longer. Sweet (1993) also documented toad movements of at least 0.7 mile before toads left his study area. Griffin (1999) documented a toad moving downstream 0.64 mi (1025 m) over 42 days before escaping its transmitter. Although it is well documented that toads can travel 0.7–0.8 mile within a stream or river over the course of a season, it is possible that these represent minimum distances since anecdotal evidence exists of toads recolonizing suitable breeding pools that are of greater distances from other breeding pools.

Food and Water

Arroyo toad tadpoles eat microscopic algae, bacteria, and protozoans from the spaces among pebbles, gravel, and sand or abraded from stones (Sweet 1992). Juveniles and adults feed on insects, but specialize on ants. When foraging, arroyo toads are often found around the driplines of oak trees (Sweet 1992). These areas often lack vegetation, yet have sufficient levels of prey. When active at night, toads often can be observed near ant trails feeding on ants, beetles, and other prey.

Water in the form of shallow pools along streams is essential for arroyo toad breeding (see Sites for Breeding, Reproduction and Rearing of Offspring below).

Cover or Shelter

During the day and other periods of inactivity, arroyo toads seek shelter by burrowing into the sand (Sweet 1992). Thus, areas of sandy or friable (readily crumbled) soils are necessary for the animals to burrow, but these soils can be interspersed with gravel or cobble deposits. Arroyo toads may also seek temporary shelter under rocks or debris and have been found in mammal burrows on occasion (Griffin 1999). Upland sites with extremely compact soils can also be used for foraging and dispersal (D. Holland, in litt. 2000).

Sites for Breeding, Reproduction and Rearing of Offspring

The arroyo toad has specialized breeding habitat requirements. They favor shallow pools located in open sand and gravel channels, along low-gradient (typically less than 6 percent) reaches of medium-to-large-sized streams (Sweet 1992). These streams can have either intermittent or perennial streamflow, and typically experience periodic flooding that scours vegetation and replenishes fine sediments. In at least some portions of its range, the species also breeds in smaller streams and canyons where low-gradient breeding sites are more sporadically distributed. Breeding pools must persist long enough for the completion of larval development (at least in most years), which is generally March through June, depending on location and weather. Sweet (1992) measured the average age-to-metamorphosis of arroyo toad larvae on the Los Padres National Forest at 71 days, with a predicted minimum age-to-metamorphosis of 62 days. Most arroyo toads metamorphose during June and July in the northern part of the toad's range, and from late April through June in the southern portion of its range, although it may be later, particularly at higher elevations (D. Holland, in litt. 2000).

Breeding arroyo toads lay their eggs in water over substrates of sand, gravel, or cobble in open sites such as overflow pools, old flood channels, and shallow pools along streams (Sweet 1992). Such habitats rarely have closed canopies over the lower banks of the stream channel due to periodic flooding events. Heavily shaded pools are generally unsuitable for larval and juvenile arroyo toads because of lower water and soil temperatures, and poor algal mat development. Pools less than 12 inches (30 centimeters (cm)) deep with clear water that have flow rates less than 0.2 ft per second (5 cm per second), and bottoms composed of sand or well-sorted fine gravel, are favored by adults for breeding and egg deposition (Sweet 1992). Larvae usually hatch in 4 to 6 days at water temperatures of 54 to 59 degrees Fahrenheit (12 to 16 degrees Celsius). Although egg strings are laid in slow moving water, larvae (tadpoles) can be found in streams with water velocities of up to 1.0 to 1.3 ft per second (30 to 40 cm per second) (Sweet 1992).

Pursuant to our regulations, we are required to identify the known physical and biological features or PCEs, essential to the conservation of the arroyo toad, together with a description of any critical habitat that is designated. Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the arroyo toad's primary constituent elements are:

1. Rivers or streams with hydrologic regimes that supply water to provide space, food, and cover needed to sustain eggs, tadpoles, metamorphosing juveniles, and adult breeding toads. Specifically, the conditions necessary to allow for successful reproduction of arroyo toads are:

a. Breeding pools with areas less than 12 in (30 cm) deep;

b. Areas of flowing water with current velocities less than 1.3 ft per second (40 cm per second); and

c. Surface water that lasts for a minimum length of 2 months in most years (*i.e.*, a sufficient wet period in the spring months to allow arroyo toad larvae to hatch, mature, and metamorphose).

2. Low-gradient stream segments (typically less than 6 percent slope) with sandy or fine gravel substrates that support the formation of shallow pools and sparsely vegetated sand and gravel bars for breeding and rearing of tadpoles and juveniles.

3. A natural flooding regime, or one sufficiently corresponding to a natural regime, that will periodically scour riparian vegetation, rework stream channels and terraces, and redistribute sands and sediments, such that breeding pools and terrace habitats with scattered vegetation are maintained.

4. Riparian and adjacent upland habitats (*e.g.*, alluvial scrub, coastal sage scrub, chaparral, and oak woodlands, but particularly alluvial streamside terraces and adjacent valley bottomlands that include areas of loose soil where toads can burrow underground) to provide foraging, aestivation, and living areas for subadult and adult arroyo toads.

5. Stream channels and adjacent upland habitats allowing for migration between foraging, burrowing, or aestivating sites, dispersal between populations, and recolonization of areas that contain suitable habitat.

These aquatic, riparian, and upland habitat PCEs form the bases of our critical habitat units. These features are essential to the conservation of the arroyo toad. All lands identified as essential and designated as critical habitat contain one or more of the PCEs for the arroyo toad.

Criteria Used To Identify Critical Habitat

We are designating critical habitat on lands that we have determined are occupied at the time of listing and contain the primary constituent elements of the arroyo toad. In a few instances, designated areas were not known to be occupied at the time of listing, but have been determined to be essential to the conservation of the species and have some or all of the toad's primary constituent elements (see unit descriptions for specific discussions). Drainage basins containing features essential to the conservation of the arroyo toad are generally reflected in this final critical habitat designation. This critical habitat designation focuses

on providing sufficient breeding, riparian, and upland habitats for the arroyo toad, thus promoting the conditions for maintaining self-sustaining arroyo toad populations and metapopulations across their historic range in California. Since arroyo toads are found in a variety of ecologically and geographically distinct areas, it is important to preserve the species' genetic diversity as well as the variety of ecological environments in which it is endemic.

We determined an area was essential if it had one or more of the following characteristics: (1) Supports a substantial core population of arroyo toads; (2) supports at least a small toad population and possesses favorable habitat conditions for population expansion and persistence; (3) suitable habitat situated in a location that appears to be crucial for maintaining the viability of a larger metapopulation; (4) occupied habitat on the periphery of the arroyo toad's geographic range; and (5) occupied habitat in atypical or underrepresented ecological environments (*e.g.*, high elevation or desert-edge populations). These areas were known to be occupied at the time of listing or subsequently and have one or more of the primary constituent elements described above.

Areas supporting core populations or that have the potential to support large populations were determined to be essential because they represent the foundation for continued persistence of the species. Furthermore, some habitat areas that would not be considered essential if geographically isolated, are in fact essential when situated in locations where they facilitate continued connectivity and dispersal of individuals between surrounding adjacent populations or play a significant role in maintaining metapopulation viability (*e.g.*, by providing additional areas of occupancy that provide resilience to periodic extirpations of adjacent habitat patches) (Hunter 2002). Populations on the periphery of the species range or in atypical ecological environments are important for maintaining the genetic diversity of the species, which is important for evolutionary adaptations to changing climatic and environmental conditions (Hunter 2002).

To identify and map areas that are essential, we determined areas that contained the essential features as described above, used data on known arroyo toad locations, and data on movement distances by arroyo toads. Arroyo toad locations were from the California Natural Diversity Data Base (CNDDB 2005) and information from biologists that have not yet been entered into the data base; only locations from the time of listing (1974 to 1994) up through the present were used. Spatial data on stream gradients with grades less than 6 percent, aerial photography, surveys of habitat suitability, and site visits were all used to determine the extent of suitable breeding habitat in these areas. We identified occupied areas on stream reaches containing suitable breeding habitat, along with interspersed, interconnecting higher gradient segments, as essential. Occupied areas were defined as stream reaches in which the species was observed that contain contiguous stretches of suitable habitat. Occupancy extended up to approximately 0.7 mile (1.1 km) upstream from the upper-most arroyo toad observation to accommodate within-stream movements by toads. The 0.7 mile (1.1 km) instream movement distance was selected from a variety of studies demonstrating that arroyo toads travel this distance over the course of about a year (Sweet 1993; Griffin 1999; Holland and Sisk 2001; Ramirez 2002a; Hitchcock *et al.* 2004). Interspersed higher gradient stream segments are often patchily distributed within stream reaches and were included as essential stream reaches because of their proximity to suitable breeding habitat and their importance in facilitating movement between breeding sites. The upper most bound of an essential stream reach was determined by the upper most occupied area. The change in upstream critical habitat areas from the proposed critical habitat rule is discussed above in the Summary of Changes from the Proposed Rule section.

To delineate essential upland habitat areas, we used a GIS-based modeling procedure to identify alluvial terraces, valley bottomlands, and upland habitats adjacent to stream reaches known to be occupied by the arroyo toad. Lacking spatially explicit data on geomorphology, we used elevation above the stream channel as an indicator of the extent of alluvial and upland foraging habitat. After some experimentation, we determined that areas up to 82 ft (25 m) in elevation above the stream channel were most likely to contain the riparian and upland habitat elements essential to arroyo toads. Most arroyo toad activity and movement occurred within these areas and steeper slopes away from the stream were eliminated. However, in flat areas, we truncated the upland habitat delineation at a distance of 1,640 ft (500 m) from the stream channel if the 82 ft (25 m) elevation limit had not yet been reached at that point. The 82 ft (25 m) elevation limit was reached at distances less than 1,640 ft (500 m) from the mapped stream channel along the majority of the stream reaches, so the distance limit was often not a factor. We based the 82 ft (25 m) or 1,640 ft (500 m) limit on the results of an arroyo toad study on Camp Pendleton in San Diego County (Holland and Sisk 2000), which is by far the most indepth, complete study of the distribution and use of upland habitat by arroyo toads. Holland and Sisk (2000) established extensive pitfall trap arrays at different distances and locations and operated the traps at different times of the year over several years. Eighty-eight percent of the adult and sub-adult toads were captured in the riparian wash area. Although a few toads were caught at distances of 1,000 m or more from the riparian wash area, approximately 68 percent of the arroyo toads found in upland habitats were within 1,640 ft (500 m). The change in upland distance from the proposed critical habitat rule is discussed above in the Summary of Changes from the Proposed Rule section.

This GIS-based modeling technique was effective at capturing alluvial areas associated with river valleys, and thus, the width of the upland component of critical habitat varies based on topography. The critical habitat designation widens in broad alluvial valleys and narrows in places where streams run through constricted canyons or between surrounding hills.

To provide legal boundaries for the critical habitat areas, critical habitat boundaries for all drainages were mapped as contiguous blocks of 100 m-by-100 m cells that conform to a Universal Transverse Mercator (UTM) grid.

To identify critical habitat units, we first examined those lands under Federal jurisdiction. Those lands include areas managed by the Department of Defense (DOD), the U.S. Forest Service, the Bureau of Land Management (BLM), the U.S. Army Corps of Engineers (Army Corps), and the Service. We also considered the existing status of non-Federal and private lands in designating areas as critical habitat. We also determined the extent of Tribal land areas as part of the critical habitat designation process. We have coordinated with the respective Tribes on this designation under the guidance of the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), E.O. 13175, and 512 DM 2, which requires us to coordinate with federally-recognized

Tribes on a Government-to-Government basis.

In determining critical habitat boundaries, we made every effort to exclude all developed areas, such as buildings, paved areas, and other lands unlikely to contain primary constituent elements essential for arroyo toad conservation. Our 100-meter UTM grid minimum mapping unit was used to minimize the amount of development along the urban edge included in our mapping areas. Any such structures, paved areas, or otherwise developed areas inadvertently left inside critical habitat boundaries are not considered part of the designated units. This also applies to the land on which such structures sit directly. Therefore, Federal actions limited to these areas would not trigger section 7 consultations, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

A brief discussion of each area designated as critical habitat is provided in the unit descriptions below. Additional detailed documentation concerning the essential nature of these areas is contained in our supporting record for this rulemaking.

Special Management Considerations or Protection

As a result of agriculture and urbanization, and the construction, operation, and maintenance of water storage reservoirs, flood control structures, roads, and recreational facilities such as campgrounds and off-highway vehicle parks, many arroyo toad populations have been reduced in size or extirpated (eliminated) due to extensive habitat loss from the 1920s into the 1990s (Campbell *et al.* 1996). Although these factors have not dramatically reduced the range of the arroyo toad, within its range many of the habitats that were historically capable of supporting large numbers of arroyo toads have been lost in the last 100 years. Jennings and Hayes (1994) believe that the loss of habitat, coupled with the manipulation of water levels in many central and southern California streams and rivers, predation from introduced aquatic species, and habitat degradation from introduced plant species, caused arroyo toads to be extirpated from 76 percent of their previously occupied habitat in California. Through focused survey efforts over recent years, a few new arroyo toad populations have been discovered. Because of these recent efforts, however, it is unlikely that many more populations remain undiscovered, at least on public land.

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and contain the primary constituent elements may require special management considerations or protection. As discussed throughout this final rule, our proposed rule published on April 28, 2004 (69 FR 23253), and our previous final designation of critical habitat for the arroyo toad (66 FR 9414, February 7, 2001), the arroyo toad and its habitat are threatened by a multitude of human-related activities, including but not limited to: alteration of the natural hydrological regime (*e.g.*, inundation of habitat behind dams, sediment trapping behind dams, water flow manipulations from dams and waste water treatment plants, ground water pumping, water diversions, channelization, bank stabilization, water contamination); degradation and loss of habitat through urbanization; the inadvertent or intentional introduction of nonnative species (*e.g.*, exotic predators, plants, and diseases); mining (*e.g.*, sand and gravel and suction dredge); agriculture (*e.g.*, loss of upland habitat and use of pesticides and herbicides); road placement within, across, or adjacent to river corridors; off-highway vehicle use in stream channels; livestock grazing (*e.g.*, trampling of arroyo toads and compaction of soils); and recreation (*e.g.*, campground placement on stream terraces, anglers, equestrians, hikers, and mountain bikers). While many of these threats operate concurrently and cumulatively with each other and with natural disturbances (*e.g.*, droughts and wildfires), the loss of existing habitat, alteration of stream flows, and the continued colonization of habitat by nonnative species, likely represent the most significant current threats to arroyo toads. As such, we believe that each area designated as critical habitat may require some level of management and/or protection to address the current and future threats to the arroyo toad to ensure the overall recovery of the species. Such management considerations and protections would benefit the arroyo toad and its habitat because of the following: Exotic predators and pets may eat or injure arroyo toads; unnatural water releases from dams can wash away arroyo toad eggs and tadpoles, promote the growth of exotic species, or reduce the availability of open sand bar habitat; water diversions can dry a streambed prior to the completion of metamorphosis from tadpole to toad; toads can be crushed by channel maintenance, road construction, or the plowing of agricultural fields with heavy machinery; toads can be trampled during recreational activities; and arroyo toad habitat can be adversely affected by agricultural practices, the invasion of exotic species, and inundation from water impoundments. However, designation of critical habitat does not carry with it any requirement that landowners or land managers implement any special management or protection programs. Threats specific to each unit that may require special management considerations or protection are further discussed in the Unit Descriptions section.

Critical Habitat Designation

We are designating 6 units as critical habitat for the arroyo toad. The critical habitat areas described below constitute our best assessment at this time of areas we determined to be occupied at the time of listing, contain the primary constituent elements, and that may require special management. Units that are currently occupied, but were not known to be occupied at the time of listing, have been determined to be essential to the conservation of the species and have one or more of the species' primary constituent elements (see Unit Descriptions below). The 6 areas designated as critical habitat, plus the 17 units that have been excluded from critical habitat designation, are shown in Table 1 above. Table 2 below shows the approximate area designated as critical habitat for the arroyo toad by land ownership and county.

TABLE 2.—APPROXIMATE CRITICAL HABITAT IN ACRES (AC) (HECTARES (HA)) BY COUNTY AND LAND OWNERSHIP

County	Forest Service	BLM	FWS	Military	State/local	Tribal	Private	Total
Monterey	0	0	0	0	0	0	0	0
Santa Barbara	1,853 ac (750 ha)	0	0	0	0	0	2,947 ac (1,193 ha)	4,800 ac (1,942 ha)

TABLE 2.—APPROXIMATE CRITICAL HABITAT IN ACRES (AC) (HECTARES (HA)) BY COUNTY AND LAND OWNERSHIP—Continued

County	Forest Service	BLM	FWS	Military	State/local	Tribal	Private	Total
Ventura	3,668 ac (1,494 ha)	0	0	0	0	0	340 ac (138 ha)	4,008 ac 1,622 ha)
Los Angeles	734 ac (197 ha)	0	0	0	0	0	0	734 ac (297 ha)
San Bernardino	492 ac (199 ha)	0	0	0	0	0	628 ac (254 ha)	1,120 ac (453 ha)
Riverside	700 ac (283 ha)	333 ac (135 ha)	0	0	0	0	0	1,033 ac (418 ha)
Orange	0	0	0	0	0	0	0	0
San Diego	0	0	0	0	0	0	0	0
Total	7,447 ac (3,013 ha)	333 ac (135 ha)	0	0	0	0	3,915 ac (1,585 ha)	11,695 ac (4.733 ha)

Unit Descriptions

Critical habitat and essential habitat that has been excluded includes arroyo toad habitat throughout the species' range in Monterey, Santa Barbara, Ventura, Los Angeles, Riverside, San Bernardino, Orange, and San Diego Counties, California. Lands we considered for critical habitat are under private, local agency, county, State, Tribal, and Federal ownership. We divided the lands we determined to be essential to the conservation of the species into 23 units. We are designating critical habitat in 6 units, and excluding the remaining 17 units for various reasons, as described in the exclusions section below. For those areas that have been excluded, the unit description is provided to define the unit and identify why we consider it essential to the conservation of the species. Although all of the units are within the geographic range of the species, we are not designating all of the areas known to be occupied by the arroyo toad. A brief description of each unit, reasons why it contains the features essential for the conservation of the arroyo toad, and the special management considerations particular to each unit, are presented below. Additionally, if a unit was not known to be occupied at the time of listing, we have also described why we have determined these units to be essential to the conservation of the species. The unit boundaries are generally based on geographically distinct river basins. In several instances, a river basin has been broken into two or more units based on human or natural landscape features that effectively separate portions of the basin (*e.g.*, a large reservoir or gorge).

Unit 1: San Antonio River, Monterey County

We have excluded all essential lands in unit 1 including all lands on Fort Hunter Liggett from the final critical habitat designation under section 4(b)(2) of the Act (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). Unit 1 consists of 6,775 ac (2,742 ha) of the San Antonio River and adjacent uplands, from about 2 mi (3 km) upstream of the confluence with Mission Creek downstream to San Antonio Reservoir, a distance of about 17 mi (27 km), and includes small portions of Mission Creek and other tributaries. The vast majority of the lands within this unit are owned by the Army. The northernmost known population of arroyo toads is located here, and is approximately 100 mi (160 km) north of the nearest documented extant population. Arroyo toads were not known to occur within this area at the time the species was listed, but have since been observed along the entire length of this segment of the San Antonio River (Service 1999), which is still in a relatively natural state and consists of high-quality arroyo toad habitat. This area contains all the primary constituent elements, including breeding pools in low-gradient stream segments, sandy substrates, seasonal flood flows, and relatively undisturbed riparian habitat and upland benches for foraging and dispersal. The protection of this area is essential to maintaining the complete genetic variability of the species and the full range of ecological settings within which it is found, which is essential to the ability of the arroyo toad to adapt to changing environmental conditions. For these reasons we have determined this unit to be essential to the conservation of the species. Military operations (including occasional troop movements and weed control) in and near the riparian zone may create the need for special management considerations in this unit.

Unit 2: Sisquoc River, Santa Barbara County

Unit 2 consists of approximately 22 mi (36 km) of the Sisquoc River and adjacent uplands, from the vicinity of Abel Canyon Campground downstream to the confluence with La Brea Creek. The unit encompasses approximately 4,800 ac (1,942 ha) of which 61 percent is private land and 39 percent is within the Los Padres National Forest. Upper stretches of the river are within the National Forest and mostly within the San Rafael Wilderness Area. Below the National Forest boundary, the river and adjacent uplands are on rural, private lands. This long, undammed stream is occupied arroyo toad habitat and is one of the few remaining major rivers in southern California with a natural flow regime. Arroyo toads were known to occur within this area at the time the species was listed and have been found during recent surveys. This area contains all of the primary constituent elements, including breeding pools in low-gradient stream segments, sandy or fine gravel substrates, seasonal flood flows, and relatively undisturbed riparian/upland habitat for foraging and dispersal. Lands within this unit are threatened by grazing, sand and gravel mining, and limited recreational activities and require special management to reduce the impacts resulting from these threats.

Unit 3: Upper Santa Ynez River Basin, Santa Barbara County

All essential lands in unit 3 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Unit 3 is located upstream of Gibraltar Reservoir and incorporates portions of the upper Santa Ynez River, Indian Creek, Mono

Creek, and adjacent uplands. The unit encompasses approximately 3,106 ac (1,257 ha) within the boundaries of Los Padres National Forest, with 74 percent on National Forest lands and 26 percent on private non-residential inholdings. The segment of the upper Santa Ynez River designated as critical habitat extends approximately 7 mi (11 km) from the vicinity of Juncal Campground downstream to Gibraltar Reservoir. Indian Creek is designated from its confluence with Mono Creek upstream approximately 3 mi (5 km). Mono Creek and associated uplands are designated for approximately 6 mi (10 km) from Olgilvy Ranch downstream to its confluence with the Santa Ynez River. Arroyo toads were known to occur within this area at the time the species was listed and have been found during recent surveys. This area contains all of the primary constituent elements, including breeding pools in low-gradient stream segments, sandy or fine gravel substrates, seasonal flood flows, and relatively undisturbed riparian/upland habitat for foraging and dispersal.

A large and well-studied arroyo toad population occurs in this area (Sweet 1992, 1993). It is likely a remnant of a much larger population that historically extended downstream below what is now Lake Cachuma and upstream into the area occupied by Jameson Reservoir. The population along Mono Creek is one of the more robust populations of arroyo toads on the Los Padres National Forest and is free of exotic vertebrate predators for much of its length (Jamie Uyehara, Forest Service, pers. comm. 2003). Unit 3 is also the wettest area occupied by arroyo toads in the Northern Region (Teale Data Center 1998; California Irrigation Management Information System 2000).

It is likely that arroyo toads in this unit experience precipitation and soil moisture conditions that are not faced by toads at drier sites. Potential adaptations to these conditions make the protection of this area essential to maintaining the genetic diversity of the species. Because it is within, or is surrounded by, National Forest land, this area has favorable habitat conditions for population persistence. The arroyo toad population currently inhabiting Mono and Indian Creeks is particularly healthy and could be used as a source for the reestablishment of arroyo toads in downstream reaches of the Santa Ynez River, if warranted. The leading threats to arroyo toads in this area that require special management are primarily along the lower Santa Ynez River and lower Mono Creek and include exotic species (*e.g.*, bullfrogs), recreation, water withdrawls, and problems associated with an upstream dam (*e.g.*, sediment trapping, altered hydrological regime, temperature changes).

Unit 4: Sespe Creek, Ventura County

Unit 4 includes 20 mi (32 km) of Sespe Creek and adjacent uplands, from the confluence with Tule Creek downstream to the confluence with Alder Creek. The unit encompasses approximately 4,008 ac (1,622 ha), of which 92 percent is on the Los Padres National Forest, primarily within the Sespe Wilderness. The remainder is in remote, private inholdings. Arroyo toads were known to occur within this area at the time the species was listed and have been found during recent surveys. One of the largest arroyo toad populations on the Los Padres National Forest occurs in this unit along Sespe Creek (Forest Service, in litt. 1999), which is undammed and retains its natural flooding regime. This core population is spread over large areas of high quality habitat, including numerous high-quality breeding pools, an abundance of sandy substrates, unimpeded seasonal flood flows, and relatively undisturbed riparian habitat and upland benches for foraging and dispersal (Sweet 1992). Up to several hundred adult arroyo toads inhabit this reach of the Sespe River (Sweet 1992, 1993), and during years of successful reproduction, such as 2003, thousands of juveniles can be found as well (Tom Murphy, Forest Service, pers. comm. 2003).

Arroyo toads have been found up to 3,300 ft (1,000 m) in elevation in this area, which is one of the highest known occurrences in the Northern Region. The arroyo toads in this unit likely experience temperature extremes or other environmental conditions not faced by toads at lower elevations. Potential adaptations to these conditions make the protection of this area essential for the maintenance of the genetic diversity of the species. Impacts to the Sespe Creek habitat that require special management are from recreational activities (*e.g.*, horseback riding, hiking, and other trail use) and exotic predators (*e.g.*, bullfrogs) (Sweet 2003). Special management is needed in this unit to reduce or eliminate the impacts from recreation and reduce or eliminate exotic predators.

Unit 5: Piru Creek, Ventura and Los Angeles Counties

All essential lands in unit 5 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Unit 5 encompasses approximately 2,921 acres (1,182 ha) of which 83 percent is within the Los Padres and Angeles National Forests, with the remaining area on a few private inholdings. This unit is divided into two subunits. Subunit 5a encompasses approximately 8 mi (13 km) of Piru Creek and adjacent uplands from the vicinity of Frazier Creek downstream to Pyramid Reservoir. Subunit 5b encompasses approximately 9 mi (15 km) of Piru Creek from the confluence with Fish Creek downstream to Lake Piru. It also includes approximately 1 mi (1.6 km) of Agua Blanca Creek upstream from its confluence with Piru Creek. Subunit 5a is in a remote setting within the Los Padres National Forest, and most of subunit 5b is within the Sespe Wilderness. Arroyo toads were known to occur within this area at the time the species was listed and have been found during recent surveys.

Although much of the historical arroyo toad habitat along Piru Creek is now inundated by the two reservoirs, a substantial arroyo toad population occurs in this unit (Sweet 1993). The upper portion of subunit 5a is free of exotic vertebrate predators, and the arroyo toad population in this area has been increasing and expanding over the past several years (J. Uyehara, pers. comm. 2003). The expansion of the population is likely due, in part, to seasonal campground closures and the elimination of suction-dredge mining. Because lower Piru Creek (subunit 5b) is below a large dam, the habitat there has experienced some degradation over the years from perennial water releases, rapid changes in flow volume, excessive flows during the breeding season, and an increased presence of exotic predators. However, future releases from Pyramid Dam are scheduled to more closely mimic natural flows and benefit the arroyo toad (Eva Begley, California State Division of Water Resources, pers. comm. 2003). This should result in an expanded, stable population distributed over areas of good-to-excellent habitat that is generally undisturbed by human activities. Both upper and lower Piru Creek contain all of the primary constituent elements, including breeding pools in low-gradient stream segments, sandy substrate, seasonal flood flows (modified to some extent below Pyramid Dam), and riparian habitat and upland benches for foraging and dispersal. Special management considerations are required to address threats posed by horse and cattle grazing, recreation, and unnatural flows

that could potentially be released from Pyramid Dam.

Unit 6: Upper Santa Clara River Basin, Los Angeles County

All essential lands in unit 6 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Unit 6 includes portions of the Santa Clara River, Castaic Creek, and adjacent uplands. The unit encompasses approximately 2,538 ac (1,027 ha), of which 87 percent is private land and 13 percent is within the Angeles National Forest. This unit is divided into three subunits. Subunit 6a, predominantly within the administrative boundary of the Angeles National Forest, includes approximately 4 mi (6 km) of Castaic Creek upstream from the Elderberry Forebay of Castaic Lake, and approximately 0.7 mi (1.1 km) of Fish Creek upstream from its confluence with Castaic Creek. Subunit 6b includes approximately 6 mi (10 km) of the Santa Clara River from its confluence with the South Fork of the Santa Clara River down to its confluence with Castaic Creek, and San Francisquito Creek from the Newhall Ranch Road bridge downstream to its confluence with the Santa Clara River. Subunit 6c includes approximately 3 mi (5 km) of the upper Santa Clara River from approximately 0.5 mi (0.8 km) above its confluence with Agua Dulce Creek downstream through Soledad Canyon to its confluence with Bee Canyon Creek. Arroyo toads were known to occupy upper Castaic Creek at the time of listing (subunit 6a), but were not known to occur along the Santa Clara River (subunits 6b, 6c) at the time the species was listed. They have been observed within all three subunits during recent surveys.

A healthy population of arroyo toads can be found on Castaic Creek above the reservoir (subunit 6a). It may be the largest arroyo toad population in the Angeles National Forest (Bill Brown, Forest Service, pers. comm. 2003). A small population of arroyo toads can also be found in the Santa Clara River near the confluence with San Francisquito Creek downstream to the confluence with Castaic Creek (subunit 6b). This portion of the Santa Clara River was originally excluded from designation as critical habitat for the arroyo toad in 2000, in part because we believed that a breeding population of arroyo toads could not be sustained in this area. Recent observations of arroyo toads, including eggs thought to belong to arroyo toads, refutes this (Ruben Ramirez, Cadre Environmental, pers. comm. 2003). Because this area apparently supports a breeding population of arroyo toads with the potential to greatly expand, we believe it is essential habitat for the arroyo toad.

The upper portion of the Santa Clara River running through Soledad Canyon (subunit 6c) supports a small breeding population of arroyo toads (N. Sandburg, in litt. 2001; Rick Farris, Service, pers. comm. 2001; Frank Hovore, Hovore and Associates, in litt. 2001) and has the potential to greatly increase in size with appropriate protection.

Subunits 6a, 6b, and 6c contain all the primary constituent elements, including breeding pools in low-gradient stream segments, sandy substrates, seasonal flood flows, and riparian and upland habitats for foraging and dispersal. The majority of the lands within unit 6 are privately-owned and special management considerations are required in this unit to address urban development, agriculture, recreation, and mining threats. Exotic species, such as African clawed frogs (*Xenopus laevis*), are a concern here as well.

Castaic Creek from its confluence with the Santa Clara River upstream to Castaic Lagoon was included within subunit 6b in the February 7, 2001, designation of critical habitat. A portion of lower Castaic Creek containing suitable arroyo toad habitat was also included in our April 28, 2004, proposed rule. However, flows in this reach are affected by the operations of Castaic Dam (e.g., water removed from the system for a municipal drinking water supply) and arroyo toads have never been observed within lower Castaic Creek; thus, we no longer consider it essential to the conservation of the species in its current state. Similarly, we have concluded that San Francisquito Creek above the Newhall Ranch Road bridge lacks surface water for a sufficient duration during spring of most years to allow for arroyo toad tadpole development. Thus, this portion of San Francisquito Creek, which was included in subunit 6b in the proposed rule, does not provide breeding habitat for arroyo toads, and we no longer consider this portion of San Francisquito Creek to be essential for the conservation of the species.

Unit 7: Upper Los Angeles River Basin, Los Angeles County

All essential lands in Unit 7 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 7 include portions of Big Tujunga, Mill, and Alder Creeks, and adjacent uplands in the upper Los Angeles River Basin. The unit encompass approximately 1,772 ac (717 ha), of which 95 percent is within the Angeles National Forest and 5 percent is on private lands. This unit was divided into two subunits in the proposed rule (7a and 7b). However, all lands in subunit 7a were removed because these areas were not known to be occupied by arroyo toads and were therefore not essential. Subunit 7b encompasses: (1) Approximately 8 mi (13 km) of upper Big Tujunga Creek from immediately above Big Tujunga Reservoir upstream to approximately 1.0 mi (1.6 km) above the confluence with Alder Creek, (2) almost 3.7 mi (6 km) of Mill Creek from the Monte Cristo Creek confluence downstream to Big Tujunga Creek, and (3) 1.7 mi (2.7 km) of Alder Creek from 0.2 mi (0.3 km) downstream of the Mule Fork confluence downstream to Big Tujunga Creek.

Subunit 7b contains an important high elevation arroyo toad population in the Big Tujunga Canyon watershed in the Upper Los Angeles River basin within the Angeles National Forest. All drainages in subunit 7b have been reported to be occupied by arroyo toads within the last 15 years (Forest Service, in litt. 1996; Forest Service 2000; California Natural Diversity Data Base (CNDDB) 2003). This population occurs in a high-elevation environment that is atypical for arroyo toads and functions as the only significant known population remaining in the coastal foothills of the San Gabriel Mountains. Subunit 7b is essential for arroyo toad conservation because it contains several primary constituent elements, including breeding pools in low-gradient stream segments, sandy substrates for burrowing and aestivating, seasonal flood flows, and riparian and upland habitats for foraging and dispersal. Threats that require special management considerations for this unit include exotic predators, such as crayfish and bullfrogs, and exotic plants, such as *Arundo donax*.

Unit 8: Lower Santa Ana River Basin/ Santiago Creek, Orange County

All essential lands in Unit 8 are excluded from critical habitat designation under section 4(b)(2) of the Act because they are within the approved Orange County Central Coastal Subregion Natural Community Conservation Plan (NCCP)/Habitat Conservation Plan (HCP) area (see Application of Section 3(5)(A) and

4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). Essential areas in Unit 8 include portions of Santiago and Baker Creeks and adjacent uplands in the lower Santa Ana River Basin. The unit encompasses approximately 840 ac (340 ha) just above Irvine Lake, of which 100 percent is on private land. Unit 8 encompasses approximately 1.3 mi (2.1 km) stretch of lower Baker Canyon from the Cleveland National Forest boundary downstream to the confluence with Santiago Creek as well as approximately 2.0 mi (3.2 km) of Santiago Creek from the Baker Canyon confluence downstream to Irvine Lake.

Unit 8 contains an important arroyo toad population in Santiago and Baker Creeks in central Orange County. Toads were observed in lower Baker Canyon and at the confluence of Silverado Creek and Santiago Creek during the 1970s and 1980s (Robert Fisher, USGS, in litt. 1985; CNDDB 2003). This population may represent one of the last remnants of a greater historic population that existed in the Santa Ana River basin that was mostly extirpated due to urbanization of the greater Los Angeles metropolitan area. It is also possible that this population belongs to a larger metapopulation that extends across the lower coastal mountain slopes of the Santa Ana Mountains from Santiago Creek to San Mateo Creek (including Units 10 and 11). This unit is essential because it contains primary constituent elements, such as low-gradient sandy streams and adjacent upland terraces for foraging, burrowing, and aestivation. Threats that require special management considerations include impacts from nearby residential activities, and degrading habitat conditions due to past commercial sand and gravel removal operations.

Unit 9: San Jacinto River Basin, Riverside County

Unit 9 includes portions of the San Jacinto River and Bautista Creek and adjacent uplands in the San Jacinto River Basin. The unit encompasses approximately 700 ac (283 ha), of which 100 percent is within the San Bernardino National Forest. We are designating a 3.1 mi (5.1 km) discontinuous stretch of Bautista Creek and an approximately 0.5 mi (0.8 km) discontinuous reach of the San Jacinto River east of the Forest Service boundary as critical habitat. Approximately 2,418 ac (978 ha) of essential habitat on private and State lands along the San Jacinto River from the Sand Canyon confluence downstream to the Soboba Indian Reservation border and along Bautista Creek from the San Bernardino National Forest boundary downstream to near the middle of section 27 (T5S, R1E), where the stream enters a debris basin, is excluded because it is within the Western Riverside MSHCP planning area (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

Unit 9 contains an important arroyo toad population in the San Jacinto River and Bautista Creek within the San Bernardino National Forest. Arroyo toads were first discovered in lower Bautista Creek in 1975 (G. Stewart, unpubl. data) in an area that has since suffered severe habitat loss due to substantial urban development. Arroyo toads have also recently been reported in the San Jacinto River (B. Ortega in litt. 2000) and in Bautista Creek within the San Bernardino National Forest (USGS 2000, 2001). This unit contains the most northeastern arroyo toad population within the coastal region for the species and is effectively isolated from other known toad populations to the south in the Santa Margarita Watershed, to the west in the San Juan Watershed, and from residual populations to the north in the Santa Ana Watershed due to geographic features. It is likely that this isolation has occurred over long geologic time, and therefore, toads in the San Jacinto Watershed may have evolved unique genetic, phenotypic, and/or behavioral characteristics that are essential for the conservation of the species. Furthermore, unit 9 is essential for arroyo toad conservation because it contains several primary constituent elements, including low gradient sandy streambeds with slow moving water suitable for arroyo toad breeding and adjacent upland terrace for foraging and burrowing that promote the ability of this area to support a viable population. Threats that require special management considerations for this unit include destruction of habitat and mortality of individual toads due to recreation, vehicular traffic, and road improvements to the nearby Bautista Road (USGS 2001).

Unit 10: San Juan Creek Basin, Orange County

All essential lands in Unit 10 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 10 include portions of San Juan Creek, Bell Canyon, Trabuco Creek, and adjacent uplands in the San Juan Creek Basin. The unit encompasses approximately 5,256 ac (2,127 ha), of which 52 percent is private land, 41 percent is Orange County Park Land (Caspers Wilderness Park and O'Neill Regional Park), and 8 percent is within the Cleveland National Forest. This unit is divided into two subunits. Subunit 10a encompass approximately 18.5 mi (30 km) of San Juan Creek from the Lower San Juan picnic ground downstream to Interstate 5 and about 2.5 mi (4 km) of Bell Canyon from just below Crow Canyon downstream to the confluence with San Juan Creek. Subunit 10b covers approximately 5 mi (8 km) of Trabuco Creek from the Cleveland National Forest boundary to approximately 0.9 mi (1.4 km) downstream of the State Route 241 (Foothill Transportation Corridor) bridge.

Unit 10 contains a vital arroyo toad population in the San Juan Creek Basin that was known to be occupied at the time the species was listed. Arroyo toads were originally discovered in San Juan Creek in 1974 (F. Roberts, Jr., in litt.), but the extent of their occupancy in this Basin was not known at the time the species was listed under the Act. Recent surveys have collectively demonstrated that subunit 10a supports a significant toad population (P. Bloom, environmental consultant, in litt. 1998; USGS, in litt. 1999a; CNDDB 2005). Subunit 10a is essential for arroyo toad conservation because it contains several primary constituent elements in San Juan Creek and Bell Canyon, including low-gradient stream segments with sandy or fine gravel substrates that support shallow pools and alluvial scrub habitat that provides suitable foraging, burrowing, and aestivating habitat. Subunit 10b is also essential for arroyo toad conservation because it is occupied and contains several primary constituent elements in Trabuco Creek (D. Holland, in litt. 2000), such as low-gradient streams with shallow pools and adjacent upland habitat for foraging and burrowing that are favorable for population persistence. Arroyo toad populations in this unit may function as an important linkage between toads in Santiago Creek (formerly proposed as Unit 8) to the north and the San Mateo Creek Basin to the south (Unit 11). This population is threatened by exotic predators (bullfrogs), increased water diversions, and residual effects of recent gravel mining operations (Bloom 1998) and requires special management to reduce the impacts associated with these threats.

Unit 11: San Mateo Creek and San Onofre Creek Basins, San Diego and Orange Counties

All essential lands in Unit 11 are either excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section) or exempted from critical habitat designation due to Marine Corps Base, Camp Pendleton's (Camp Pendleton) Integrated Natural Resource Management Plan (INRMP) (see the Exemptions Under Section 4(a)(3) section for a detailed discussion). Essential areas in Unit 11 include portions of San Mateo, Cristianitos, Talega, Gabino, La Paz, San Onofre, and Jardine Creeks, and adjacent uplands in the San Mateo and San Onofre Creek Basins. This unit encompasses approximately 8,178 ac (3,310 ha), of which 83 percent is within portions of Marine Corps Base, Camp Pendleton (Camp Pendleton), including State lease lands, and 17 percent is on private land. This unit was divided into three subunits in the proposed rule (11a, 11b, and 11c). Subunit 11a includes approximately 3.1 mi (5 km) of San Mateo Creek from the Cristianitos Creek confluence downstream to just below Interstate 5 highway and includes portions of Cristianitos Creek from just above Gabino Creek downstream to the confluence with San Mateo Creek. This subunit also includes approximately 3.1 mi (5 km) of Gabino Creek upstream from its confluence with Cristianitos Creek, including about 0.6 mi (1 km) of La Paz Creek, as well as approximately 2.7 mi (4.3 km) of Talega Creek upstream from its confluence with Cristianitos Creek and beyond the boundaries of Camp Pendleton. Portions of essential habitat in both subunit 11a along San Mateo, San Onofre, and Talega Creeks and San Onofre Creek and subunit 11c within Camp Pendleton were originally excluded from the proposed rule because they were within mission-essential training areas (69 FR 23253). These areas, as well proposed State leased lands (subunit 11a) and cantonment areas (subunit 11c), are now exempted from critical habitat based on Camp Pendleton's approved INRMP that was signed in 2001. Subunit 11b encompasses approximately 6 mi (9.7 km) of San Mateo Creek from the Cleveland National Forest boundary downstream to the confluence with Cristianitos Creek. Subunit 11c encompasses approximately 8 mi (12.9 km) of San Onofre Creek upstream from Interstate 5 highway as well as approximately 2 mi (3.2 km) of Jardine Canyon upstream from the confluence with San Onofre Creek.

Unit 11 contains an indispensable arroyo toad population in the San Mateo Creek and San Onofre Creek Basins. Unit 11 contains several primary constituent elements of low-gradient stream segments with sandy or fine gravel substrates, shallow pools for breeding and rearing of tadpoles and juveniles, and riparian and adjacent uplands habitats for foraging and dispersal to other populations. With so many favorable habitat conditions, this area is able to support a considerable arroyo toad population (Holland and Goodman 1998; CNDDB 2005) and is essential for the species. An unusual and important aspect of this unit is its close proximity to the coast because nearly all of the historic near-coastal populations have been extirpated due to extensive urbanization and river channelization along the coastal regions of southern California. Distinctive climatic conditions near the coast may provide different selective pressures on toads in this area, and favor specific genetic characteristics that help maintain the genetic diversity of the species. Lands within this unit are threatened by cumulative impacts from human activities, including direct mortality from vehicle collisions and vehicular crossings of stream beds, recreational activities, camping, fire, exotic predators, and invasive plants (Holland and Goodman 1998) and require special management to reduce impacts associated with these threats.

Unit 12: Lower Santa Margarita River Basin, San Diego County

All essential lands in Unit 12 are either excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section) or exempted from critical habitat designation due to Camp Pendleton's and Naval Weapons Station Seal Beach Detachment Fallbrook's (Fallbrook Naval Weapons Station) INRMP (see the Exemptions Under Section 4(a)(3) section for a detailed discussion). Essential areas in Unit 12 encompass approximately 6,388 ac (2,585 ha), of which 86 percent is on Camp Pendleton, 5 percent is on Fallbrook Naval Weapons Station, and 8 percent is on private land. This unit is divided into two subunits (12a and 12b). In the proposed critical habitat rule, portions of subunits 12a and12b along the Santa Margarita River, De Luz Creek, and Roblar Creek in subunits 12a and 12b within Camp Pendleton were excluded because they were within mission-essential training areas (69 FR 23253). These areas are now exempted from critical habitat based on Camp Pendleton's approved INRMP that was signed in 2001. Portions of essential habitat in subunit 12b along the Santa Margarita River within the Fallbrook Naval Weapons Station are also exempted from the final critical habitat designation due to their INRMP and Fire Management Plan. Subunit 12a includes approximately 5 mi (8.0 km) of De Luz Creek from the town of De Luz to the confluence with the Santa Margarita River as well as approximately 2 mi (3.2 km) of Roblar Creek. Subunit 12b includes portions of the Santa Margarita River from approximately 1 mi (1.6 km) northeast of the Camp Pendleton boundary downstream Interstate 5 highway.

Unit 12 contains a significant arroyo toad population in the lower Santa Margarita River Basin. Recent surveys of the Santa Margarita River and De Luz Creek immediately downstream of this unit on Camp Pendleton have documented what is probably the largest known population of arroyo toads (Holland 1995; Holland and Goodman 1998; Varanus Biological Services, Inc. 1999; Holland and Sisk 2001; CNDDB 2005). This unit contains several primary constituent elements including rivers with suitable hydrologic regimes, low-gradient stream segments with sandy substrates supporting shallow pools and gravel bars for breeding and rearing tadpoles and juveniles, and riparian and adjacent upland habitat to provide foraging and living areas for subadult and adult toads. This unit is important for the conservation of the species because of its size and potential connectivity to populations in the upper Santa Margarita River Basin (Unit 13). Threats to this habitat that require special management considerations include cumulative impacts to the species' habitat from human activities, including direct mortality from vehicle collisions and vehicular crossings of stream beds, fire, exotic predators, and invasive plants (Holland and Goodman 1998).

Unit 13: Upper Santa Margarita River Basin, Riverside County

All essential lands in Unit 13 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 13 are located upstream from Vail Lake and include portions of Arroyo Seco and Temecula Creeks, and adjacent uplands in the upper Santa

Margarita Basin. The unit encompasses approximately 2,115 ac (856 ha), of which 81 percent is private land and 19 percent is within the Cleveland National Forest. This unit is divided into two subunits (13a and 13b). The upper half of subunit 13b in Temecula Creek, upper portion of subunit 13a, and all of Wilson Creek was removed because it was not known to be occupied, and therefore no longer considered to be essential. Subunit 13a includes 3.7 mi (5.9 km) of Arroyo Seco Creek from just north of the San Diego/ Riverside Counties boundary downstream to Vail Lake. Subunit 13b includes approximately 3 mi (4.8 km) of Temecula Creek from just east of the town of Radec downstream to Vail Lake.

Unit 13 contains an important arroyo toad population in the Upper Santa Margarita Basin upstream from Vail Lake. Unit 13 is important for the conservation of the species because it provides a potential link to populations in the lower Santa Margarita River Basin and other nearby drainages containing suitable habitat, such as upper portions of Temecula Creek and Wilson Creek that are not known to be occupied. Toads were known to occupy the Upper Santa Margarita Basin at the time of listing in 1994 and have also been documented in this area more recently (AMEC Earth and Environmental, Inc. 2001; CNDDB 2005). Unit 13 is essential for the conservation of the arroyo toad because it contains several primary constituent elements, such as low gradient sandy stream channels with slow moving water suitable for breeding and adjacent upland terraces for foraging, burrowing, and aestivating. Exotic predators, campground activities, streambed alterations, and agricultural run-off threaten arroyo toads in this unit and require special management.

Unit 14: Lower and Middle San Luis Rey River Basin, San Diego County

All essential lands in Unit 14 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential lands in Unit 14 include portions of the San Luis Rey River and adjacent upland areas below the La Jolla Indian Reservation, as well as sections of Pala and Keys Creeks in the lower and middle San Luis Rey River Basin. The unit encompasses approximately 8,669 ac (3,508 ha), of which 84 percent is private land, 10 percent is on the Pala Indian Reservation, and 5 percent is on the Rincon Indian Reservation. Approximately 30 mi (48 km) of the San Luis Rey River from the western edge of the La Jolla Indian Reservation downstream to the confluence with Guajome Creek near the City of Oceanside are designated as critical habitat. It also includes approximately 3.4 mi (5.5 km) of Pala Creek and 1.7 mi (2.7 km) of Keys Creek upstream from their confluence with the San Luis Rey River.

Unit 14 contains an indispensable arroyo toad population in the San Luis Rey River Basin. This unit was known to be occupied at the time of listing in 1994. Several more recent surveys have documented the presence of arroyo toads throughout this unit (Dudek & Associates 1995; California Department of Transportation 1999; PCR Services Corporation 1999; Tierra Environmental Services 1999; Varanus Biological Services, Inc. 1999; Cadre Environmental 2004). This long, low-elevation (all below 1,000 ft (305 m) in elevation) unit is situated in a broad, flat valley with a low-gradient river that supports all the primary constituent elements, such as shallow pools for breeding and sandy substrates in adjacent upland terraces for foraging, burrowing, and aestivating. This unit is necessary for the conservation of the arroyo toad because it supports one of the largest contiguous river reaches that is occupied by the species and has the ability to support a viable population. Special management considerations that are required in this unit include addressing issues regarding dams and water diversions in the upper end of the unit and minimizing impacts from intensive urbanization, agriculture, exotic predators, and plants.

Unit 15: Upper San Luis Rey River Basin, San Diego County

All essential lands in Unit 15 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 15 include the upper San Luis Rey River above Lake Henshaw, two of its headwater tributaries, and adjacent uplands in the upper San Luis Rey River Basin. The unit encompasses approximately 6,183 ac (2,502 ha), of which 73 percent is private land and 27 percent is within the Cleveland National Forest. This unit consists of two subunits (subunits 15a and 15b). Subunit 15a covers almost 8.7 mi (14 km) of the upper San Luis Rey River from the Indian Flats area downstream to the upper end of Lake Henshaw and includes about 7.8 mi (12.5 km) of Agua Caliente Creek from the western edge of section 13 (T10S, R3E) to the confluence with the San Luis Rey. Subunit 15b includes approximately 1.6 mi (2.5 km) of the West Fork of the San Luis Rey River, where it runs through Barker Valley.

Unit 15 contains an important high-elevation arroyo toad population with large areas of suitable habitat. Arroyo toads were known to occupy this unit at the time of listing in 1994. More recent surveys have also documented arroyo toads in both subunits 15a and 15b (USGS 2000; CNDDB 2005). Unit 15 is important for the conservation of the species because it contains a unique assemblage of several small, disjunct, high-elevation arroyo toad populations and one significant population on Agua Caliente Creek (E. Gergus, San Diego State University, in litt. 1992; CNDDB 2005) in an area where in-stream and/ or overland dispersal between populations is likely still possible. Maintaining adequate genetic connectivity within this population increases the probability of these populations' long term persistence. This unit is essential because it contains the primary constituent elements of low-gradient stream segments with sandy substrates supporting shallow pools, and riparian and adjacent upland habitats that provide areas for foraging and burrowing. The primary threats against the arroyo toad in this unit that would be alleviated through special management include groundwater pumping on private lands, exotic predators, and grazing.

Unit 16: Santa Ysabel Creek Basin, San Diego County

All essential lands in Unit 16 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 16 include portions of Santa Ysabel, Santa Maria, Guejito, and Temescal Creeks (Pamo Valley) and adjacent uplands in the San Dieguito River/Santa Ysabel Creek Basin. The unit encompasses approximately 10,259 ac (4,152 ha), of which 93 percent is private land, 3 percent is within the Cleveland National Forest, 1 percent is on County Park land, 1 percent on California Department of Fish and Game (CDFG) land, and the remaining 1 percent is on the Mesa Grande Indian Reservation. This unit consists of four subunits (16a, 16b, 16c, and 16d). Subunit 16a includes approximately 9 mi (14.5 km) of Santa Ysabel Creek from the confluence with Temescal Creek downstream to the confluence with

Santa Maria Creek, approximately 4.3 mi (7 km) of Temescal Creek from the northern edge of Pamo Valley to the confluence with Santa Ysabel Creek and approximately 2.5 mi (4.0 km) of Boden Canyon upstream from the Santa Ysabel Creek confluence. Subunit 16b includes approximately 10 mi (16.1 km) of Guejito Creek from the 2,000 ft (610 m) elevation contour downstream to the confluence with Santa Ysabel Creek. Subunit 16c covers approximately 7.0 mi (11.2 km) of Santa Maria Creek from the west side of Ramona south of the Ramona Airport to the confluence with Santa Ysabel Creek. Subunit 16d includes approximately 3 mi (4.8 km) of Santa Ysabel Creek upstream from the confluence with Witch Creek.

Unit 16 contains a vital arroyo toad population for the conservation of the species in the Santa Ysabel River Basin. This unit was known to be occupied at the time of listing in 1994, and more recent surveys have documented toads to occupying all of the drainages in this unit, including a significant population in Temescal and Santa Ysabel Creeks within Pamo Valley (Varanus Biological Services, Inc. in litt. 1999; Tierra Environmental Services, in litt. 2001; USGS, in litt. 2002; CNDDB 2005). This unit has a high conservation value because it is interconnected with other occupied essential areas in the San Diego MSCP that are excluded. Collectively, these areas contain large amounts of suitable habitat that promote the ability of a large population to persist and contribute to the species recovery. Unit 16 is essential because it contains several primary constituent elements, including low-gradient sandy stream segments with shallow pools for breeding and rearing of tadpoles, upland sandy terraces that provide foraging and burrowing habitat, and stream channels and upland habitats that allow for migration to foraging areas. Grazing, exotic predators, and urbanization (Tierra Environmental Services, in litt. 2001; CNDDB 2005) are the primary threats to this arroyo toad essential habitat that require special management considerations in this unit.

Unit 17: San Diego River Basin/San Vicente Creek, San Diego County

All essential lands in Unit 17 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential lands in Unit 17 include portions of the San Diego River and San Vicente Creek and adjacent uplands in the San Diego River Basin. The unit encompasses approximately 1,955 ac (791 ha), of which 83 percent is private land, 10 percent is within the Cleveland National Forest, and 7 percent is on the Capitan Grande Indian Reservation. The unit was divided into four subunits in the proposed rule (subunits 17a, 17b, 17c, 17d), of which two (subunits 17b and 17c) are no longer essential because they are not known to be occupied. Subunit 17a includes approximately 5 mi (8 km) of the San Diego River from Ritchie Creek downstream through 0.5 mi (0.9 km) of the Capitan Grande Indian Reservation to the upper edge of El Capitan Reservoir and approximately 0.6 mi (1 km) of lower Cedar Creek. Subunit 17d includes 4 mi (6.4 km) of San Vicente Creek upstream from San Vicente Reservoir.

Unit 17 contains a necessary arroyo toad population in the upper San Diego River Basin. Arroyo toads were known to occupy this unit at the time of listing in 1994 (CNDDB 2005). Unit 17 is important for the arroyo toad conservation because it contains suitable habitat for population expansion, thus increasing the probability of the long-term persistence of these populations. This unit is essential because it contains the primary constituent elements of low-gradient stream segments with sandy substrates supporting shallow pools for breeding, riparian and adjacent upland habitats that provide foraging, living, and migration areas for subadult and adult toads. Special management considerations or protections are required to minimize threats from exotic predators.

Unit 18: Sweetwater River Basin, San Diego County

All essential lands in Unit 18 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 18 include portions of the Sweetwater River and Peterson Canyon and adjacent uplands in the Sweetwater River Basin. The unit encompasses approximately 5,347 ac (2,164 ha), of which 46 percent is private land, 32 percent is on California State Park lands, 17 percent is within the Cleveland National Forest, 3 percent is on the San Diego National Wildlife Refuge, 2 percent is on CDFG land, and less than 1 percent on the Sycuan Indian Reservation. The unit was divided into four subunits in the proposed rule (18a, 18b, 18c, and 18d). Subunit 18d was no longer essential because this area was not known to be occupied. Subunit 18a covers approximately 20 mi (32 km) of the Sweetwater River from approximately one mile upstream of the Stonewall Creek confluence in the Green Valley in Cuyamaca Rancho State Park downstream to the confluence with Viejas Creek. Subunit 18b includes approximately 0.5 mi (0.8 km) of the Sweetwater River between Viejas Creek and Loveland Reservoir and 1.5 mi (2.4 km) of Peterson Canyon from just east of the Taylor Creek confluence downstream to the top of Loveland Reservoir. Subunit 18c encompasses approximately 16 mi (26 km) of the Sweetwater River from immediately below Loveland Dam downstream to the upper edge of Sweetwater Reservoir.

Unit 18 contains a significant arroyo toad population in the Sweetwater River Basin that was known to be occupied at the time the species was listed in 1994. This unit is necessary for conservation of the arroyo toad because it supports several significant populations over large stretches of rivers and streams (E. Gergus, in litt. 1992; Ervin and Griffin, in litt. 1997; Varanus Biological Services, Inc. 1999; CNDDB 2005). Unit 18 is essential because it contains the primary constituent elements of open sandy river bottoms with shallow pools that support breeding populations and adjacent upland foraging and burrowing areas. Maintaining suitable habitat conditions and connectivity are essential to provide for the long-term persistence of these populations. Lands within these subunits require special management considerations to address threats from adverse (*i.e.*, timing, amount) water releases from reservoirs, cattle grazing, gravel mining operations, off highway vehicular traffic, and exotic predators.

Unit 19: Cottonwood Creek Basin, San Diego County

All essential lands in Unit 19 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 19 include portions of Cottonwood, Potrero, Pine Valley, Morena, La Posta, and Kitchen Creeks and adjacent uplands in the Cottonwood Creek Basin. This large unit encompasses approximately 11,135 ac (4,579 ha), of which 55 percent is private land, 36 percent is within the Cleveland National Forest, 8 percent is on land owned by San Diego County, and less than 1 percent is on BLM land. This unit is divided into four subunits (19a, 19b, 19c, 19d). Subunit 19a covers

7 mi (11.2 km) of Cottonwood Creek from its confluence with Kitchen Creek downstream to Morena Reservoir and includes approximately 3.7 mi (6 km) of La Posta Creek, 2.8 mi (4.5 km) of Morena Creek, and 5 mi (8 km) of Kitchen Creek upstream from the Cottonwood Creek confluence. Subunit 19b includes 9.3 mi (15 km) of Potrero Creek from approximately the 2,466-ft (752-m) elevation benchmark downstream to the confluence with Cottonwood Creek, approximately 10 mi (16.1 km) of Cottonwood Creek from Barrett Lake downstream to the United States International Border. Portions of 19b between Morena Reservoir and Barrett Lake and 19c (Scove Canyon) were no longer considered essential because these areas were not known to be occupied. Subunit 19c covers about 7.5 mi (12 km) of Pine Valley Creek from the north edge of section 12 (T15S, R4E) downstream to approximately 0.6 mi (1 km) south of Interstate 8 and includes approximately 0.6 mi (1 km) of Noble Creek. Subunit 19d encompasses 8 mi (13 km) of Pine Valley Creek from the Nelson Canyon confluence downstream to Barrett Reservoir.

Unit 19 contains a fundamentally important arroyo toad population in the Cottonwood Creek Basin. This unit was known to be occupied at the time the species was listed and also contains several recent documentations of large distinct arroyo toad occurrences (E. Gergus, in litt. 1992; Varanus Biological Services, Inc. 1999; USGS, in litt. 1999b; CNDDB 2005). This unit is important for the conservation of the species because it contains several areas where in-stream and/or overland dispersal between populations is likely possible and where there is room for population expansion. Lands within this unit also provide an important linkage to populations occurring on excluded essential habitat within the San Diego MSCP area. This unit is essential because it contains the primary constituent elements of wide, open sandy low-gradient stream segments supporting shallow pools for breeding and sparsely vegetated upland habitat for foraging and burrowing. Urbanization, grazing, Border Patrol activities, introduced plants, and exotic predators are the primary threats to this arroyo toad essential habitat that require special management considerations.

Unit 20: Upper Santa Ana River Basin/ Cajon Wash, San Bernardino County

Essential areas in Unit 20 include approximately 4 mi (6.4 km) of Cajon Wash and adjacent uplands, from just south of Cajon campground downstream to the San Bernardino National Forest boundary. The unit encompasses approximately 1,119 ac (4453 ha), of which 56 percent is private land and 44 percent is within the San Bernardino National Forest.

This population may represent some of the last vestiges of a much greater population that historically existed along the upper Santa Ana River Basin, but was almost entirely extirpated due to urbanization of the greater Los Angeles area. Arroyo toads were not known to occur within this area at the time the species was listed but were located near the junction between Lone Pine Canyon and Cajon Wash in 2000 (USGS 2000). The nearest known arroyo toad population occurs approximately 3.7 mi (6 km) (straight line distance) to the east in the West Fork Mojave River (Unit 22). However, the steep terrain between these populations makes it likely that these populations are geographically isolated from one another. Protecting this population is essential for the conservation of the species because it helps preserve an important remnant population that may possess unique genetic, phenotypic, and/or behavioral variation of the species. This unit is essential because it contains the primary constituent elements of low-gradient sandy stream segments supporting shallow breeding pools, adjacent upland terraces for foraging and burrowing, and a flooding regime that sufficiently corresponds to natural conditions and periodically scours riparian vegetation and reworks stream channels. Recreational usage is the primary threat to this habitat and requires special management considerations.

Unit 21: Little Rock Creek Basin, Los Angeles County

Essential areas in Unit 21 include approximately 4.5 mi (7.2 km) of Little Rock Creek and adjacent uplands, from just north of the Little Sycamore campground downstream to the upper end of Little Rock Reservoir (in the vicinity of Rocky Point Picnic Ground), and approximately 1.1 mi (1.8 km) of Santiago Creek and adjacent uplands upstream from the confluence with Little Rock Creek in the Little Rock Creek Basin. The unit encompasses approximately 734 ac (297 ha), all of which is within the Angeles National Forest.

Unit 21 contains an important desert arroyo toad population in the Little Rock Creek Basin. Arroyo toads were not known to occur within this area at the time the species was listed. This unit is important for the conservation of the species because recent surveys have documented toads in this basin (Forest Service, in litt. 1998; Ramirez 2002a), which is geographically isolated from other known toad populations. Therefore, it is possible that arroyo toads in this desert area possess unique genetic and phenotypic variation. Protecting peripheral populations such as this is necessary for the species conservation because it maintains a broad range of genetic diversity for the species. Losses of diversity can result in reduced evolutionary flexibility and declines in fitness. This unit is essential because it contains the primary constituent elements of low-gradient sandy stream segments that support shallow breeding pools, adjacent upland areas for foraging, and a hydrologic regime that sufficiently corresponds to natural conditions and scours the riparian vegetation, thus providing open areas for movement. Threats from recreational activities require special management considerations to preserve the area's favorable habitat conditions for the persistence of this population.

Unit 22: Upper Mojave River Basin, San Bernardino County

All essential lands in Unit 22 are excluded from critical habitat designation under section 4(b)(2) of the Act for economic reasons (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section). Essential areas in Unit 22 include portions of the Mojave River, the West Fork of the Mojave River, Horsethief and Little Horsethief Creeks, Grass Valley Creek, Deep Creek, and adjacent uplands in the upper Mojave River Basin. The unit encompasses approximately 6,328 ac (2,561 ha), of which 35 percent is private land, 34 percent is managed by the U.S. Army Corps of Engineers in association with a flood control reservoir, 28 percent is within the San Bernardino National Forest, 2 percent is California State Parks land, and 1 percent is BLM land. The unit was divided into three subunits (22a, 22b, 22c) in the proposed rule. Subunit 22b was removed as essential because it is not known whether this area is occupied. Subunit 22a includes: (1) Approximately 9.3 mi (18 km) of Deep Creek from near Holcomb Creek downstream to the confluence with the West Fork; (2) approximately 4 mi (6 km) of Little Horsethief Creek upstream from its confluence with Horsethief Creek; (3) approximately 4 mi (6 km) of Horsethief Creek from approximately 1 mi (1.6 km) above the Little Horsethief Creek confluence downstream to the West Fork confluence; (4) approximately 6 mi (10 km) of the West Fork of the Mojave River from Highway 173 downstream to Mojave River Forks

Dam; (5) approximately 1 mi (1.6 km) of the Mojave River below Mojave River Forks Dam; (6) approximately 1.4 mi (2.2 km) of Grass Valley Creek upstream from the confluence with the West Fork; and (7) approximately 2.8 mi (4.5 km) of Kinley Creek upstream from the Deep Creek confluence. Subunit 22c includes approximately 1 mi (1.6 km) of the upper West Fork of the Mojave River, above Silverwood Lake, from near the 3,613 ft (1,462 m) elevation benchmark downstream to the upper end of the lake.

These subunits contain the primary constituent elements of low-gradient sandy stream segments that support shallow breeding pools, adjacent upland areas for foraging, and a hydrologic regime that sufficiently corresponds to natural conditions and scours the riparian vegetation, thus providing open areas for movements by toads. Subunit 22c was not known to be occupied at the time the species was listed, but toads have been found during recent surveys (Tierra Madre Consultants, Inc. in litt. 1995; Ramirez 2002b; CNDDB 2005; Forest Service, in litt. 2003; Ramirez 2003). Summit Valley, which encompasses the lower portions of Horsethief Creek and the West Fork of the Mojave River, is a broad, flat, alluvial valley that supports a substantial arroyo toad population (Ramirez 2003). Providing adequate and proper streamflows and protections for the upland alluvial habitats would increase the probability for the long-term persistence of this large toad population. If adequate streamflows and upland alluvial habitats can be maintained, this desert unit would have the most favorable conditions of any of the desert units for long-term persistence of the large toad population. Protection of this area is essential to maintain the range of genetic and phenotypic diversity of the species. The presence of exotic species, grazing, residential development, flood control activities, and recreational activity (particularly off-road vehicle use) may create the need for special management in this unit.

Unit 23: Whitewater River Basin, Riverside County

Essential areas in Unit 23 include approximately 7.2 mi (11.7 km) of the Whitewater River and adjacent uplands, from near Red Dome downstream to the Colorado River Aqueduct. The unit encompasses approximately 333 ac (135 ha), of which 100 percent is BLM land. Approximately 625 ac (252 ha) of essential habitat within the draft Coachella Valley MSHCP planning area has been excluded from the final designation (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

Unit 23 contains another important desert arroyo toad population. This unit was known to be occupied at the time of listing. Arroyo toads were observed and photographed in the drainage in 1992 (Patten and Myers 1992) but were not detected in surveys conducted during the 2000 breeding season (Jones and Stokes, in litt. 2000). However, 2000 was generally a bad year for arroyo toad breeding activity, particularly in the southern half of the species' range, because of below average precipitation and subsequent low streamflows. In 2003, a tadpole was identified with almost complete certainty to be an arroyo toad near where the Colorado River Aqueduct crosses the river (P. Bloom, in litt. 2003). Given the relatively recent documentation of arroyo toads in this drainage, and the continued presence of suitable habitat in the area, we believe it is likely that this unit is still occupied. Unit 23 is essential because it supports several primary constituent elements such as open sandy areas near small areas of slow moving water and adjacent sparse riparian habitat for foraging and burrowing. These essential PCEs support an isolated desert population on the easternmost periphery of the species' range in the Colorado Desert that may possess unique phenotypic and genetic variation that are unique to desert populations and possibly distinct from desert populations in Units 21 and 22 in the Mojave Desert. Maintaining greater genetic diversity creates greater potential for adaptation to changing environmental conditions. Threats to this population that require special management considerations include unsuitable water flow for breeding and off highway vehicular traffic.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, we define destruction or adverse modification as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species and are relying on the statutory provisions of the Act in evaluating the effects of Federal actions on designated critical habitat, pending further regulatory guidance.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent

with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect the arroyo toad or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the arroyo toad. Federal activities that, when carried out, may adversely affect critical habitat for the arroyo toad include, but are not limited to:

(1) Actions that would affect aquatic, riparian, or upland areas by any Federal agency. Such activities could include, but are not limited to, flood control or changes in water banking activities. These activities could eliminate or reduce the habitat necessary for the reproduction, sheltering, or growth of arroyo toads.

(2) Actions that would affect the regulation of water flows by any Federal agency. Such activities could include, but are not limited to, damming, diversion, and channelization. These activities could eliminate or reduce the habitat necessary for the reproduction, sheltering or growth of arroyo toads.

(3) Actions that would involve regulations funded or permitted by the Federal Highway Administration. (We note that the Federal Highway Administration does not fund the routine operations and maintenance of the State highway system.). Such activities could include, but are not limited to, new road construction and right-of-way designation. These activities could eliminate or reduce aquatic or riparian habitat along river crossings necessary for reproduction, sheltering or growth of arroyo toads.

(4) Actions that would involve regulation of airport improvement activities by the Federal Aviation Administration. Such activities could include, but are not limited to, the creation or expansion of airport facilities. These activities could eliminate or reduce aquatic, riparian, or upland habitat necessary for the reproduction, sheltering, foraging, or growth of arroyo toads.

(5) Actions that would involve licensing of construction of communication sites by the Federal Communications Commission. Such activities could include, but are not limited to, the installation of new radio equipment and facilities. These activities could eliminate or reduce the habitat necessary for the reproduction, sheltering, foraging, or growth of arroyo toads.

(6) Actions that would involve funding of activities by the U.S. Environmental Protection Agency, Department of Energy, Federal Emergency Management Agency, Federal Highway Administration, or any other Federal agency. Such activities could include, but are not limited to, activities associated with the cleaning up of Superfund sites, erosion control activities, and flood control activities. These activities could eliminate or reduce upland and/or aquatic habitat for arroyo toads.

(7) Actions that would affect waters of the United States by the Army Corps under section 404 of the Clean Water Act. Such activities could include, but are not limited to, placement of fill. These activities could eliminate or reduce the habitat necessary for the reproduction, feeding, or growth of arroyo toads.

Of the six units we are designating as critical habitat, we consider four of them (units 2, 4, 9, 23) to be occupied by the species at the time of listing, as identified in the listing rule (59 FR 64859). Critical habitat units 20 and 21 were not known to be occupied at the time of listing but are currently occupied; the arroyo toad populations in these units have, in all likelihood, been inhabiting areas within these two units for many years, but were not detected until after the species became listed in 1994. We consider all of the units designated as critical habitat, as well as those that have been excluded, to be essential to the conservation of the arroyo toad. All units are within the geographic range of the species, all are occupied by the species (based on observations made within the last 20 years), and are likely to be used by the arroyo toad, whether for foraging, breeding, growth of larvae and juveniles, intra-specific communication, dispersal, migration, genetic exchange, or sheltering. Federal agencies already consult with us on activities in areas currently occupied by the species or if the species may be affected by the action to ensure that their actions do not jeopardize the continued existence of the species.

We recognize that the designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, we want to ensure that the public is aware that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the prohibitions of section 9 of the Act. Critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts, if new information available to these planning efforts calls for a different outcome.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office or Carlsbad

Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Ave., Portland, OR 97232 (telephone 503/231–2063; facsimile 503/231–6243).

Application of Sections 3(5)(A) and 4(a)(3) and Exclusion Under Section 4(b)(2)of the Act

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection. Therefore, areas within the geographic area occupied by the species that do not contain the features essential for the conservation of the species are not, by definition, critical habitat. Similarly, within the geographic area occupied by the species, if the features essential for the conservation of the species will not require special management considerations or protection, the area is not, by definition, critical habitat. To determine whether the essential features within an area may require special management, we first determine if the essential features located there generally require special management to address applicable threats. If those features do not require special management, or if they do in general but not for the particular area in question because of the existence of an adequate management plan or for some other reason, then the essential features within the area do not require special management.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (*i.e.*, the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances that the conservation strategies and measures will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

Further, section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we use the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas that we are proposing as critical habitat. Lands we have excluded pursuant to section 4(b)(2) include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species; (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs); (3) Endangered Species Management Plans prepared by the DOD (where a 4(a)(3) exemption is not possible due to a unsigned INRMP); and (4) areas with significant economic impacts to landowners.

We have considered, but are excluding from critical habitat for the arroyo toad, essential habitat in the following areas under section 4(b)(2): Lands covered by the Orange County Central-Coastal NCCP/HCP, Western Riverside Multiple Species Habitat Conservation Plan (MSHCP), and pending Coachella Valley MSHCP; areas on Fort Hunter Liggett; and lands with significant economic impacts to landowners. See below for a detailed discussion of our exclusion of these lands under section 4(b)(2) of the Act.

Section 318 of fiscal year 2004 the National Defense Authorization Act (Public Law No. 108–136) amended the Endangered Species Act to address the relationship of Integrated Natural Resources Management Plans (INRMPs) to critical habitat by adding a new section 4(a)(3). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. The following installations have INRMPs in place that provide a benefit for the arroyo toad, and essential habitat on these installations is exempted from the critical habitat designation under section 4(a)(3): Marine Corps Base, Camp Pendleton and Naval Weapons Station, Seal Beach Detachment Fallbrook (Fallbrook Naval Weapons Station). See below for a detailed discussion of our exemption of these lands under section 4(a)(3) of the Act. Table 3 lists the total size of areas designated as critical habitat or as essential to the conservation of the arroyo toad, and areas excluded from the final designation.

TABLE 3.—TOTAL SIZE OF FINAL CRITICAL HABITAT FOR THE ARROYO TOAD, INCLUDING AREAS EXCLUDED AND EXEMPTED FROM THE FINAL DESIGNATION

Total essential habitat	104,699 ac (42,370 ha)
Essential habitat exempted under section 4(a)(3) of the Act: Camp Pendleton (except lands leased to the CDPR) and Fallbrook Naval Weapons Station.	12,630 ac (5,111 ha)
Exclusion of essential habitat under section 4(b)(2) of the Act: Fort Hunter Liggett; HCP plan areas including Central-Coastal Orange County NCCP/HCP, Western Riverside MSHCP, pending Coachella Valley MSHCP; areas with a significant economic impact to landowners.	80,374 ac (32,526 ha)
Total Final Critical Habitat	11,695 ac (4,732 ha)

Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resource Management Plan (INRMP). An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on military lands. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for the ecological needs of listed species; and a monitoring and adaptive management plan. We consult with the military on the development and implementation of INRMPs for installations with listed species.

We are prohibited from designating as critical habitat any lands or other geographical areas owned or controlled by the DOD, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act, if the Secretary of the Interior determines, in writing, that such plan provides a benefit to the species for which critical habitat is proposed for designation. In order to provide a benefit to the species, the INRMP must meet the following three criteria: (1) A current INRMP must be complete and provide a benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing for periodic monitoring and revisions (adaptive management) as necessary. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the military installation, including conservation provisions for listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan.

We have exempted lands owned by Camp Pendleton and Fallbrook Naval Weapons Station from the final critical habitat designation pursuant to section 4(a)(3) of the Act based on legally operative INRMPs that provide a benefit to the arroyo toad. This includes portions of Unit 11 and Unit 12 on Camp Pendleton and a portion of Unit 12 on Fallbrook Naval Weapons Station. Although Fort Hunter Liggett has not completed an INRMP, we are excluding essential habitat on this base under 4(b)(2) of the Act based on their completed Endangered Species Management Plan for the arroyo toad. Detailed discussions of the exemptions and exclusion of military lands are discussed by installation below.

Marine Corps Base, Camp Pendleton

The arroyo toad occurs primarily in three watersheds on Camp Pendleton: Santa Margarita, San Onofre, and San Mateo Rivers. Arroyo toad populations within these watersheds on Camp Pendleton contain features essential to the conservation of the species because these watersheds retain relatively natural hydrological processes and functions. The Santa Margarita watershed is one of the least altered major watersheds occupied by the species throughout its range. Also, the lower portions of all three watersheds represent the last remaining coastal plain areas where high numbers of arroyo toads occur within 6 mi (10 km) of the coast and in coastal marsh zones. Elsewhere throughout the species' range, urban and agricultural development has been largely responsible for extirpating arroyo toad populations in low coastal plain areas.

Camp Pendleton's INRMP was completed and signed by the Commanding General on November 9, 2001. The INRMP provides conservation measures that will directly and indirectly benefit the arroyo toad and other listed species found on the Base. According to Camp Pendleton's March 16, 2005 comment letter, the Base annually reviews and updates its INRMP with cooperation of the Service and California Department of Fish and Game to verify that: (1) The Base has sufficient professionally trained natural resources management staff available to implement the INRMP; (2) there have not been significant changes to the installation's mission requirements or its natural resources; (3) planned actions are implemented in an adaptive manner, adjusting management priorities and methodologies to accommodate changing natural resource and mission requirements; and (4) the required Federal, State, and installation coordination has occurred.

Camp Pendleton manages listed species, including the arroyo toad, in its riparian areas, such as Santa Margarita River, within the framework of programmatic management plans, approved in a biological opinion (BO) issued by the Service on October 30, 1995 (Service 1995). The biological opinion discussed ongoing and planned training activities, infrastructure maintenance activities, several construction projects, and a Riparian and Estuarine Ecosystem Conservation Plan and assessed potential impacts to six federally-listed species, including the arroyo toad. Management measures include, but are not limited to, programmatic instructions to avoid and minimize impacts to listed species (*e.g.* vehicle traffic must use existing roads, trails and crossings in riparian areas) and riparian habitat enhancement (exotic vegetation and animal control). Camp Pendleton's management of riparian areas provides a benefit to the arroyo toad.

Additionally, Camp Pendleton states in their March 16, 2005, comment letter that they are also conducting a study examining arroyo toad use of habitat dominated by giant reed (*Arundo donax*) and have partnered with the U.S. Geological Survey's Biological Resources Division to develop and implement a rigorous, science-based monitoring protocol for the arroyo toad populations on the Base.

Camp Pendleton has demonstrated ongoing funding of their INRMP and management of endangered and threatened species. According to their March 16, 2005, comment letter, in FY 2003, Camp Pendleton spent approximately $5 million to fund INRMP-driven projects and to assure its implementation. During FY 2004, they applied over $3.5 million toward projects, programs, and activities that provide direct and indirect benefit to the management and conservation of Base natural resources. Moreover, in partnership with the Service, Camp Pendleton is funding two Service biologists to assist in implementing their Sikes Act program and buffer lands acquisition initiative.

Based on Camp Pendleton's past funding history for listed species and their Sikes Act program, we believe there is a high degree of certainty that Camp Pendleton: (1) Will continue to have the necessary staffing, funding levels, funding sources, and other resources to implement their INRMP, (2) has the legal authority, legal procedural requirements, authorizations, and regulatory mechanisms to implement their INRMP and other conservation efforts, and (3) will implement the INRMP in coordination with the California Department of Fish and Game

and with the Service. We also believe that there is a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with Camp Pendleton on a variety of endangered and threatened species issues, including the arroyo toad. The management programs and Base directives to avoid and minimize impacts to the species are consistent with current and ongoing section 7 consultations with Camp Pendleton. Through our cooperative relationship with Camp Pendleton and the section 7 consultation process, we can ensure that conservation efforts identified in the INRMP for the arroyo toad will: (1) Address the nature and extent of threats, (2) provide for monitoring and reporting progress on implementation, and (3) incorporate the principles of adaptive management. Therefore, we find that the INRMP for Camp Pendleton provides a benefit for the arroyo toad and are exempting from critical habitat all lands on Camp Pendleton, including lands leased to the State, pursuant to section 4(a)(3) of the Act.

Fallbrook Naval Weapons Station

Fallbrook Naval Weapons Station, located in northern San Diego County, is approximately 8,850 ac (3,581 ha). Fallbrook Naval Weapons Station contains high quality habitat that supports a large population of the arroyo toad within the Santa Margarita watershed. Arroyo toads at Fallbrook NWS have the potential to disperse into adjacent populations downstream on Camp Pendleton and upstream to suitable habitat on private lands.

In 1996, Fallbrook NWS completed an INRMP to address conservation and management recommendations within the scope of the installation's military mission. The INRMP provides conservation measures that will directly and indirectly benefit the arroyo toad and other listed species found on the Naval Station. The 1996 INRMP was prepared with input from the Service and incorporates conservation measures outlined in several previously completed consultations between the Service and Fallbrook NWS. Fallbrook NWS is currently working with the Service to revise and update their INRMP.

Additionally, Fallbrook NWS recently completed a formal section 7 consultation with the Service to revise their fire management plan to provide more effective fuels management and wildfire control, while minimizing impacts to listed species on the installation, including the arroyo toad. The revised fire management plan incorporates fuels management and fire suppression activities with habitat management needs of the arroyo toad and other listed species to promote conservation and recovery of these species on Fallbrook NWS.

Based on Fallbrook Naval Weapons Station's Sikes Act program, we believe there is a high degree of certainty that they: (1) Will continue to have the necessary staffing, funding levels, funding sources, and other resources to implement their INRMP, (2) has the legal authority, legal procedural requirements, authorizations, and regulatory mechanisms to implement their INRMP and other conservation efforts, and (3) will implement the INRMP in coordination with the California Department of Fish and Game and with the Service. We also believe that there is a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with Fallbrook Naval Weapons Station on a variety of endangered and threatened species issues, including the arroyo toad. The management programs and Station's directives to avoid and minimize impacts to the species are consistent with current and ongoing section 7 consultations with Fallbrook Naval Weapons Station. Through our cooperative relationship with Fallbrook Naval Weapons Station and the section 7 consultation process, we can ensure that conservation efforts identified in the INRMP for the arroyo toad will: (1) Address the nature and extent of threats, (2) provide for monitoring and reporting progress on implementation, and (3) incorporate the principles of adaptive management. Therefore, we find that the INRMP for Fallbrook Naval Weapons Station provides a benefit for the arroyo toad and are exempting from critical habitat all lands on Fallbrook Naval Weapons Station pursuant to section 4(a)(3) of the Act.

Fort Hunter Liggett

The arroyo toad occupies an approximately 17-mi (27.4-km) segment of the San Antonio River at Fort Hunter Liggett. This segment contains features essential to the conservation of the species and is of important biological value because it supports the northernmost known population and is approximately 100 mi (160 km) north of the nearest documented extant population. Arroyo toads in this unit may experience climatic conditions not faced by toads at sites farther south. The protection of this area is important to maintaining the complete genetic variability of the species and the full range of ecological settings within which it is found. This stretch of the San Antonio River is undammed, provides excellent habitat for the arroyo toad, and supports probably one of the largest populations within the Northern Region.

In the proposed rule, we considered but did not propose to include mission-essential training areas on Fort Hunter Liggett as critical habitat for the arroyo toad under section 4(b)(2) of the Act, because designation of critical habitat could adversely impact national security. The Army conducts training operations using landing fields, tanks, machine guns, grenade launchers, and other weapons at Fort Hunter Liggett. The Army has stated that it considers critical habitat to conflict with mission-essential training tasks, and that critical habitat designation would adversely affect Fort Hunter Liggett's training mission. The Army submitted a map to us of the mission-essential training areas that are found within lands we determined to contain features essential to the conservation of the arroyo toad (Army, in litt. 2003). During the public comment period for the proposal, the Army stated that we had incorrectly concluded that the only mission-essential areas are the individual training sites. Rather, all Fort Hunter Liggett lands are essential for realistic and effective training. Thus, the designation of the areas we proposed as critical habitat would seriously limit their ability to conduct critical training activities.

The Army recognizes the need for protection and conservation of sensitive species, including the arroyo toad, on military lands and has identified conservation measures to protect and conserve arroyo toads and their habitat. The Army has coordinated with us to finalize the development of their Endangered Species Management Plan (ESMP) for the arroyo toad at Fort Hunter Liggett, which currently guides management of all lands occupied by arroyo toads along the San Antonio River. The ESMP includes measures to minimize harm to the arroyo toad from training activities and outlines actions to ensure the persistence of arroyo toads on the installation. The ESMP is an appendix to, and part of, the INRMP for Fort Hunter Liggett. We expect the INRMP, which is in a final draft form, to be finalized and signed in 2005. We have reviewed Fort Hunter Liggett's ESMP in relation to the three criteria listed above for evaluating management plans, and we find that the ESMP meets the criteria and will provide a benefit to the arroyo toad population at Fort Hunter Liggett.

(1) Benefits of Inclusion

The primary benefit of any critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that the activity will not destroy or adversely modify designated critical habitat. The educational benefits of critical habitat include informing the Army of areas that are important to the conservation of listed species. However, because the Army has worked cooperatively with the Service to develop an ESMP that protects the toad and its essential habitat on Fort Hunter Liggett, and the nearly finalized INRMP is expected to be completed in 2005 (for which we will complete a Section 7 consultation), we do not believe that designation of critical habitat on the fort will significantly benefit the arroyo toad beyond the protection already afforded the species under the Act. In addition, through the INRMP development process and development of the ESMP for the arroyo toad, the Army is already aware of essential arroyo toad habitat areas on the installation.

(2) Benefits of Exclusion

Substantial benefits are expected to result from the exclusion of Fort Hunter Liggett from critical habitat. The Army has stated that all training and non-training areas together are integral to their mission of ensuring troop readiness. If we designate critical habitat on the base the Army would be required to engage in consultation with us on activities that may affect designated critical habitat. The requirement to consult on activities occurring on the base could delay and impair the ability of the Army to conduct effective training activities and limit Fort Hunter Liggett's utility as a military training installation, thereby adversely affecting national security.

In addition, exclusion of Fort Hunter Liggett lands from the final designation will allow us to continue working with the Army in a spirit of cooperation and partnership. In the past the Army has generally viewed the designation of critical habitat as having a negative regulatory effect that discourages cooperative and proactive efforts by the Army to conserve listed species and their habitats. The DoD generally views designation of critical habitat on military lands as an indication that their actions to protect the species and its habitat are inadequate. Excluding these areas from the perceived negative consequences of critical habitat will facilitate cooperative efforts between the Service and the Army to formulate the best possible INRMP and ESMP, and continue effective management of the arroyo toad at Fort Hunter Liggett.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We met with the Army on December 12, 2003, at Fort Hunter Liggett to discuss essential arroyo toad habitat, and possible impacts to the base. We also received extensive comments from the Army during the public comment period. In light of national security interests and the Army's need to maintain a high level of readiness and fighting capabilities, and in light of the Army's completed ESMP for the arroyo toad, we excluded critical habitat on all lands within unit 1, including all Fort Hunter Liggett lands, under section 4(b)(2) of the Act. We find that the benefits of excluding these lands from critical habitat outweigh the benefits of including them. We further find that the exclusion of these areas will not lead to the extinction of the arroyo toad because Army training activities are conducted primarily outside of the riparian corridor where toads are concentrated, and the ESMP is expected to effectively manage for the persistence of the San Antonio River population.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act

This section allows the Secretary to exclude areas from critical habitat for economic reasons if she determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat, unless the exclusion will result in the extinction of the species concerned. This is a discretionary authority Congress has provided to the Secretary with respect to critical habitat. Although economic and other impacts may not be considered when listing a species, Congress has expressly required their consideration when designating critical habitat. Exclusions under this section for non-economic reasons are addressed above.

In general, we have considered in making the following exclusions that all of the costs and other impacts predicted in the economic analysis may not be avoided by excluding the area, due to the fact that the areas in question are currently occupied by the arroyo toad and there will be requirements for consultation under Section 7 of the Act, or for permits under section 10 (henceforth "consultation"), for any take of the species, and other protections for the species exist elsewhere in the Act and under State and local laws and regulations. In addition, some areas are also occupied by other listed species and in some cases are designated as critical habitat for those species. In conducting economic analyses, we are guided by the 10th Circuit Court of Appeal's ruling in the New Mexico Cattle Growers Association case (248 F.3d at 1285), which directed us to consider all impacts, "regardless of whether those impacts are attributable co-extensively to other causes." As explained in the analysis, due to possible overlapping regulatory schemes and other reasons, there are also some elements of the analysis which may overstate some costs.

Conversely, the 9th Circuit has recently ruled ("Gifford Pinchot", 378 F.3d at 1071) that the Service's regulations defining "adverse modification" of critical habitat are invalid because they define adverse modification as affecting both survival and recovery of a species. The court directed us to consider that adverse modification should be focused on impacts to recovery. While we have not yet proposed a new definition for public review and comment, changing the adverse modification definition to respond to the Court's direction may result in additional costs associated with critical habitat definitions (depending upon the outcome of the rulemaking). This issue was not addressed in the economic analysis for the arroyo toad, as this was well underway at the time the decision was issued and we have a court-ordered deadline for reaching a final decision, so we cannot quantify the impacts at this time. However, it is a factor to be

considered in evaluating projections of future economic impacts from critical habitat.

In addition, we have received several credible comments on the economic analysis contending that it underestimates, perhaps significantly, the costs associated with this critical habitat designation. Both of these factors are a balancing consideration against the possibility that some of the costs shown in the economic analysis might be attributable to other factors, or be overly high, and so not necessarily avoided by excluding the area for which the costs are predicted from this critical habitat designation.

We recognize that we have excluded a significant portion of the proposed critical habitat. Congress expressly contemplated that exclusions under this section might result in such situations when it enacted the exclusion authority. House Report 95–1625, stated on page 17: "Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat * * * In some situations, no critical habitat would be specified. In such situations, the Act would still be in force prevent any taking or other prohibited act * * *." (emphasis supplied)

We accordingly believe that these exclusions, and the basis upon which they are made, are fully within the parameters for the use of section 4(b)(2) set out by Congress.

Unit 3

We have excluded all of proposed Unit 3, consisting of approximately 3,675 ac (1,487 ha) under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would exceed $20 million between the years 2004 through 2025, almost all of which would be related to impacts to local water supplies. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, modification of current operations of dams and other elements of water projects, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

We note that the analysis made the assumption that the Service would require revisions in dam operations to benefit the species in only half of the cases where such modifications could reasonably be required, as only the higher priority situations were likely to be addressed. As a result, the analysis reduced the estimated cost impacts to water supplies by 50% across-the-board. While this is one possible outcome, it is also quite possible that the Service, either of its own volition or as the result of litigation, might in fact address every case where modification to existing dam operations are needed to avoid adverse modification of critical habitat, if it were designated. Therefore, in both this and other units addressed below where there are significant projected costs relating to water supplies, there is a reasonable possibility that these costs may be twice the projected amounts.

The analysis also presents an alternative under which costs would be approximately half of the amount provided, but does not have, and thus does not provide, information to indicate the probability of this occurring. As a result, it is quite apparent how the higher costs could be reached, but not clear as to whether the lower-cost scenario could occur.

The economic analysis looked at two different generally accepted ways of measuring economic impacts from the designation—economic efficiency and regional economic impact. The figures resulting from these analyses are not the same, and should not be added in an effort to obtain cumulative totals. Please consult the economic analysis for explanations of the two methods and of their differences.

The economic analysis found that in addition to the efficiency effects noted above, the total impacts to water supply from this unit and other proposed units would cause a regional reduction in output of $10.6 million between the years 2004 through 2025 (again reduced by 50% on the assumption that only half the affected dams would be required to undertake changes, as explained above—see Table 18 of the Economic Analysis) and a loss of 85 jobs.

By excluding this unit, some or all of those costs will be avoided.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive

climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat—even in the post-Gifford Pinchot environment—which requires only that there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 5

We have excluded all of proposed Unit 5, consisting of approximately 2,921 ac (1,182 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would exceed $15 million between the years 2004 through 2025. Over $14 million of this would be related to impacts to local water supplies (see also discussion above on water costs). These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, modification of current operations of dams and other elements of water projects, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 6

We have excluded all of proposed Unit 6, consisting of approximately 2,538 ac (1,027 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would exceed $21 million between the years 2004 through 2025. Over $16 million of this would fall on private property owners, and over $3 million would be related to impacts to local water supplies (see also discussion above on water costs). These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, modification of current operations of dams and other elements of water projects, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat.

In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. In regards to subunit 6b specifically, the Natural River Management Plan (NRMP) (Valencia Company 1998) ensures the protection of most of the river corridor areas considered essential for the arroyo toad along the Santa Clara River and lower San Francisquito Creek with conservation easements, which total approximately 1,200 ac (486 ha). The Newhall Ranch Specific Plan (separate from the NRMP), includes protection via conservation easement for the Santa Clara River corridor from just above the confluence of Castaic Creek down to the Los Angeles County border. The Castaic Creek river corridor below the I–5 bridge would be protected via conservation easement as well. Newhall Land has also agreed to protect approximately 48 additional ac (19 ha) of prime arroyo toad habitat within the Santa Clara River corridor near the I–5 bridge via conservation easement (riparian areas not included in the NRMP). Thus, most all of the breeding habitat and riparian river corridor in subunit 6b is protected or designated for protection via conservation easement. Ultimately, these easements will extend along every river mile of Castaic Creek, San Francisquito Creek, and the Santa Clara River within subunit 6b. There is accordingly no reason to believe that the exclusion of unit 6 would result in extinction of the species.

Unit 7

We have excluded all of Unit 7, consisting of approximately 1,772 ac (717 ha) , under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign

specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consulting with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be nearly $36 million between the years 2004 through 2025. Over $26 million of this would fall on private property owners, and over $7 million would be related to impacts to local water supplies (see also discussion above on water costs). These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, modification of current operations of dams and other elements of water projects, time delays, and uncertainty. By excluding this unit, some or all of those costs will be avoided.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above —which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 10

We have excluded all of Unit 10, consisting of approximately 5,256 ac (2127 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be nearly $56 million between the years 2004 through 2025. Over $53 million of this would fall on private property

owners. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 11

We have excluded all private lands in proposed Unit 11, consisting of approximately 1,399 ac (566 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be nearly $18 million between the years 2004 through 2025. Over $15 million of this would fall on private property owners. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The

exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 12

We have excluded all private lands in Unit 12, consisting of approximately 537 ac (217 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $40 million between the years 2004 through 2025, nearly all of which would fall on private property owners. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 13

We have excluded all of Unit 13, consisting of approximately 2,115 ac (856 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth

of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $34 million between the years 2004 through 2025, nearly all of which would fall on private property owners. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation.

In regards to subunits 13a and 13b specifically, the Western Riverside MSHCP offers additional conservation measures to protect the arroyo toad within their planning area, including surveying for additional populations and protecting habitat, which will help ensure the long-term conservation of the arroyo toad. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 14

We have excluded all of Unit 14, consisting of approximately 8,669 ac (3508 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be nearly $144 million between the years 2004 through 2025. Over $133 million of this would fall on private property owners, and over $8 million would be related to impacts to local water supplies (see also discussion above on water costs). These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, modification of

current operations of dams and other elements of water projects, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. In regards to portions of Unit 14 specifically, the Rincon and Pala Indian Tribes have each offered additional conservation measures to protect arroyo toad habitat on their lands.

The Pala Band of Mission Indians' arroyo toad management plan states that the Tribe will work to achieve the following as conservation practices to benefit the arroyo toad: (1) Maintenance of open space along Pala Creek and the San Luis Rey River to allow for within stream movements by arroyo toads and water flow; (2) encouragement of allottees to cluster dwellings near roadways to create corridors for toad movements into upland areas; (3) placement of a vehicle bridge across the San Luis Rey River to remove impacts to toads by vehicles crossing the river; and (4) removal of non-native plants and animal species throughout toad corridors.

The Rincon Band of Mission Indians' arroyo toad management plan provides a comprehensive management framework to address threats to the toad within the HMA, including: (1) Monitoring and eradication of introduced plants and animals; (2) exclusion of mining; (3) exclusion of livestock grazing; (4) exclusion of unauthorized recreational uses and off-road vehicle use; and (5) provide a community educational outreach component. This plan is intended to serve as an interim plan that will be incorporated into the Rincon Tribe's Multiple Species Habitat Conservation Plan currently under development and scheduled for completion by or before 2006. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 15

We have excluded all of Unit 15, consisting of approximately 6,183 ac (2,502 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining -breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consulting with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $81 million between the years 2004 through 2025, nearly all of which would fall on private property owners. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam

operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 16

We have excluded all of Unit 16, consisting of approximately 10,259 ac (4,152 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $180 million between the years 2004 through 2025. Nearly $168 million of this would fall on private property owners, and nearly $10 million would be related to impacts to local water supplies (see also discussion above on water costs). These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, modification of current operations of dams and other elements of water projects, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation.

In regards to portions of subunits 16a, 16b, and 16c specifically, the San Diego Multiple Species Conservation Program offers additional conservation measures

to protect the arroyo toad within their planning area, including protecting and maintaining sufficient, suitable, low-gradient sandy stream habitat to meet the arroyo toad's breeding requirements; preserve sheltering and foraging habitats within 0.6 mi (1km) of occupied breeding habitat within designated preserve lands; and control nonnative predators and human impacts within designated preserve land. Preserve lands are currently under development and are intended to be permanently maintained and managed for the benefit of the arroyo toad and other covered species. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 17

We have excluded all of Unit 17, consisting of approximately 1,955 ac (791 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $71 million between the years 2004 through 2025. Over $40 million of this would fall on private property owners, and nearly $30 million would be related to impacts to local water supplies (see also discussion above on water costs). These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, modification of current operations of dams and other elements of water projects, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation.

In regards to portions of subunit 17d specifically, the San Diego Multiple Species Conservation Program offers additional conservation measures to protect the arroyo toad within their planning area, including protecting and maintaining sufficient, suitable, low-gradient sandy stream habitat to meet the arroyo toad's breeding requirements; preserve sheltering and foraging habitats within 0.6 mi (1km) of occupied breeding habitat within designated preserve lands; and control nonnative predators and human impacts within designated preserve land. Preserve lands are currently under development and are intended to be permanently maintained and managed for the benefit of the arroyo toad and other covered species. Additionally, in regards to portions of 17a, the Barona Band of Mission Indians and Viejas Band of Kumeyaay Indians have both agreed to establish a cooperative approach with us concerning arroyo toad conservation on certain lands in Capitan Grande Reservation, which is jointly administered by both Tribes. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 18

We have excluded all of Unit 18, consisting of approximately 5,347 ac (2164 ha), under section 4(b)(2) of the Act. The analysis which led us to the

conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $98 million between the years 2004 through 2025. Over $94 million of this would fall on private property owners, and nearly $2 million would be related to impacts to local water supplies (see also discussion above on water costs). These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, modification of current operations of dams and other elements of water projects, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation.

In regards to portions of subunits 18a, 18b, and 18c specifically, the San Diego Multiple Species Conservation Program offers additional conservation measures to protect the arroyo toad within their planning area, including protecting and maintaining sufficient, suitable, low-gradient sandy stream habitat to meet the arroyo toad's breeding requirements; preserve sheltering and foraging habitats within 0.6 mi (1km) of occupied breeding habitat within designated preserve lands; and control nonnative predators and human impacts within designated preserve land. Preserve lands are currently under development and are intended to be permanently maintained and managed for the benefit of the arroyo toad and other covered species.

In addition, the Sycuan Band of Kumeyaay Nation Habitat Conservation Strategy Measures Plan (HCSMP) includes the following conservation measures: (1) Protection of existing habitat for compliance and species recovery; (2) enhancement of existing habitat; (3) restoration to create new habitat; (4) management of habitat to maintain and preserve ecological functions; (5) avoidance and minimization of direct impacts on individuals and populations land habitat of covered species; (6) population enhancement measures that dierectly or indirectly incrase abundance of covered species, and (7) research necessary to improve conservation measure effectiveness. Conservation measures to protect, enhance, restore habitat are primarily directed toward conservation of focus species' habitat, such as that for the arroyo toad, on the Reservation and Singing Hills golf course. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 19

We have excluded all of Unit 19, consisting of approximately 11,315 ac (4,579 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $202 million between the years 2004 through 2025, nearly all of which would fall on private property owners. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis—exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above—which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation.

In regards to portions of subunit 19b specifically, the San Diego Multiple Species Conservation Program offers additional conservation measures to protect the arroyo toad within their planning area, including protecting and maintaining sufficient, suitable, low-gradient sandy stream habitat to meet the arroyo toad's breeding requirements; preserve sheltering and foraging habitats within 0.6 mi (1km) of occupied breeding habitat within designated preserve lands; and control nonnative predators and human impacts within designated preserve land. Preserve lands are currently under development and are intended to be permanently maintained and managed for the benefit of the arroyo toad and other covered species. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Unit 22

We have excluded all of Unit 22, consisting of approximately 6,328 ac (2,561 ha), under section 4(b)(2) of the Act. The analysis which led us to the conclusion that the benefits of excluding this area exceed the benefits of designating it as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely modify the critical habitat would require a consultation with us, as explained above, in the section of this notice entitled "Effects of Critical Habitat Designation." Yet another benefit might be modification of current operations of dams and other elements of water projects to provide water at times more beneficial to the species than the current operation of some dams within proposed critical habitat. Since the economic analysis of this is based on projections of future actions, it is not possible to assign specific actions, and benefits to the species, for particular units.

In general, the modifications would be designed to have water flows in stream reaches downstream from dams more closely resemble the stream's natural state. Benefits would include avoidance of excess artificial water flows washing eggs or tadpoles downstream, possibly avoiding growth of exotic species, increasing the availability of open sand bar habitat, and maintaining breeding pools long enough for larvae to develop.

However, inasmuch as this area is currently occupied by the species, consultation for activities which might adversely impact the species, including

possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3) would be required even without the critical habitat designation and without regard to the existence of a Federal nexus.

In summary, we believe that this proposed unit as critical habitat would provide little additional Federal regulatory benefits for the species. Because the proposed critical habitat is occupied by the species, there must be consultation with the Service over any Federal action which might impact the toad. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple notice and comments which accompanied the development of this regulation, and publicity over the prior litigation.

(2) Benefits of Exclusion

The economic analysis conducted for this proposal estimates that the costs associated with designating this unit of the proposed critical habitat would be over $27 million. Over $25 million of this would fall on private property owners. These figures include costs associated with conducting consultations with us pursuant to section 7 of the Act, loss of land values associated with the avoidance of arroyo toads and their habitat, time delays, and uncertainty. Excluding this unit would avoid some or all of those costs.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis— exceed the educational and regulatory benefits, including possible changes to dam operations, which may be already provided for as discussed above — which could result from including those lands in this designation of critical habitat.

We also believe that excluding these lands, and thus helping landowners and water users avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat, which requires—even in the post-Gifford Pinchot environment—only that the there be no adverse modification resulting from Federally-related actions. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of Habitat Conservation Plans and other active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. In regards to subunit 22a specifically, the Rancho Las Flores Planned Community (Rancho Las Flores) and neighboring Las Flores Ranch (both in Summit Valley, San Bernardino County), have each offered additional conservation measures to protect arroyo toad habitat on their lands.

Additional conservation measures offered by Rancho Las Flores include the protection of approximately 290 ac (117 ha) of prime arroyo toad habitat within the river corridors of Horsethief Creek and the West Fork of the Mojave River. Additional protection along Grass Valley Creek is contemplated as well. As a part of the development plans for Rancho Las Flores, the land owners have agreed to minimize impacts to arroyo toad habitat from humans, cattle, and development, monitor the status of the arroyo toad, and remove exotic species.

Additional conservation measures offered by Las Flores Ranch include the protection of approximately 190 acres (77 ha) of prime arroyo toad habitat within the river corridors of Horsethief Creek and the West Fork of the Mojave River as well as measures to minimize impacts from humans, horses, and development. There is accordingly no reason to believe that the exclusion of unit 22 would result in extinction of the species.

Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally-listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Some areas occupied by the arroyo toad involve several complex HCPs that address multiple species, cover large areas, and are important to many participating permittees. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally-listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP. However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place. The State of California also has a NCCP process that is very similar to the federal HCP process and is often completed in conjunction with the HCP process. We recognize that many of the projects with HCPs also have state issued NCCPs.

In the case of approved regional HCPs and accompanying Implementing Agreements (IAs) (*e.g.*, those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage for the arroyo toad, a primary goal of these regional plans is to provide for the protection and management of habitat essential for the

species' conservation, while directing development to other areas. The regional HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the arroyo toad. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a system of interlinked habitat blocks that provide for its biological needs.

We considered, but did not designate as critical habitat, lands within the Central-Coastal NCCP/HCP in Orange County and Western Riverside MSHCP under section 4(b)(2) of the Act. These approved and legally operative HCPs include portions of two critical habitat units (units 8 and 9). We believe the benefits of excluding lands within these legally operative HCPs from the final critical habitat designation will outweigh the benefits of including them. The following represents our rationale for excluding these areas.

Orange County Central Coastal Subregional NCCP/HCP

All essential habitat for the arroyo toad in Unit 8 in western Orange County is excluded under section 4(b)(2) of the Act from critical habitat because it is within the Orange County Central Coastal Subregional NCCP/HCP. The Central-Coastal NCCP/HCP in Orange County was developed in cooperation with numerous local and State jurisdictions and agencies, and participating landowners, including the cities of Anaheim, Costa Mesa, Irvine, Orange, and San Juan Capistrano; Southern California Edison; Transportation Corridor Agencies; The Irvine Company; California Department of Parks and Recreation; Metropolitan Water District of Southern California; and Orange County. Approved in 1996, the Central-Coastal NCCP/HCP provides for the establishment of approximately 38,738 ac (15,677 ha) of reserve lands for 39 covered species within the 208,713 ac (84,463 ha) planning area. All of Unit 8 is within the plan area. We issued an incidental take permit under section 10(a)(1)(B) of the Act that provides conditional incidental take authorization for the arroyo toad for all areas within the Central-Coastal Subregion, except the North Ranch Policy Plan area. This take authorization only applies to smaller arroyo toad populations. reintroduced populations, or populations that have expanded due to NCCP/HCP reserve management. It also requires implementation of a mitigation plan to relocate toads to protected areas within reserves, when necessary. The Central-Coastal NCCP/HCP provides for monitoring of the arroyo toad and adaptive management of its habitat within the reserve system. Adaptive management activities may include a program to control exotic predators, such as bullfrogs, clawed frogs, and nonnative fishes. It also includes a program to close dirt road crossings without culverts or upgrading such crossings with concrete fords and/or culverts on publicly owned lands outside the reserve system, if baseline monitoring indicates such measures would likely be effective.

The North Ranch Policy Plan area was excluded from take authorization provided under the Central Coastal NCCP/HCP's biological opinion due to a lack of detailed biological information and specific conservation commitments at the time of adoption of the NCCP/HCP. We have since determined that available arroyo toad habitat within the North Ranch Policy Plan area has features essential to the conservation of the arroyo toad because it helps support a viable Santa Ana Mountain arroyo toad population. In 2002, the owner, The Irvine Company, granted a conservation easement to The Nature Conservancy over a portion of the North Ranch Policy Plan Area that covered the arroyo toad critical habitat areas. We recognize that the Irvine Company has taken steps to conserve the North Ranch Policy Area, including a $10 million management endowment. The conservation easement provides adequate protection for arroyo toad habitat within this unit. As a result, we are excluding the North Ranch Policy Plan area from critical habitat.

Western Riverside MSHCP

Portions of essential habitat for the arroyo toad in Unit 9 located on non-Federal lands are excluded under section 4(b)(2) of the Act from critical habitat because they are within the Western Riverside MSHCP in western Riverside County. Participants in this HCP include 14 cities and the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department. California Department of Parks and Recreation and Caltrans are also participants. Approved on June 22, 2004, the Western Riverside MSHCP provides for the establishment of approximately 153,000 ac (62,000 ha) of diverse habitats of reserve lands for 146 covered species within the 1.26-million acre (510,000-ha) planning area. The conservation of 153,000 ac (62,000 ha) will complement other existing natural and open space areas (*e.g.*, State Parks, Forest Service, and County Park Lands). The Western Riverside MSHCP provides for conservation actions within the planning area, including surveying for additional populations and habitat protection, which will help ensure the long-term conservation of the arroyo toad. We are designating portions of Unit 9 on U.S. Forest Service lands within the planning area boundary of the Western Riverside MSHCP as critical habitat because Forest Service activities are not covered under a section 10(a)(1)(B) permit.

(1) Benefits of Inclusion

Under section 7, critical habitat designation will provide little additional benefit to the arroyo toad within the boundaries of these approved HCPs. The principal benefit of any designated critical habitat is that federally-funded, permitted, or authorized activities that may affect critical habitat will require consultation under section 7 of the Act. Such consultations ensure that adequate protection is provided to avoid adverse modification or destruction of critical habitat. Currently approved HCPs that cover the toad are designed to ensure the conservation of the species within the plan area, and incorporate special management and protection measures for arroyo toad habitat within plan boundaries. The adequacy of plan measures to protect the toad and its habitat has undergone thorough evaluation in the section 7 consultations completed prior to approval of the plans, and therefore, the benefit of including these areas to require section 7 consultation is negated.

Development and implementation of these HCPs have provided other important conservation benefits for the toad, including the development of biological information to guide conservation efforts and assist in the species' recovery. The educational benefits of designating critical habitat, including informing the public of areas that are important to the conservation of listed species, are essentially the same as those that have occurred during the process of reviewing and approving these HCPs. Specifically, each of these HCPs involved public participation through public notices and public comment periods, prior to being approved. For these reasons, we believe that designation of critical habitat would provide little additional benefit in areas covered by these approved HCPs. Federal actions that may affect the toad will still require consultation under section 7 of the Act.

(2) Benefits of Exclusion

The benefits of excluding HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review after an HCPs is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if participants abandon the voluntary HCP process. Designation of critical habitat within the boundaries of approved HCPs could also be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. The benefits of excluding lands within approved HCPs generally from critical habitat apply fully to the approved HCPs discussed above that cover the arroyo toad.

A related benefit of excluding lands within approved HCPs that cover the arroyo toad from the critical habitat designation is the continued ability to seek new partnerships with future HCPs participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within approved HCPs plan areas are designated as critical habitat, it would likely have a chilling effect on our ability to establish new partnerships to develop HCPs, particularly large regional HCPs that involve numerous participants and address landscape-level conservation of the toad and its habitat. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future. We have determined that the benefits of excluding lands within approved HCPs from critical habitat designation outweigh the benefits of inclusion.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In general, we find that the benefits of critical habitat designation on lands within approved HCPs are small while the benefits of excluding such lands from designation of critical habitat are substantial. After weighing the small benefits of including these lands against the much greater benefits derived from excluding them, including relieving property owners of an additional layer of approvals and regulation, and encouraging the pursuit of additional conservation partnerships, we are excluding lands within approved HCPs from the critical habitat designation pursuant to section 4(b)(2) of the Act. The educational benefits of critical habitat, including informing the public about areas that are important for the long-term survival and conservation of the species, have been provided by the public notice and comment procedures required to establish these HCPs.

We have reviewed and evaluated the approved Orange County Central Coastal Subregional NCCP/HCP and the Western Riverside NCCP/HCP for Unit 8 and Unit 9 and find that each of these HCPs includes the arroyo toad as a covered species and provides protection for the arroyo toad and its associated habitat in perpetuity. Excluding these lands also preserves the partnerships that we developed with the local jurisdictions and project proponent in the development of the HCPs and NCCP/HCPs. Therefore, essential habitat covered under these HCPs and NCCP/HCPs have been excluded pursuant to section 4(b)(2) of the Act since the benefits of exclusion outweigh the benefits of inclusion as critical habitat.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan—Exclusions Under Section 4(b)(2) of the Act

Portions of Unit 23 are being excluded pursuant to section 4(b)(2) of the Act from designated critical habitat because they are located within the draft Coachella Valley MSHCP or Plan in Riverside County. The draft Coachella Valley MSHCP has been in development from the mid-1990s to present, pursuant to an application to the Service for a Section 10(a)(1)(B) permit under the Act. The following entities submitted signed a Memorandum of Understanding (Planning Agreement) to govern the preparation of the MSHCP: Coachella Valley Association of Governments (CVAG); the cities of Cathedral City, Coachella, Desert Hot Springs, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs, and Rancho Mirage; County of Riverside; U.S. Fish and Wildlife Service; California Department of Fish and Game; Bureau of Land Management; U.S. Forest Service; and the National Park Service. Subsequently, California Department of Transportation, Coachella Valley Water District, Imperial Irrigation District, Riverside County Flood Control and Water Conservation District, Riverside County Regional Parks and Open Space District, Riverside County Waste Management District, California Department of Parks and Recreation, and Coachella Valley Mountains Conservancy also decided to participate in preparation of the Plan. The parties later amended the Planning Agreement to also address the requirements of the Natural Community Conservation Planning (NCCP) Act and prepared a NCCP pursuant to California Fish and Game Code Section 2810. The draft Coachella Valley MSHCP area encompasses approximately 1.2 million ac (485,623 ha), of which 69,000 ac (27,923 ha) is owned by an Indian Reservation and are not included in the draft MSHCP, leaving a total of 1.1 million ac (445,154 ha) addressed by the draft MSHCP in Riverside County.

It is estimated by CVAG that there are 2,045 ac (828 ha) of habitat for arroyo toad in the draft MSHCP plan area, all within the proposed Whitewater Canyon Conservation. Of this 2,045 ac (828 ha), 1,296 ac (525 ha) are considered existing conservation lands. Of the 749 ac (303 ha) of arroyo toad habitat not currently conserved within the Whitewater Canyon Conservation Area, the draft MSHCP proposes to conserve 674 ac (273 ha) of modeled arroyo toad habitat as part of the preferred alternative reserve design. All essential areas in Unit 23 are within the preferred alternative reserve. Other goals of this draft MSHCP include: (1) Protecting other important conservation areas to allow for population fluctuation and promote genetic diversity; (2) protecting essential ecological processes, such as sand transport systems, necessary to maintain core

habitat and other conserved areas; (3) maintaining biological corridors and linkages among all conserved populations to the maximum extent feasible; and (4) ensuring conservation of habitat quality through biological monitoring and adaptive management actions.

The draft MSHCP states that, although Whitewater Canyon is open to the public and existing uses that may impact arroyo toad habitat will not be eliminated by the MSHCP, impacts to essential habitat for the arroyo toad in Unit 23 will be minimized as a result of the following: (1) 96% of the modeled habitat will be conserved under the MSHCP; (2) the MSHCP includes acquisition of essential habitat on private lands in Whitewater Canyon from willing sellers; and (3) development of management prescriptions for land on essential habitat in public ownership in the canyon to minimize activities deleterious to the arroyo toad and its habitat. The Plan as states that other areas of potential suitable habitat in Snow Creek and Mission Creek will be conserved (CVMC 2004).

CVAG has demonstrated a sustained commitment to develop the MSHCP to comply with section 10(a)(1)(B) of the Act, the California Endangered Species Act, and the State's NCCP program. On November 5, 2004, the Service published a Notice of Availability of a Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the draft MSHCP.

Although not yet completed and implemented, CVAG has made significant progress in the development of its MSHCP to meet the requirements outlined in section 10(a)(1)(B) of the Act. In light of the Service's confidence that CVAG will reach a successful conclusion to its MSHCP development process, we are excluding lands within their preferred alternative reserve design from final critical habitat designation for the arroyo toad.

(1) Benefits of Inclusion

As stated previously, the benefits of designating critical habitat on lands within the boundaries of approved HCPs are normally small. Where HCPs are in place that include coverage for arroyo toad, our experience has shown that the HCPs and their Implementing Agreements include management measures and protections designed to protect, restore, enhance, manage, and monitor habitat that benefit the long-term protection of the species. The principal benefit of designating critical habitat is that projects carried out, authorized, or funded by Federal agencies that may affect critical habitat require the action agency to consult with the Service to ensure such activities do not destroy or adversely modify designated critical habitat. In the case of the CVAG, their draft MSHCP will be analyzed by the Service to determine the effects of the MSHCP on the species for which the participants are seeking incidental take permits. The draft MSHCP currently under review by the Service reflects revisions made to the Plan based on comments and input from the Service and California Department of Fish and Game.

(2) Benefits of Exclusion

Excluding lands within CVAG's draft MSHCP preferred alternative reserve design area from critical habitat designation will enhance our ability to work with Plan participants in the spirit of cooperation and partnership. A more detailed discussion concerning our rationale for excluding HCPs from critical habitat designation is outlined under the previous section. Further, the Service believes the analysis conducted to evaluate the benefits of excluding approved HCPs from critical habitat designation is applicable and appropriate to apply to CVAG's MSHCP.

(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

In general, we find that the benefits of critical habitat designation on lands within pending HCPs that cover those species are small while the benefits of excluding such lands from designation of critical habitat are substantial. After weighing the small benefits of including lands within the draft MSHCP area against the much greater benefits derived from exclusion, we are excluding all essential areas within CVAG's draft MSHCP from the final critical habitat pursuant to section 4(b)(2) of the Act, with the exception of essential areas on lands that are owned by public agencies who are not signatories to the MSHCP (*i.e.*, U.S. Forest Service and Bureau of Land Management).

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions which might adversely affect the toad, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The toad is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned. We conducted an economic analysis to estimate potential economic effects of the proposed arroyo toad critical habitat designation (Economic & Planning Systems 2004). The draft analysis was made available for public review on February 14, 2005 (70 FR 7459). We accepted comments on the draft analysis until March 16, 2005.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the arroyo toad. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy

baseline. The total conservation costs from reported efficiency effects associated with the designation of critical habitat in this rule are approximately $9 million from 2004 to 2025. This total includes losses in land value (by far the primary cost source), as well as project modification, administrative, CEQA, delay, and uncertainty costs.

A copy of the final economic analysis and description of the exclusion process with supporting documents are included in our administrative record and may be obtained by contacting the Ventura or Carlsbad offices (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if this designation of critical habitat for the arroyo toad would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, land development, fruit and nut farms, cattle ranching, and small governments). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted or authorized by Federal agencies; non-Federal activities are not affected by the designation.

When this critical habitat designation is effective, Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. In areas where occupancy by arroyo toad is unknown, the designation of critical habitat could trigger additional review of Federal agencies pursuant to section 7 of the Act and may result in additional requirements on Federal activities to avoid destruction or adverse modification of critical habitat.

In our economic analysis of this designation we evaluated the potential economic effects on small business entities and small governments resulting from conservation actions related to the listing of this species and proposed designation of its critical habitat. We evaluated small business entities in three categories: land development, fruit and nut farms, and cattle ranching. On the basis of our analysis we determined that this proposed designation of critical habitat for the arroyo toad would result in: (1) An annual impact to less that one percent (17 projects and therefore businesses—assuming one project per business) of land development small businesses and that those businesses could realize an impact of approximately 20 percent of total annual sales; (2) an annual impact to less that one percent (one farm) of small fruit and nut farms and that that farm would realize an impact of less than three percent of total annual sales; (3) an annual impact to less that one percent of cattle ranches (one ranch) and that the ranch would realize an impact of less than approximately $100,000 of total annual sales; (4) an annual impact to less that one percent of small viticulture firms (one firm) and that the firm would realize an impact of less than approximately five percent of total annual sales; and (5) an annual impact to less that one percent of small governments as a percent of the county total and small governments would realize an impact of less than one percent of annual government budget. Based on this data from the proposed rule, and the additional exclusions of units made in this final rulemaking, we have determined that this designation would not affect a substantial number of small land development companies, fruit and nut farms, or cattle ranches. Further, we have determined that this designation would also not result in a significant effect to the annual sales of those small impacted by this designation. As such, we are certifying that this designation of critical habitat would not result in a significant economic impact on a substantial number of small entities.

Local Government Impacts (Public Sector Impacts)

Only two small local governments would be affected by arroyo toad critical habitat designation: the cities of Rancho Santa Margarita and San Juan Capistrano. There is no record of consultations between the Service and these cities. In general, city governments may get involved in land use projects, and therefore section 7 consultations, through various permits, or involvement in local utility and infrastructure projects. This involvement is usually as an interested party, not the primary applicant. The economic analysis estimates that these two cities will consult as a prime applicant two times in the next 21 years. This would represent less than one percent of the total annual budget of each city.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the small businesses that may be required to consult with us regarding their project's impact on arroyo toad and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer "reasonable and prudent alternatives." Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction. that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating sections 7(a)(2) and 9 of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this critical habitat designation. Within the critical habitat units, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by any Federal agency;

(3) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities on Federal lands (such as those managed by the Service, Forest Service, DOD, or BLM);

(4) Regulation of grazing, mining, and recreation by the BLM, DOD, Corps, or Forest Service;

(5) Regulation of airport improvement activities by the FAA;

(6) Military training and maneuvers, facilities operations, and maintenance on DOD lands designated as critical habitat;

(7) Licensing of construction of communication sites by the Federal Communications Commission; and,

(8) Funding of activities by the U.S. Environmental Protection Agency (EPA), Department of Energy (DOE), FEMA, Federal Highway Administration (FHA), or any other Federal agency.

It is likely that a developer or other project proponent could modify a project or take measures to protect the arroyo toad. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include Corps permits, permits we may issue under section 10(a)(1)(B) of the Act; funding for Federal Highway Administration, Federal Emergency Management Agency or FAA projects; and regulation of grazing, mining, and recreation by the BLM, DOD, Corps, or Forest Service. We certify that the rule will not have a significant impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C 801 *et seq.*), this rule to designate critical habitat for the arroyo toad is not considered to be a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises, nor will the rule have a significant economic impact on a substantial number of small entities. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply,

distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designate critical habitat for the arroyo toad is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, Small Government Agency Plan is not required.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with the Department of the Interior policies, we requested information from, and coordinated development of, this final critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by the arroyo toad imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to the States and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Endangered Species Act. This rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the arroyo toad.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we have coordinated with federally-recognized Tribes on a Government-to-Government basis. We have excluded Tribal lands from critical habitat pursuant to section 4(b)(2) of the Act based on economic considerations.

Relationship to Mexico

We are not aware of any existing national regulatory mechanism in Mexico that would protect the arroyo toad or its habitat. Although new legislation for wildlife is pending in Mexico, and Mexico has laws that could

provide protection for rare species, there are enforcement challenges. Even if specific protections were available and enforceable in Mexico, the portion of the arroyo toad's range in Mexico alone, in isolation, would not be adequate to ensure the long-term conservation of the species.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Ventura Fish and Wildlife Office, or the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Author

The primary author of this notice is the staff of the U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4205; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.95(d) by revising critical habitat for the arroyo toad (*Bufo californicus*) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

ARROYO TOAD *(Bufo californicus)*

(1) Critical habitat units are depicted for Santa Barbara, Ventura, Los Angeles, San Bernardino, and Riverside Counties, California, on the maps below.

(2) The primary constituent elements of critical habitat for the arroyo toad are the habitat components that provide:

(i) Rivers or streams with hydrologic regimes that supply water to provide space, food, and cover needed to sustain eggs, tadpoles, metamorphosing juveniles, and adult breeding toads. Specifically, the conditions necessary to allow for successful breeding of arroyo toads are:

(A) Breeding pools with areas less than 12 in (30 cm) deep;

(B) Areas of flowing water with current velocities less than 1.3 ft per second (40 cm per second); and

(C) Surface water that lasts for a minimum length of 2 months in most years, *i.e.*, a sufficient wet period in the spring months to allow arroyo toad larvae to hatch, mature, and metamorphose.

(ii) Low-gradient stream segments (typically less than 6 percent) with sandy or fine gravel substrates that support the formation of shallow pools and sparsely vegetated sand and gravel bars for breeding and rearing of tadpoles and juveniles.

(iii) A natural flooding regime or one sufficiently corresponding to a natural regime that will periodically scour riparian vegetation, rework stream channels and terraces, and redistribute sands and sediments, such that breeding pools and terrace habitats with scattered vegetation are maintained.

(iv) Riparian and adjacent upland habitats (particularly alluvial streamside terraces and adjacent valley bottomlands that include areas of loose soil where toads can burrow underground) to provide foraging and living areas for subadult and adult arroyo toads.

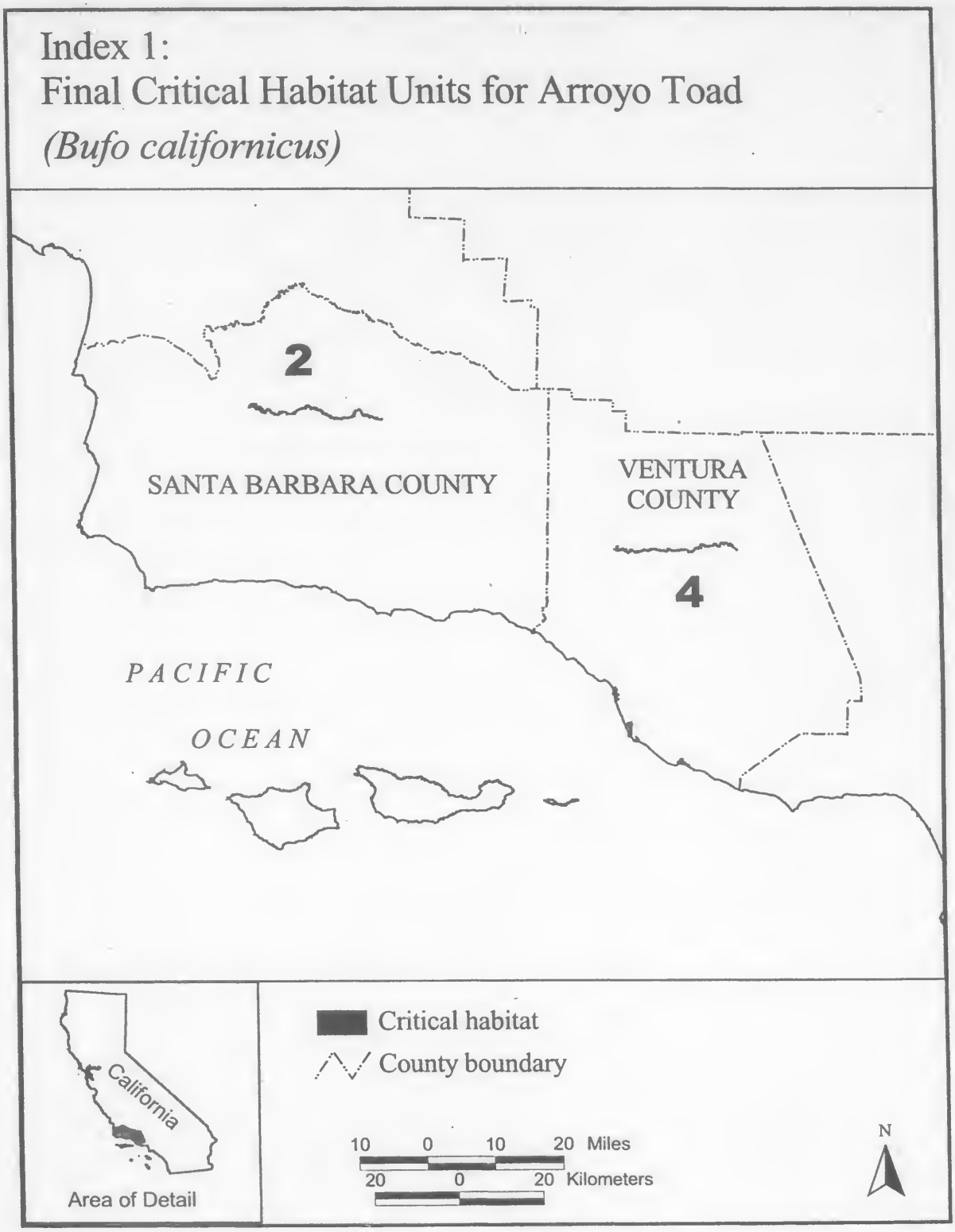
(v) Stream channels and adjacent upland habitats that allow for migration to foraging areas, overwintering sites, dispersal between populations, and recolonization of areas that contain suitable habitat.

(3) Critical habitat does not include man-made structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, roads, and the land on which such structures are located.

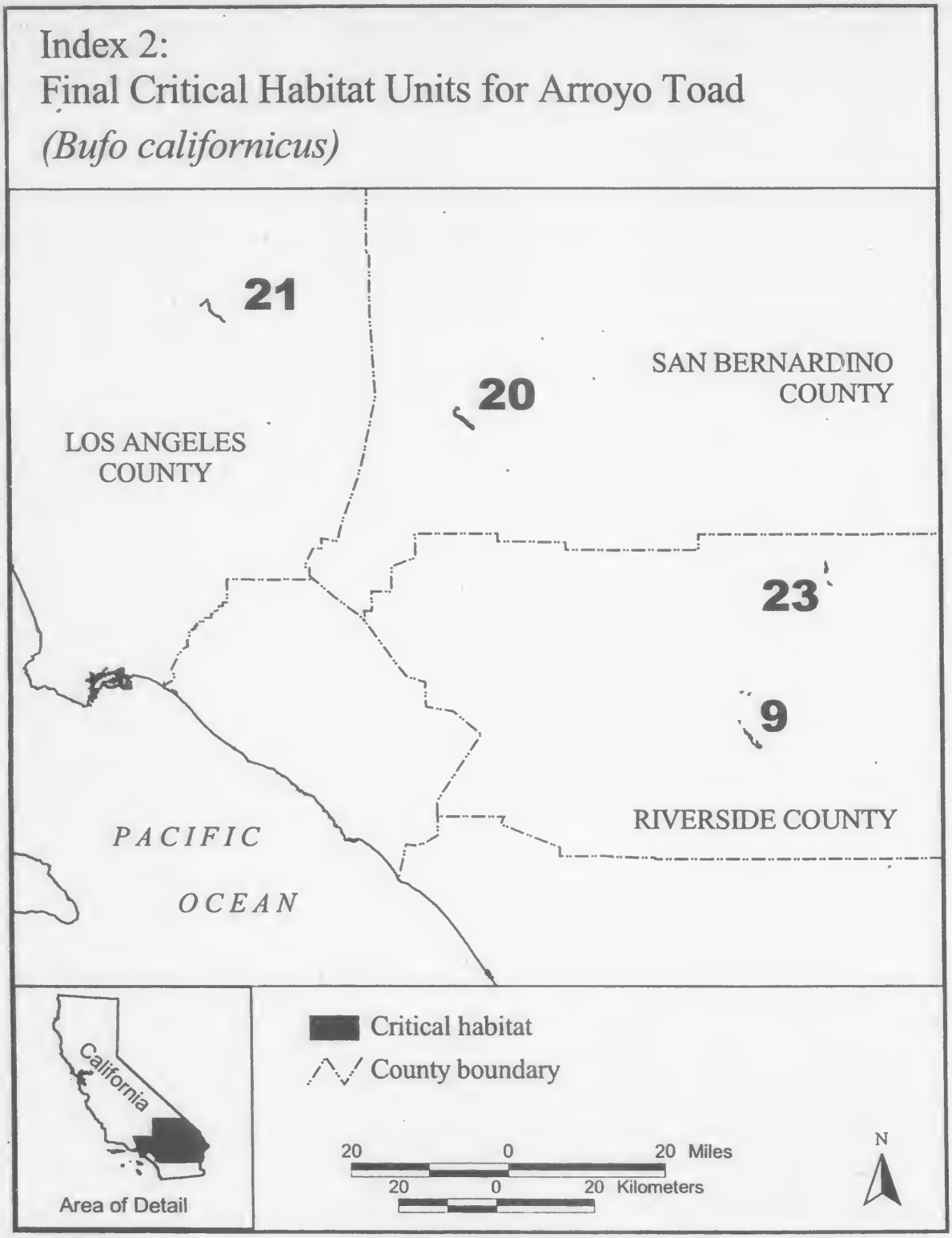
(4) Index maps of arroyo toad critical habitat.

(i) *Note:* Map 1 (index map) follows:

BILLING CODE 4310–55–P



(ii) Map 2 (index map) follows:



BILLING CODE 4310-55-C

(5) Unit 2; Sisquoc River, Santa Barbara County, California.

(i) From USGS 1:24,000 scale quadrangles Foxen Canyon, Zaca Lake,

Bald Mountain and Hurricane Deck. Land bounded by the following UTM Zone 10, NAD 27 coordinates (E, N): 754600, 3859000; 754600, 3859600; 754700, 3859600; 754700, 3859700; 754800, 3859700; 754800, 3859800; 754900, 3859800; 754900, 3859900; 755000, 3859900; 755000, 3860000; 755100, 3860000; 755100, 3860100; 755300, 3860100; 755300, 3860200; 756200, 3860200; 756200, 3860300; 756500, 3860300; 756500, 3860200; 756600, 3860200; 756600, 3859700; 756400, 3859700; 756400, 3859600; 756700, 3859600; 756700, 3859700; 757400, 3859700; 757400, 3859600; 757600, 3859600; 757600, 3859500; 757700, 3859500; 757700, 3859400; 757800, 3859400; 757800, 3859200; 757900, 3859200; 757900, 3859100; 758100, 3859100; 758100, 3858900; 758200, 3858900; 758200, 3858800; 758300, 3858800; 758300, 3858700; 758500, 3858700; 758500, 3858600; 758600, 3858600; 758600, 3858700; 758800, 3858700; 758800, 3859100; 758900, 3859100; 758900, 3859200; 759600, 3859200; 759600, 3859100; 759700, 3859100; 759700, 3859000; 759900, 3859000; 759900, 3858800; 760000, 3858800; 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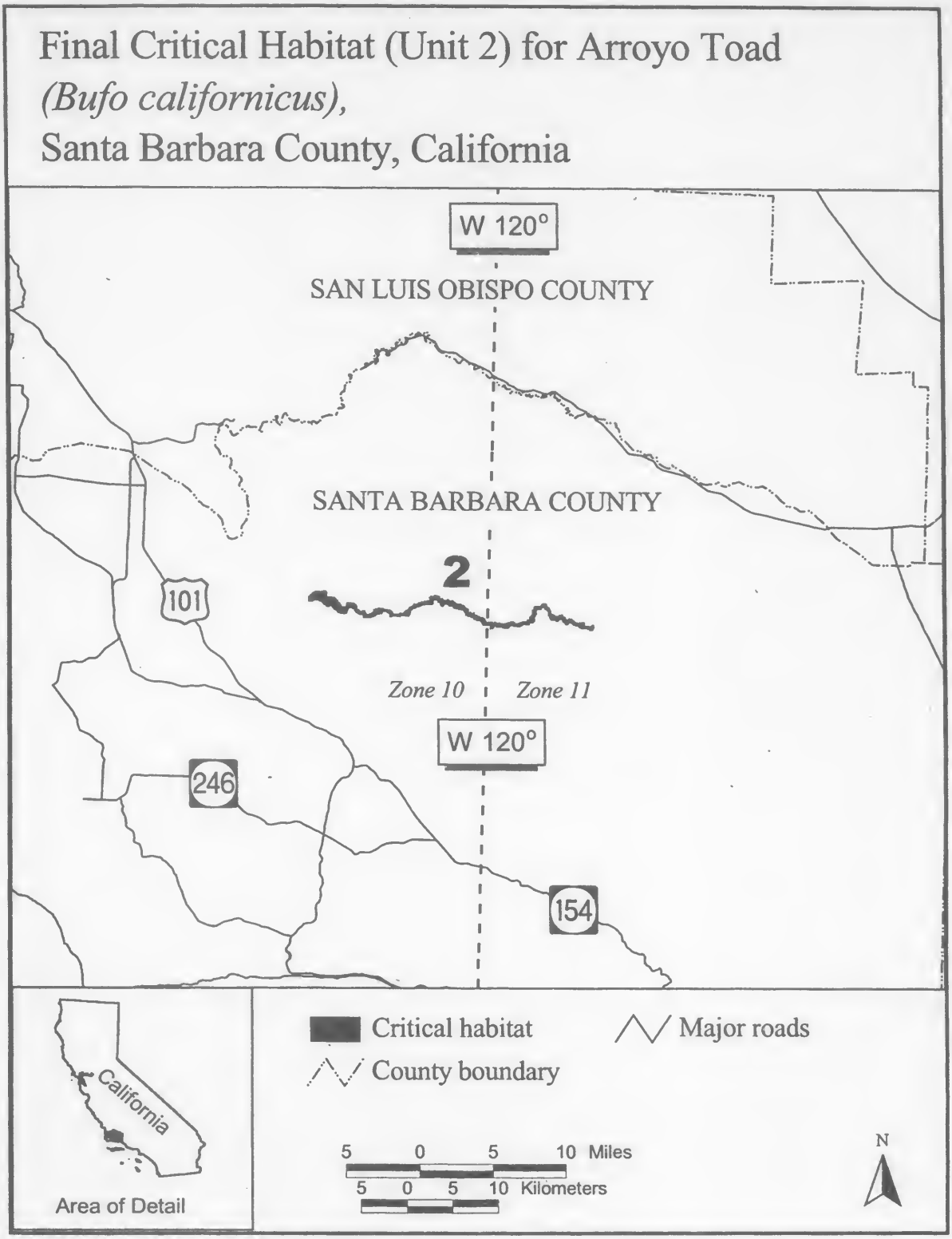
(ii) **Note:** Map of Unit 2 follows.



(6) Unit 4; Sespe Creek, Ventura County, California.

(i) From USGS 1:24,000 scale quadrangles Wheeler Springs, Lion Canyon, Topatopa Mountains, and Devils Heart Peak. Land bounded by the

following UTM zone 11, NAD 27 coordinates (E, N): 318600, 3828000; 318600, 3827800; 318800, 3827800; 318800, 3827700; 318900, 3827700; 318900, 3827400; 319100, 3827400; 319100, 3827700; 319200, 3827700; 319200, 3827800; 319500, 3827800; 319500, 3827700; 319600, 3827700; 319600, 3827500; 319700, 3827500; 319700, 3827300; 319800, 3827300; 319800, 3827400; 319900, 3827400; 319900, 3827300; 320000, 3827300; 320000, 3826900; 320100, 3826900; 320100, 3826800; 320400, 3826800; 320400, 3826700; 320500, 3826700; 320500, 3826500; 320900, 3826500; 320900, 3826300; 321000, 3826300; 321000, 3826100; 320900, 3826100; 320900, 3826000; 320700, 3826000; 320700, 3826200; 320600, 3826200; 320600, 3826300; 320400, 3826300; 320400, 3826400; 320300, 3826400; 320300, 3826500; 320200, 3826500; 320200, 3826600; 319900, 3826600; 319900, 3826700; 319800, 3826700; 319800, 3826900; 319700, 3826900; 319700, 3827000; 319400, 3827000; 319400, 3827300; 319300, 3827300; 319300, 3827100; 319200, 3827100; 319200, 3827000; 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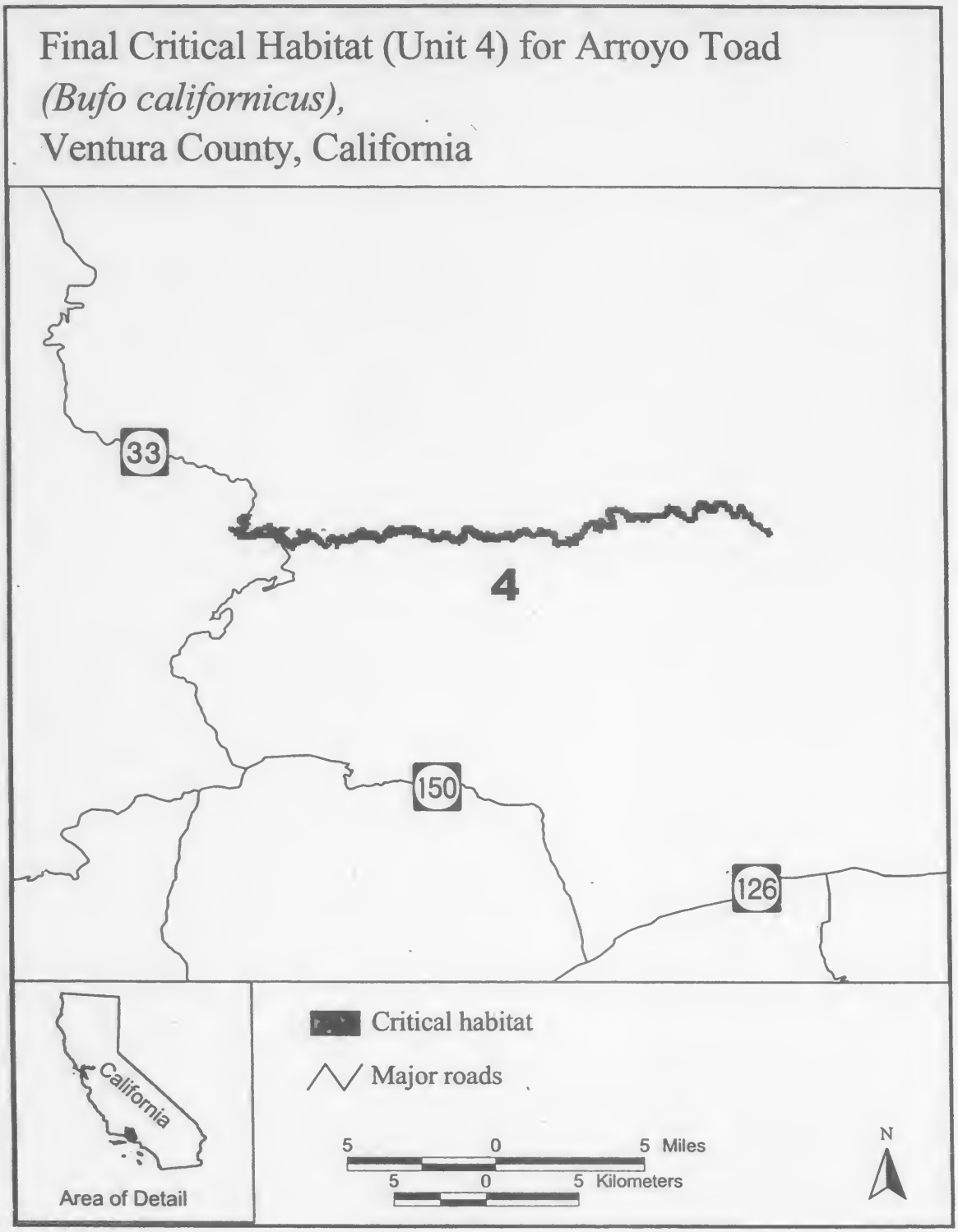
(ii) **Note:** Map of Unit 4 follows.

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(7) Unit 9; San Jacinto River Basin/ Bautista Creek, Riverside County, California.

(i) From USGS 1:24,000 scale quadrangle Blackburn Canyon. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 515200, 3733300; thence east to the Cleveland National Forest (CNF) boundary at y-coordinate 3733300; thence south, west, and north along the CNF boundary, passing y-coordinate 3733300, to x-coordinate 515200; returning to 515200, 3733300.

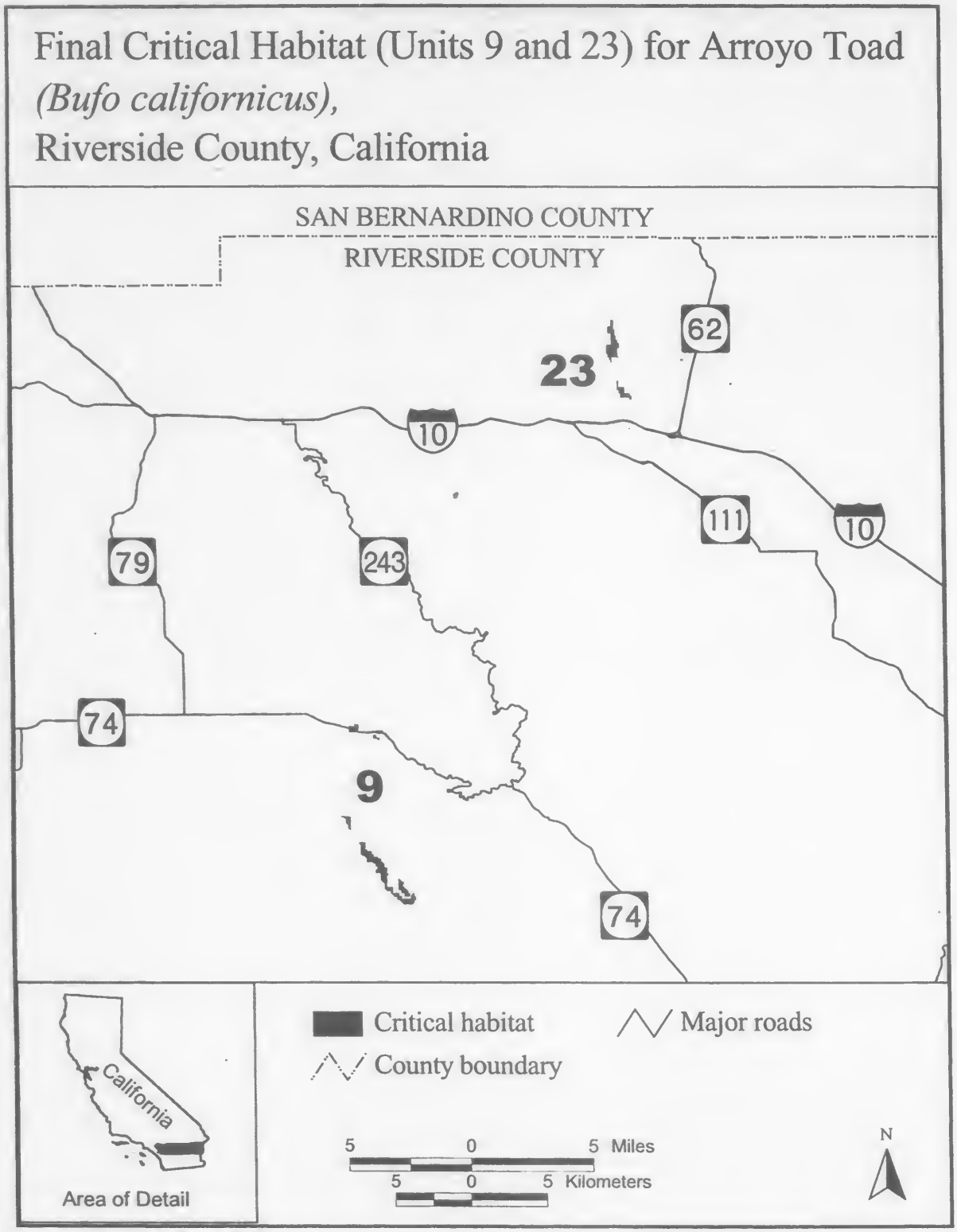
(ii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 517000, 3732900; thence south to the CNF boundary at x-coordinate 517000; thence west and north along the CNF boundary to y-coordinate 3732900; returning to 517000, 3732900.

(iii) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 516700, 3732300; 516700, 3732400; thence west to the CNF boundary at y-coordinate 3732400; thence north and southeast along the CNF boundary to y-coordinate 3732300; returning to 516700, 3732300.

(iv) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 514700, 3726400; 514700, 3726700; 514600, 3726700; 514600, 3726800; 514500, 3726800; 514500, 3727100; 514400, 3727100; 514400, 3727200; 514200, 3727200; thence north to the CNF boundary at x-coordinate 514200; thence east and south along the CNF boundary to y-coordinate 3726300; thence west and following coordinates 514800, 3726300; 514800, 3726400; returning to 514700, 3726400.

(v) Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 515800, 3725000; 515900, 3725000; 515900, 3724900; 516200, 3724900; 516200, 3724700; 516300, 3724700; 516300, 3724500; 516600, 3724500; 516600, 3724400; 516800, 3724400; 516800, 3724200; 516900, 3724200; 516900, 3724100; 517000, 3724100; 517000, 3723800; 517200, 3723800; 517200, 3723400; 517300, 3723400; thence south to the CNF boundary at x-coordinate 517300; thence west and southeast along the CNF boundary, passing x-coordinate 518500, to y-coordinate 518800; thence east following coordinates 3721900; 518800, 3722000; 518900, 3722000; 518900, 3722100; 519000, 3722100; 519000, 3721900; 519100, 3721900; 519100, 3721700; 519000, 3721700; 519000, 3721500; 518900, 3721500; 518900, 3721400; 518300, 3721400; 518300, 3721500; 518200, 3721500; 518200, 3721600; 518100, 3721600; 518100, 3721700; 517900, 3721700; 517900, 3721900; 517700, 3721900; 517700, 3722000; 517600, 3722100; 517500, 3722100; 517500, 3722300; 517200, 3722300; 517200, 3722400; 517100, 3722400; 517100, 3722800; 517000, 3722800; 517000, 3722900; 516900, 3722900; 516900, 3723000; 516800, 3723000; 516800, 3723500; 516500, 3723500; 516500, 3723700; 516600, 3723700; 516600, 3723900; 516500, 3723900; 516500, 3724100; 516300, 3724100; 516300, 3724200; 515900, 3724200; 515900, 3724500; 515800, 3724500; 515800, 3724600; 515600, 3724600; 515600, 3724700; 515500, 3724700; 515500, 3725400; 515400, 3725400; thence north to the CNF boundary at x-coordinate 515400; thence east along the CNF boundary to x-coordinate 515800; returning to 515800, 3725000. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 518000, 3723100; 518000, 3723000; 518100, 3723000; 518100, 3722900; 518300, 3722900; 518300, 3722700; 518200, 3722700; 518200, 3722600; 518300, 3722600; 518300, 3722500; 518400, 3722500; 518400, 3722400; 518500, 3722400; 518500, 3722300; 518600, 3722300; 518600, 3722100; 518700, 3722100; thence south to the CNF boundary at x-coordinate 518700; thence northwest along the CNF boundary to y-coordinate 3723100; returning to 518000, 3723100.

(vi)**Note:** Map of Unit 9 follows.


Final Critical Habitat (Units 9 and 23) for Arroyo Toad
(Bufo californicus),
Riverside County, California
SAN BERNARDINO COUNTY
RIVERSIDE COUNTY
23
9
62
10
111
10
79
243
74
74
California
Area of Detail
Critical habitat
County boundary
Major roads
5 0 5 Miles
5 0 5 Kilometers
N

(8) Unit 20; Upper Santa Ana River Basin/Cajon Wash, San Bernardino County, California.

(i) From USGS 1:24,000 scale quadrangle Cajon. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 457100, 3792000; 457300, 3792000; 457300, 3791900; 457400, 3791900; 457400, 3792000; 457500, 3792000; 457500, 3791900; 457600, 3791900; 457600, 3792000; 457700, 3792000; 457700, 3791900; 457800, 3791900; 457800, 3791800; 457900, 3791800; 457900, 3791700; 458000, 3791700; 458000, 3791500; 457900, 3791500; 457900, 3791400; 457400, 3791400; 457400, 3791300; 457200, 3791300; 457200, 3791000; 457100, 3791000; 457100, 3790800; 457200, 3790800; 457200, 3790600; 457300, 3790600; 457300, 3790500; 457400, 3790500; 457400, 3790400; 457500, 3790400; 457500, 3790300; 458000, 3790300; 458000, 3790200; 458300, 3790200; 458300, 3790100; 458600, 3790100; 458600, 3790000; 458700, 3790000; 458700, 3789900; 458800, 3789900; 458800, 3789800; 458900, 3789800; 458900, 3789700; 459000, 3789700; 459000, 3789600; 459100, 3789600; 459100, 3789400; 459400, 3789400; 459400, 3789300; 459500, 3789300; 459500, 3789200; 459600, 3789200; 459600, 3789000; 459700, 3789000; 459700, 3788900; 459800, 3788900; 459800, 3788800; 459900, 3788800; 459900, 3788700; 460000, 3788700; 460000, 3788600; 460100, 3788600; 460100, 3788500; 460400, 3788500; 460400, 3788400; 460600, 3788400; 460600, 3788300; 460700, 3788300; 460700, 3788200; 460800, 3788200; 460800, 3788100; 460900, 3788100; 460900, 3787400; 460800, 3787400; 460800, 3787200; 460500, 3787200; 460500, 3787300; 460400, 3787300; 460400, 3787400; 460300, 3787400; 460300, 3787500; 460200, 3787500; 460200, 3787600; 460100, 3787600; 460100, 3787700; 460000, 3787700; 460000, 3787800; 459800, 3787800; 459800, 3787900; 459700, 3787900; 459700, 3788000; 459600, 3788000; 459600, 3788100; 459400, 3788100; 459400, 3788200; 459300, 3788200; 459300, 3788300; 459200, 3788300; 459200, 3788500; 459100, 3788500; 459100, 3788700; 458900, 3788700; 458900, 3788900; 458700, 3788900; 458700, 3789000; 458500, 3789000; 458500, 3789100; 458300, 3789100; 458300, 3789300; 458100, 3789300; 458100, 3789400; 458000, 3789400; 458000, 3789500; 457900, 3789500; 457900, 3789600; 457800, 3789600; 457800, 3789700; 457700, 3789700; 457700, 3789800; 457600, 3789800; 457600, 3789700; 457500, 3789700; 457500, 3789800; 457300, 3789800; 457300, 3789900; 457000, 3789900; 457000, 3790100; 456900, 3790100; 456900, 3790200; 456800, 3790200; 456800, 3790500; 456700, 3790500; 456700, 3791000; 456600, 3791000; 456600, 3791200; 456700, 3791200; 456700, 3791300; 456800, 3791300; 456800, 3791400; 456900, 3791400; 456900, 3791500; 457100, 3791500; returning to 457100, 3792000.

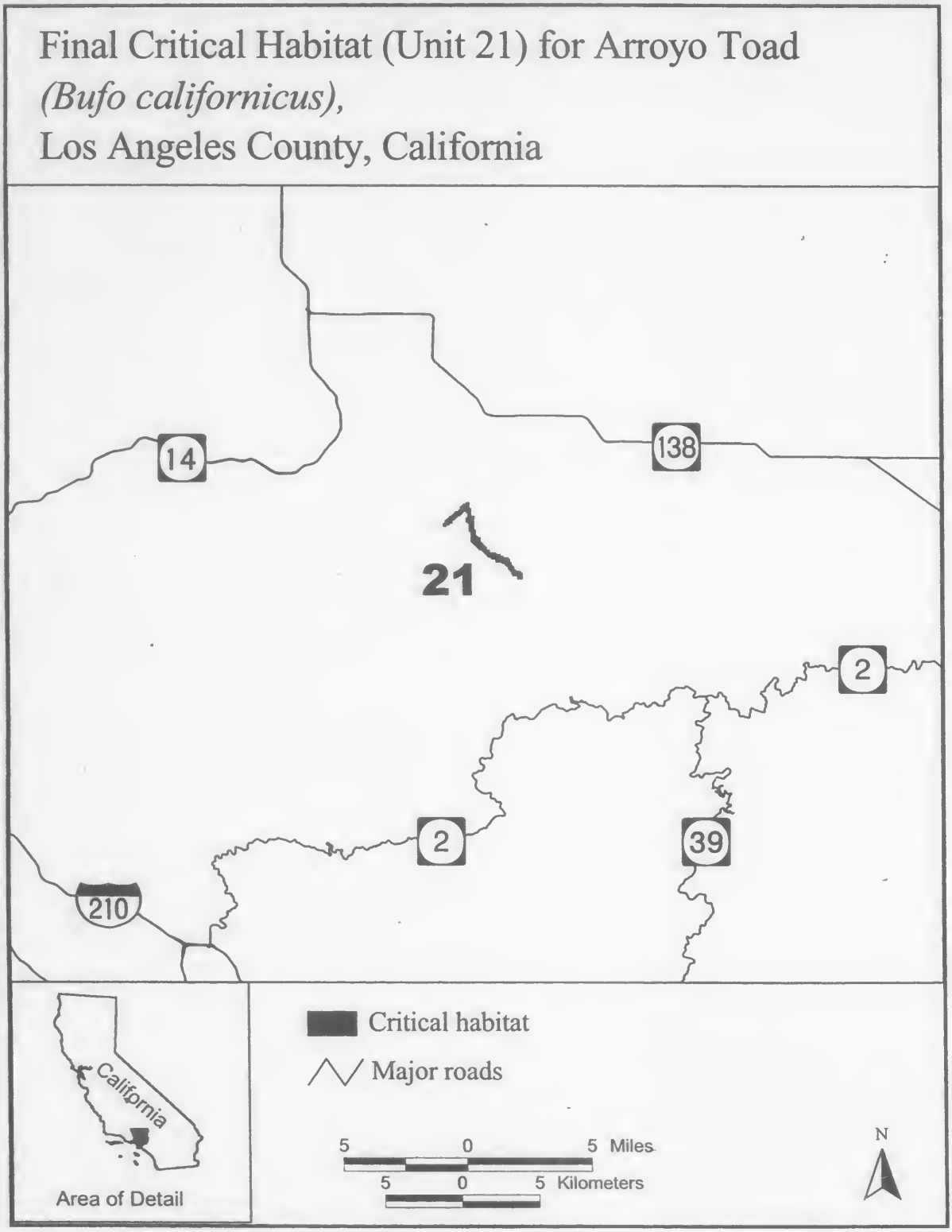
(ii) **Note:** Map of Unit 20 follows.

(9) Unit 21; Little Rock Creek Basin, Los Angeles County, California.

(i) From USGS 1:24,000 scale quadrangles Juniper Hills and Pacifico Mountain. Land bounded by the following UTM zone 11, NAD27

coordinates (E, N): 406300, 3814500; 406500, 3814500; 406500, 3814100; 406600, 3814100; 406600, 3813600; 406800, 3813600; 406800, 3813400; 406700, 3813400; 406700, 3813300; 406800, 3813300; 406800, 3812700; 406900, 3812700; 406900, 3812300; 407000, 3812300; 407000, 3812200; 407200, 3812200; 407200, 3811900; 407300, 3811900; 407300, 3811800; 407400, 3811800; 407400, 3811700; 407500, 3811700; 407500, 3811600; 407600, 3811600; 407600, 3811400; 407800, 3811400; 407800, 3811200; 408200, 3811200; 408200, 3811100; 408500, 3811100; 408500, 3811000; 408700, 3811000; 408700, 3810900; 409000, 3810900; 409000, 3810800; 409100, 3810800; 409100, 3810600; 409200, 3810600; 409200, 3810400; 409300, 3810400; 409300, 3810300; 409400, 3810300; 409400, 3810100; 409500, 3810100; 409500, 3810000; 409800, 3810000; 409800, 3809900; 409900, 3809900; 409900, 3809500; 409600, 3809500; 409600, 3809700; 409300, 3809700; 409300, 3809800; 409200, 3809800; 409200, 3810000; 409100, 3810000; 409100, 3810100; 409000, 3810100; 409000, 3810300; 408900, 3810300; 408900, 3810400; 408800, 3810400; 408800, 3810500; 408600, 3810500; 408600, 3810600; 408200, 3810600; 408200, 3810800; 407900, 3810800; 407900, 3810900; 407700, 3810900; 407700, 3811000; 407600, 3811000; 407600, 3811100; 407500, 3811100; 407500, 3811200; 407400, 3811200; 407400, 3811300; 407300, 3811300; 407300, 3811400; 407100, 3811400; 407100, 3811500; 407000, 3811500; 407000, 3811600; 406900, 3811600; 406900, 3811700; 406800, 3811700; 406800, 3811800; 406700, 3811800; 406700, 3811900; 406600, 3811900; 406600, 3812600; 406500, 3812600; 406500, 3813100; 406400, 3813100; 406400, 3813200; 406300, 3813200; 406300, 3813500; 406400, 3813500; 406400, 3813800; 406300, 3813800; 406300, 3814000; 406200, 3814000; 406200, 3813900; 406100, 3813900; 406100, 3813800; 406000, 3813800; 406000, 3813700; 405900, 3813700; 405900, 3813600; 405700, 3813600; 405700, 3813500; 405600, 3813500; 405600, 3813400; 405500, 3813400; 405500, 3813300; 405400, 3813300; 405400, 3813100; 405200, 3813100; 405200, 3813000; 405000, 3813000; 405000, 3812900; 404800, 3812900; 404800, 3813100; 404900, 3813100; 404900, 3813300; 405000, 3813300; 405000, 3813400; 405100, 3813400; 405100, 3813500; 405200, 3813500; 405200, 3813600; 405400, 3813600; 405400, 3813700; 405500, 3813700; 405500, 3813800; 405600, 3813800; 405600, 3813900; 405800, 3813900; 405800, 3814000; 405900, 3814000; 405900, 3814200; 406000, 3814200; 406000, 3814300; 406100, 3814300; 406100, 3814400; 406300, 3814400; returning to 406300, 3814500.

(ii) **Note:** Map of Unit 21 follows.



(10) Unit 23; Whitewater River Basin, Riverside County, California.

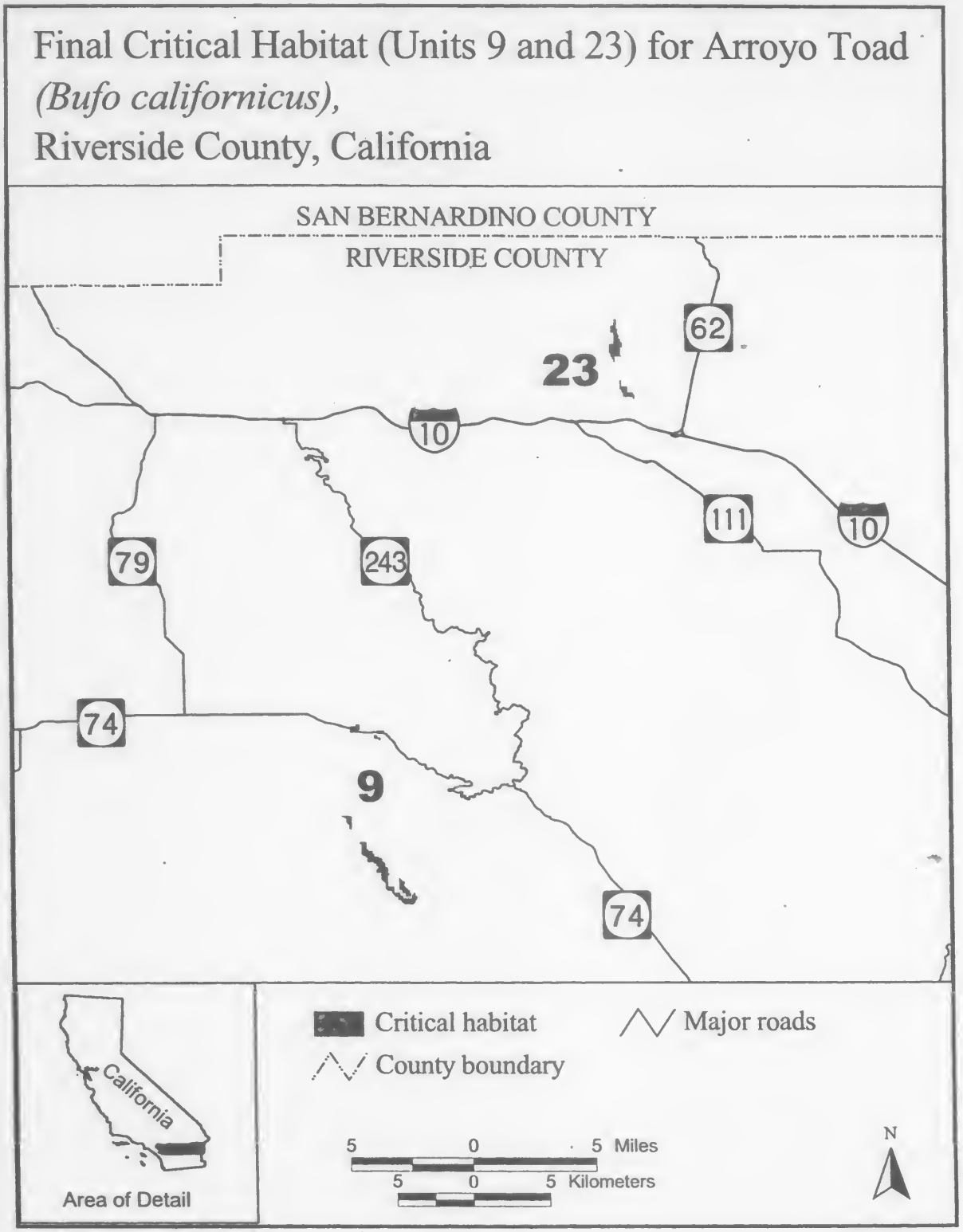
(i) From USGS 1:24,000 scale quadrangle White Water. Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 532500, 3759600;

532600, 3759600; 532600, 3759200; 532700, 3759200; 532700, 3758900; 532800, 3758900; 532800, 3758700; 532900, 3758700; 532900, 3758400; 532800, 3758400; 532800, 3757800; 532900, 3757800; thence south to the Bureau of Land Management (BLM) boundary at x-coordinate 532900; thence west and south along the BLM boundary to y-coordinate 3757400; thence west and following coordinates 532400, 3757400; 532400, 3757600; 532300, 3757600; 532300, 3757800; 532200, 3757800; 532200, 3758000; 532100, 3758000; thence north to the BLM boundary at x-coordinate 532100; thence east and north along the BLM boundary to y-coordinate 3759600; returning to 532500, 3759600.

Land bounded by the following UTM zone 11, NAD27 coordinates (E, N): 532800, 3755600; thence north to the BLM boundary at x-coordinate 532800; thence eastward along the BLM boundary to x-coordinate 533600; thence south and following coordinates 533600, 3755200; 533700, 3755200; thence south to the BLM boundary at x-coordinate 533700; thence westward along the BLM boundary to x-coordinate 533000; thence north and following coordinates 533000, 3755400; 532900, 3755400; 532900, 3755600; returning to 532800, 3755600.

(ii) **Note:** Unit 23 included on map with Unit 9.

BILLING CODE 4310–55–P


Final Critical Habitat (Units 9 and 23) for Arroyo Toad (Bufo californicus), Riverside County, California
SAN BERNARDINO COUNTY
RIVERSIDE COUNTY
23
9
62
10
111
10
79
243
74
74
California
Area of Detail
Critical habitat
County boundary
Major roads
5 0 5 Miles
5 0 5 Kilometers
N

* * * * *

Dated: March 31, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 05–6824 Filed 4–12–05; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Wednesday,
April 13, 2005

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 1124 and 1131

Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments To Tentative Marketing Agreements and Orders; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1124 and 1131

[Docket No. AO–368–A32, AO–271–A37; DA–03–04B]

Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments To Tentative Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document recommends that the producer-handler definitions of the Pacific Northwest and the Arizona-Las Vegas milk marketing orders be amended to limit producer-handler status to those entities with route disposition of fluid milk products of less than three million pounds per month.

DATES: Comments must be submitted on or before June 13, 2005.

ADDRESSES: Comments (six copies) should be filed with the Hearing Clerk, STOP 9200-Room 1083, United States Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–9200. You may send your comments by the electronic process available at Federal eRulemaking portal at *http://www.regulations.gov* or by submitting comments to *amsdairycomments@usda.gov*. Reference should be made to the title of action and docket number.

FOR FURTHER INFORMATION CONTACT: Jack Rower or Gino Tosi, Marketing Specialists, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, STOP 0231-Room 2971, 1400 Independence Avenue SW., Washington, DC 20250–0231, (202) 720–2357 or (202) 690–1366, e-mail address: *jack.rower@usda.gov* or *gino.tosi@usda.gov*.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purposes of determining which dairy farms are "small businesses," the $750,000 per year criterion was used to establish a milk marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Producer-handlers are defined as dairy farmers that process only their own milk production. These entities must be dairy farmers as a pre-condition to operating processing plants as producer-handlers. The size of the dairy farm determines the production level of the operation and is the controlling factor in the capacity of the processing plant and possible sales volume associated with the producer-handler entity. Determining whether a producer-handler is considered small or large business must depend on its capacity as a dairy farm, where a producer-handler with annual gross revenue in excess of $750,000 is considered a large business.

The amendments would place entities currently considered to be producer-handlers under the Pacific Northwest or the Arizona-Las Vegas on the same terms as all other fully regulated handlers of the two orders provided they meet the criteria for being subject to the pooling and pricing provisions of the two orders. Entities currently defined as producer-handlers under the terms of these orders will be subject to the pooling and pricing provisions of the orders if their route disposition of fluid milk products is more than 3 million pounds per month.

Producer-handlers with route disposition of less than 3 million pounds during the month will not be subject to the pooling and pricing provisions of the orders. To the extent that current producer-handlers for each order have route disposition of fluid milk products outside of the marketing areas, such route disposition will be subject to the pooling and pricing provisions of the orders if total route disposition cause them to become fully regulated.

Assuming that some current producer-handlers will have route disposition of fluid milk products of more than 3 million pounds during the month, such producer-handlers will be regulated subject to the pooling and pricing provisions of the orders like other handlers. Such producer-handlers will account to the pool for their uses of milk at the applicable minimum class prices and pay the difference between their use-value and the blend price of the order to the order's producer-settlement fund.

While this may cause an economic impact on those entities with more than 3 million pounds of route sales who currently are considered producer-handlers by the two orders, the impact is offset by the benefit to other small businesses. With respect to dairy farmers whose milk is pooled on the two marketing orders, such dairy farmers who have not heretofore shared in the additional revenue that accrues from the marketwide pooling of Class I sales by producer-handlers will share in such revenue. This will have a positive impact on 468 small dairy farmers in the Pacific Northwest and Arizona—Las Vegas marketing areas. Additionally, all

handlers who dispose of more than 3 million pounds of fluid milk products per month will pay at least the announced Federal order Class I price for such use. This will have a positive impact on 18 small regulated handlers.

To the extent that current producer-handlers in the Pacific Northwest and the Arizona-Las Vegas orders become subject to the pooling and pricing provisions, such will be determined in their capacity as handlers. Such entities will no longer have restrictions applicable to their business operations that were conditions for producer-handler status and exemption from the pooling and pricing provisions of the two orders. In general, this includes being able to buy or acquire any quantity of milk from dairy farmers or other handlers instead of being limited by the current constraints of the two orders. Additionally, the burden of balancing their milk production is relieved. Milk production in excess of what is needed to satisfy their Class I route disposition needs will receive the minimum price protection of the order established under the terms of the two orders. The burden of balancing milk supplies will be borne by all producers and handlers who are pooled and regulated under the terms of the two orders.

During September 2003, the Pacific Northwest had 16 pool distributing plants, one pool supply plant, three cooperative pool manufacturing plants, seven partially regulated distributing plants, eight producer-handler plants and two exempt plants. Of the 27 regulated handlers, 16 or 59 percent are considered large businesses. Of the 691 dairy farmers whose milk was pooled on the order, 241 or 35 percent are considered large businesses. If these amendatory actions are not undertaken, 65 percent of the dairy farmers (450) in the Pacific Northwest order who are small businesses will continue to be adversely affected by the operations of large producer-handlers.

For the Arizona—Las Vegas order, during September 2003 there were three pool distributing plants, one cooperative pool manufacturing plant, 18 partially regulated distributing plants, two producer-handler plants and three exempt plants (including an exempt plant located in Clark County Nevada) operated by 22 handlers. Of these plants, 15 or 68 percent are considered large businesses. Of the 106 dairy farmers whose milk was pooled on the order, 88 or 83 percent are considered large businesses. If these amendatory actions are not undertaken, 17 percent of the dairy farmers in the Arizona-Las Vegas order who are small businesses will continue to be adversely affected by large producer-handler operations.

In their capacity as producers, seven producer-handlers would be considered as large producers as their annual marketing exceeds 6 million pounds of milk. Record evidence indicates that for the Pacific Northwest marketing order at the time of the hearing, four producer-handlers would potentially become subject to the pooling and pricing provisions of the order because of route disposition of more than 3 million pounds per month. For the Arizona—Las Vegas order, one producer-handler would be considered a large producer because its annual marketing exceeds 6 million pounds of milk and potentially subject to the pooling and pricing provisions of the order because of route disposition exceeding 3 million pounds per month.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have minimal impact on reporting, recordkeeping, or other compliance requirements for entities currently considered producer-handlers under the Pacific Northwest and the Arizona-Las Vegas marketing orders because they would remain identical to the current requirements applicable to all other regulated handlers who are currently subject to the pooling and pricing provisions of the two orders. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

Prior documents in this proceeding: Notice of Hearing: Issued July 31, 2003; published August 6, 2003 (68 FR 46505).

Correction to Notice of Hearing: Issued August 20, 2003; published August 26, 2003 (68 FR 51202).

Notice of Reconvened Hearing: Issued October 27, 2003; published October 31, 2003 (68 FR 62027).

Notice of Reconvened Hearing: Issued December 18, 2003; published December 29, 2003 (68 FR 74874).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreements and the orders regulating the handling of milk in the Pacific Northwest and the Arizona-Las Vegas marketing areas. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act (AMAA) and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by the 60th day after publication of this decision in the **Federal Register**. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The proposed amendments set forth below are based on the record of a public hearing held at Tempe, Arizona, beginning on September 23, 2003; reconvened, and continuing at Seattle, Washington, on November 17, 2003; and reconvened and concluding at Alexandria, Virginia, on January 23, 2004, pursuant to a notice of hearing issued July 31, 2003; published August 6, 2003 (68 FR 46505), and correction to the notice issued: August 23, 2003, and published August 26, 2003 (68 FR 51202); and notices of reconvened hearings issued October 27, 2003, and published October 31, 2003 (68 FR 62027); and December 18, 2003, and published December 29, 2003 (68 FR 74874).

The material issues on the record of hearing relate to:

1. The regulatory status of producer-handlers.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. The Regulatory Status of Producer-Handlers

The producer-handler provision of the Pacific Northwest and the Arizona-Las Vegas milk marketing orders should be amended to limit producer-handlers to Class I route disposition of not more than 3 million pounds per month.

Currently, the Pacific Northwest and the Arizona-Las Vegas milk marketing orders provide separate but similar definitions that describe and define a special category of handler known as producer-handlers. While there are specific differences in how each order defines and describes producer-handlers, both orders, as do all Federal milk marketing orders, exempt producer-handlers from the pooling and pricing provisions of the orders.

Exemptions from the pooling and pricing provisions of the orders essentially means that the minimum class prices established under the orders that handlers must pay for milk are not applicable to producer-handlers and producer-handlers receive no minimum price protection for surplus milk disposed of within either order's marketing area. Producer-handlers enjoy keeping the entire value of their milk production disposed of as fluid milk products in the marketing area to themselves and do not share this value with other dairy farmers whose milk is pooled on either of the two orders.

However, producer-handlers are subject to strict definitions and limitations in their business practices. Both orders limit the ability of producer-handlers to buy or acquire milk that may be needed from dairy farmers or other handlers. Additionally, producer-handlers bear the entire burden of balancing their own milk production. Milk production in excess of what is needed to satisfy their Class I route disposition needs will receive whatever price they are able to obtain. Such milk does not receive the minimum price protection of the order.

It is the exemption from the pooling and pricing provisions of the Pacific Northwest and Arizona-Las Vegas orders that is the central issue of this proceeding. While producer-handlers are exempt from the pooling and pricing provisions of the two orders, they are "regulated" to the extent that producer-handlers submit reports to the Market Administrator who monitors producer-handler operations to ensure that such entities are in compliance with the conditions for such regulatory status. For the purposes of brevity and convenience, this decision will refer to those handlers who are subject to the pooling and pricing provisions of the orders as "fully regulated handlers" in contrast to producer-handlers.

Overview of the Proposals

This proceeding considered three proposals seeking the application of each order's pooling and pricing provisions, or full regulation, of producer-handlers when their route disposition of fluid milk products in the marketing areas exceeded 3 million pounds per month. These proposals were published in the hearing notice as Proposals 1, 2 and 3. Proposal 1 is applicable to the Pacific Northwest milk marketing order. Proposal 3 is applicable to the Arizona-Las Vegas milk marketing order. Proposal 2, applicable to only the Pacific Northwest, is identical to Proposal 1 but also seeks to limit a producer-handler from distributing fluid milk products to a wholesale customer who is served by a fully regulated or partially regulated distributing plant in the same-sized package with a similar label during the month. In this regard, Proposal 2 would make the producer-handler definition for the Pacific Northwest order more like the current Arizona-Las Vegas order.

A fourth proposal, published in the hearing notice as Proposal 4, seeking to prevent the simultaneous pooling of the same milk on the Arizona-Las Vegas milk marketing order and on a state-operated order that provides for marketwide pooling, (commonly referred to as "double-dipping") is addressed in a separate tentative final decision, issued December 23, 2004 and published in the **Federal Register** on December 30, 2004 (69 FR 78355).

Summary of Testimony

Proposal 3 received testimony by a witness appearing on behalf of United Dairymen of Arizona (UDA). UDA is a dairy cooperative supplying approximately 88 percent of the milk in the Arizona-Las Vegas milk marketing order (Order 131). The UDA witness testified in support of establishing a 3-million pound limit in route disposition of fluid milk products for producer-handlers in the marketing area, which, if exceeded, would cause the producer-handler to become subject to the pooling and pricing provisions of the order. The witness was of the opinion that the current producer-handler definition contradicts the overall purposes of the Federal milk order program to establish uniform prices among all handlers and the marketwide sharing of revenue among all producers who supply the market.

The UDA witness asserted that Sarah Farms is the largest producer-handler in the Order 131 marketing area and avoids the classified pricing and pooling requirements applicable to all other handlers. The witness characterized this as the operation of an individual handler pool within a marketwide pool. The witness stated that UDA is aware that historically Federal orders have exempted producer-handler operations from the pricing and pooling provisions of orders because they were small and had little impact in the marketplace. The witness contrasted this historical perspective with Sarah Farms, recognized as the largest producer-handler in Order 131, by citing a trade journal article that ranked Sarah Farms as the second largest U.S. dairy farm with 13,000 cows in 1995.

The witness testified that UDA estimates Sarah Farms' Class I sales within the Order 131 marketing area are about 12 million pounds per month. Because of Sarah Farms' exemption from the pooling and pricing provisions of the order, the witness estimated a loss in revenue to producers who pool milk on the order at about $11,586,589 over the period of January 2000 through July 2003, or about a 10–14 cents per hundredweight (cwt) impact on the order's blend price. In addition, the witness estimated lost revenue of about $3 million, or about a 10 cent per cwt lower blend price for the period of September 1997 through January 1999.

A second witness appearing on behalf of UDA also testified in support of Proposal 3. This witness explained that the proposed 3 million pound route disposition limit on producer-handlers was partly based on provisions of the Fluid Milk Promotion Act which requires an assessment for the promotion of fluid milk when a handler's sales are greater than 3 million pounds per month. The witness said that producer-handlers who have the ability to enjoy this level of route disposition should not be exempted from pooling and pricing provisions and that their continued exemption poses a serious threat to orderly marketing and the operation of the Federal milk order program.

The second UDA witness claimed that in December 1994, Sarah Farms was considered an insignificant factor within the Order 131 marketing area because their monthly raw milk production was less than 5 million pounds, of which less than 1.3 million pounds of Class I products were distributed within the marketing area. Relying on Market Administrator statistics, the witness added that by 1996, UDA estimated that Sarah Farms' monthly Class I route disposition had increased to more than 6 million

pounds. The witness also testified that from late 1998 until this proceeding, Sarah Farms had been one of only two producer-handlers selling Class I products in the marketing area. Relying on Market Administrator statistics, the witness estimated that Sarah Farms' Class I route sales within Order 131 had increased from about 7 million pounds per month to as much as 15 million pounds per month by 2002.

A witness appearing on behalf of the Kroger Company (Kroger), a fully regulated handler under the Pacific Northwest milk marketing order (Order 124) and Order 131, testified in support of Proposals 1, 2, and 3. The witness said that changes in marketing conditions in both orders necessitate changes in how the orders define producer-handlers. In the opinion of the witness, producer-handlers enjoy a competitive sales advantage by being exempted from the pooling and pricing provisions of both orders. The witness explained that producer-handlers have a sales advantage because they have the flexibility to set their internal raw milk price at a level well below the announced Federal order minimum Class I price that fully regulated handlers must pay.

The Kroger witness also testified that regulated handlers in Orders 124 and 131 have been forced to respond to competitive situations with producer-handlers in supplying retail grocery outlets. This was due in part to the competitive sales advantage producer-handlers have in being able to lower their price to retailers while still maintaining an adequate profit margin, the witness explained. The witness said that Kroger's retail outlets could not do this competitively without eroding their profit margins. Because of these competitive situations, the witness concluded that producer-handlers exceeding more than 3 million pounds per month in Class I sales was a reasonable estimate of when a producer-handler is in direct competition with fully regulated handlers and should therefore receive the same regulatory treatment. The same regulatory treatment of producer-handlers as fully regulated handlers above this threshold would, according to the witness, re-establish equity among handlers competing for Class I sales in these two marketing areas.

The Kroger witness was of the opinion that the volume of producer-handler route disposition was a key aspect of the disorderly marketing conditions in Orders 124 and 131. However, the witness indicated that a producer-handler's processing plant size alone was not necessarily an accurate indicator of processing plant efficiency. The witness testified that smaller plants can be very competitive. In this regard, the witness said that Kroger's largest plant was not its most efficient bottling plant.

A witness appearing on behalf of Western United Dairymen (WUD), the largest dairy farmer association in California representing approximately 1,100 of California's 2,000 dairy farmers, testified in support of Proposals 1 and 3. The witness expressed the opinion that a primary reason for the exemption of producer-handlers from the pricing and pooling provisions of Orders 124 and 131 had been because these entities were customarily small businesses that operate self-sufficiently and do not have a significant impact in the marketplace. The WUD witness testified that the regulatory exemption for producer-handlers has been largely unchanged in the Federal order system for more than 50 years. The witness explained that there had been no significant demonstration of unfair advantages accruing to producer-handlers because they are responsible for balancing their fluid milk needs and cannot transfer balancing costs to other pooled market participants.

The WUD witness also testified that some producer-handlers were becoming much larger than fully regulated fluid processors in Orders 124 and 131. The witness was of the opinion that large producer-handlers were effectively taking greater and greater shares of the Class I market in both orders and caused pooled milk to be forced into lower-valued manufacturing uses. According to the witness, these outcomes are having a direct negative impact on handlers and producers in both orders and are generating instability in the Federal milk marketing order system.

The WUD witness asserted that when producer-handler sales growth threatened the sales of fully regulated handlers under California's State-wide regulatory system, the State acted to maintain and protect their pooling and pricing system by placing a limit on the volumes of sales producer-handlers could have within the State before becoming fully regulated. The witness was of the opinion that the Federal order program also needs to act by adopting the proposed amendments to similarly limit the sales volume of producer-handlers.

A witness appearing on behalf of the Alliance of Western Milk Producers (Alliance), an organization representing California cooperatives, also testified in support of Proposals 1, 2, and 3. The witness indicated that how the Federal order program deals with the producer-handler issue is of interest to California dairy farmers because changes in Orders 124 and 131, which border California, will have a direct impact on the State's milk marketing and regulatory program. The witness was of the opinion that producer-handlers have a tremendous competitive advantage in the marketplace because they are not subject to minimum pricing and are thereby able to avoid a pooling obligation to share their Class I revenue with all pooled market participants. The witness asserted that unless some limitation is put on the route sales volume of producer-handlers, it may encourage new producer-handlers to enter the market and further erode the equitable pricing principles relied on by the Federal milk order program.

A witness appearing on behalf of Northwest Dairy Association (NDA) testified in support of Proposals 1 and 2. The witness provided a business example demonstrating how producer-handlers enjoy a pricing and marketing advantage by being exempt from the pooling and pricing provisions of Order 124. Relating past business experiences as a fully regulated handler known as Sunshine Dairy, the witness explained how business was lost to a producer-handler competitor. The witness attributed this loss of business to the competitive sales advantage enjoyed by producer-handlers resulting from their exemption from the pooling and pricing provisions of the order.

The NDA witness testified that as a fully regulated handler known as Sunshine Dairy they had also lost a small customer who, at that time, was buying about 25,000 gallons of milk per week. The witness said that this customer grew to constitute more than 10 percent of its fluid milk sales volume. According to the witness, even though they had provided great service and products, they lost the account because the customer could save hundreds of thousands of dollars a year by procuring milk from a producer-handler. According to the witness, Sunshine Dairy lost this account because the producer-handler was able to price its milk at a level below the minimum Federal order Class I price. The witness also testified that the producer-handler subsequently lost this account to a fully regulated handler that was of national scope.

The NDA witness expressed the opinion that the goal of the Federal Order system is to maintain order in the market. In this regard, the witness testified that handlers should not be exempt from the pooling and provisions of an order because they own their cows and produce their own milk supply

when other handlers are not exempted. The witness stressed that such an exemption is unfair, noting that the vast majority of dairy farmers should not receive smaller paychecks for the same product as producer-handlers because they lack a processing plant.

A witness appearing on behalf of Maverick Milk Producers Association (Maverick), a cooperative of dairy farmers located in Arizona that markets its milk in California and Arizona, testified in support of Proposal 3. The witness testified that all handlers who market their milk in Order 131 should be subject to the pooling and pricing provisions of the order, including producer-handlers. The witness inferred from Market Administrator statistics that the largest producer-handler in Order 131, Sarah Farms, had cost Maverick members in excess of $1.2 million in revenue since 1999 because Sarah Farms had not been subject to the pooling and pricing provisions of the order. The witness testified that the estimated loss of revenue to the Order 131 pool was based on an assumption that Sarah Farms produced about 18 million pounds of milk per month that would have been pooled as Class I milk.

A former executive and co-owner of Vitamilk, an independent handler no longer operating as a going concern, formerly located in Seattle, Washington, appeared on behalf of Dairy Farmers of America (DFA) and testified in support of Proposals 1 and 2. This DFA witness testified that in seeking alternative markets for its milk products, Vitamilk began to compete with producer-handlers for school milk supply contracts through one of its wholesale distributors. However, their bid attempts were unsuccessful, the witness testified, because the school district sought fixed-price contracts for packaged fluid milk which they could not supply in competition with a producer-handler. While conceding that Vitamilk was inexperienced in bidding for school-lunch business, the witness asserted that the fixed price contract offered by the producer-handler was below the combined value of the Federal order Class I price plus Vitamilk's cost allocations to marketing, processing, distribution, overhead, distributor profit, and risk.

This DFA witness explained that Vitamilk tried to retain other customers by lowering their prices in an effort to retain and gain sales volume even though the price represented no contribution to covering their indirect costs. The witness testified that prices offered by a local producer-handler were 11 to 12 cents per gallon below Vitamilk's best net price to distributors. According to the witness, even though Vitamilk's customers reported satisfaction with the company's service and other non-price attributes, the producer-handler's ability to provide fluid milk products at a lower cost resulted in the loss of customer accounts. The witness asserted that the loss of accounts was caused largely by the producer-handler's ability to price Class I products below what a fully regulated Class I handler can price its products. In addition, the witness testified that in 2003, Vitamilk even attempted to sell its Class I products at prices below breakeven and was still unable to find a price whereby it could successfully recapture business lost to a producer-handler.

A witness appearing on behalf of Shamrock Foods Company (Shamrock), a fully regulated handler located in Arizona and Colorado, testified in support of Proposal 3. The witness maintained that Shamrock is at a competitive disadvantage with producer-handlers because Shamrock is required to pay the Federal order Class I price for milk while producer-handlers are exempt from the pricing and pooling provisions of Order 131. According to the witness, the price of Class I products offered to wholesale customers by producer-handlers can be lower than what Shamrock can offer profitably and that Sarah Farms, a producer-handler of the order, has been able to raid their customer base. Furthermore, the witness said that Shamrock's ability to maintain its policy of equitable pricing among its customers, being able to hold its prices fairly constant to maintain customer loyalty, and avoid bidding against itself for its own customers is undermined because of the producer-handler pricing advantage over fully regulated handlers. The witness said Shamrock is unable to quickly adjust their business practices to meet such competition because of their size and because of different regulatory treatment.

The Shamrock witness was of the opinion that the producer-handler exemption from minimum pricing and pooling provisions threatens the economic viability of Order 131. For example, the witness explained that major customers such as Safeway, Kroger, Wal-Mart and strong independents like Costco, Bashas and Sam's Club buy milk on a wholesale basis to resell to retail consumers. The witness noted that these customers seek the opportunity to buy milk at prices similar to those offered by the producer-handler—at prices below the Federal order Class I price. The witness testified that if Proposal 3 or some other restriction limiting route disposition volume is not adopted, either there will have to be an expansion of producer-handler supplies by expanding their farms or existing fully regulated handlers will need to reorganize their business practices to develop their own-farm production and become a producer-handler to remain competitive.

The Shamrock witness offered testimony regarding market research they routinely conduct through on-going surveys of retail grocery stores in Order 131. The witness explained that Shamrock salespersons do this to gather market intelligence on their competitors. According to the witness, Shamrock's marketing research indicated that prices for bottled fluid milk offered by Sarah Farms was typically six to eight cents a gallon below their price—equating to about 48 to 64 cents on a per cwt basis. The witness testified that their market research also revealed that Sarah Farms' production and route disposition had grown from approximately 8 million pounds in 1998 to nearly 17.2 million pounds by 2003.

The Shamrock witness concluded that a sales volume limitation of 3 million pounds per month for producer-handlers was reasonable because a 3 million pound limit would represent about three percent of the total Class I sales in the Order 131 marketing area. In addition, the witness testified that a plant which processes 3 million pounds per month is an indicator of a very efficient plant operation. From these views, the witness concluded that a producer-handler with route disposition in excess of 3 million pounds per month is able to fully exploit economies of size and should therefore be treated the same as fully regulated handlers.

The Shamrock Foods witness conceded that there are additional challenges faced by producer-handlers in terms of managing milk supplies and disposing of surplus milk which fully regulated handlers do not face. The witness also acknowledged that there are costs associated with managing marketing risk, including the disposal of surplus milk production. However, the witness was of the opinion that these costs are more than covered by the competitive advantages that exist by being exempt from the pooling and pricing provisions of the order. One example the witness provided was that a producer-handler can balance its supply by selling fluid milk products into an unregulated area such as California.

A witness appearing on behalf of Shamrock Farms, which is affiliated with Shamrock Foods, testified in

support of Proposal 3. Shamrock Farms milks 6,500 cows and is located in Maricopa County, Arizona. The witness testified that Shamrock Farms has always been a pooled producer on Order 131 and its predecessor order. The witness asserted that Sarah Farms operates dairy farms with approximately 10,000 to 12,000 milking cows. While the witness conceded the lack of hard data to confirm this assertion, the witness arrived at this estimate of farm size by counting the number of milk tankers per day that delivered to the Sarah Farms' plant in Yuma, Arizona.

A consultant witness appearing on behalf of Dairy Farmers of America (DFA), proponents of Proposals 1, 2, and 3, had prepared a study that analyzed and compared the value of raw milk to a large producer-handler with the cost of milk to fully regulated handlers and described the economic impact of competition between these two business entities. The study conducted by this witness was based on a proprietary database of 150 milk processing plants owned by businesses for which this witness' company performed accounting and other consulting services. According to the witness, 20 plants were selected as being representative of the costs for six different size classes of bottling plants. The witness explained that the plant cost data was adjusted by applying regional consumer price index (CPI) factors as published by the U.S. Department of Labor. According to the witness, this method of adjusting data, the selection of relevant plants, the analytic methods employed in conducting the study, and the interpretation of the study results were all based on Generally Accepted Accounting Principles (GAAP).

The DFA consultant witness acknowledged that while the study of plant costs was based on actual plant data acquired from fully regulated handlers, the study did not include data from plants located in either the Order 124 or Order 131 marketing areas. The witness also acknowledged that the data for the smallest plants in the study were taken from producer-handler plants located in western Pennsylvania, an area not regulated by a Federal milk marketing order. The witness also explained that the study's actual data could not be offered for inspection and examination in this proceeding because individual plant cost and related information were proprietary, adding that this also explained why the data used in the study were averaged. The witness further testified that the selection of appropriate plants for inclusion in the study from all of the plants in the witness' proprietary database was based on professional judgment and experience.

The DFA consultant witness explained that the analysis of the data derived for the Order 124 and 131 marketing areas suggests that as plant volumes increase per unit, processing costs decrease and that the highest per unit processing costs are found at the smallest plant sizes. At large plant sizes, the witness contrasted, a processor, regardless of regulatory status, can increase milk processing volume at a nominal additional per unit cost.

Relating an additional example of the study's findings, the DFA consultant witness testified that, other things being equal, a hypothetical plant bottling 3 million pounds of milk per month in 2-gallon pack containers would have per unit processing costs that were significantly higher than a plant producing 20 million pounds of milk per month in the same size container packs. In addition, the witness testified that the study suggests that where a large producer-handler and a handler subject to the pooling and pricing provisions of an order compete for route sales, the producer-handler will always have a price advantage which could be as large as the difference between the Federal order Class I price and the order's blend price. The witness also said that the examination across all types of retail outlets reveals that a producer-handler will always have a price advantage in competing with fully regulated handlers.

The consultant witness for DFA provided a comparative cost analysis of servicing a warehouse store account by a fully regulated fluid milk plant and a large producer-handler using actual retail prices for 2-percent milk in Phoenix, Arizona, during January through June of 2003. The witness testified that based on the study's data and assumptions, a large producer-handler can service such an account and return a substantial above-market premium over the producer blend price. However, the study reveals that the handler paying the Class I price for its raw milk supply will have little or no margin, the witness contrasted. The producer-handler's raw milk cost advantage, the witness said, allows it to service these stores profitably at a price that cannot be matched by a fully regulated handler. The witness concluded that producer-handlers are in a position to acquire any account they choose to service by offering a price which the regulated plant cannot meet.

In other testimony, the DFA consultant witness provided a pro-forma income statement for a regulated handler in Order 124 developed using certain assumptions about costs, prices and income. The witness demonstrated through an analysis of the pro-forma income statement that a large producer-handler would be able to successfully compete with fully regulated handlers if regulated. The witness concluded from this analysis that a successful producer-handler would be economically viable even if it were subject to the order's pooling and pricing provisions.

The DFA consultant witness testified that the cost data used in the study's pro-forma income statement example was generated using statistical methods based on one month's representative data for similar sized regulated handlers and assumed that producer-handlers and regulated handlers employed union labor and operated within collective bargaining agreements. The witness testified that based on own business experience, the characterization of labor costs would be representative of large fully regulated handler operations in Order 124 and 131 marketing areas. In contrast, the witness indicated no direct knowledge of the costs of labor employed by producer-handlers in Orders 124 or 131. The witness did conclude that use of non-union labor by producer-handlers would provide them with a clear cost advantage over similar or larger size fully regulated handlers that typically employed unionized labor.

The DFA consultant witness was of the professional opinion that current Federal order regulations provide producer-handlers with a significant cost advantage that cannot be matched by fully regulated handlers that are subject to pooling and pricing regulations. If the proposal to place a 3 million pound per month volume limit on a producer-handlers route disposition is adopted, it will eliminate what the witness described as an unfair economic advantage for large producer-handlers while serving to protect a more modest pricing advantage for small producer-handlers.

In additional testimony, the consultant witness for DFA acknowledged the difficulty in reconciling the 150,000 pound per month route disposition limit established for exempt plants with the proposed 3 million pound per month limit for producer-handlers. According to the witness, the difference in these two limits are for two distinctly different entities and can be rationalized by the Department by acknowledging a value commensurate with milk production risks incurred by a producer-handler that is not incurred by handlers who buy milk from dairy farmers. A handler who buys milk from

dairy farmers does not incur the production risks associated with operating a farm enterprise, the witness said. In this regard, the witness acknowledged that the study focused only on plant processing costs and not on the cost of producing milk in the farm enterprise function of a producer-handler.

A witness representing Dean Foods (Dean) testified in support of proposals establishing a volume limit on producer-handler route disposition. The witness testified that while Dean Foods does not operate bottling plants in either Orders 124 or 131, they do operate fluid milk plants in many States regulated by Federal milk marketing orders and in areas not subject to Federal milk order regulation. The witness testified that where Dean faces competition from plants that do not pay regulated minimum prices, Dean is affected. The witness stressed that milk bottling plants need to have equitable raw milk costs for the Federal milk order system to remain valid.

The Dean witness said that competitiveness and efficiency are not necessarily a function of processing plant size. On this theme, the witness provided an example where a small, fully regulated milk bottler in Bryan, Texas, successfully bid to supply a Texas state prison against a much larger Dean plant. The witness testified that the Bryan plant had processing capacity of less than 3 million pounds per month but was more efficient than the Dean plant and that because of its management structure, it could adjust more quickly to changing market conditions.

A witness appearing on behalf of the National Milk Producers Federation (NMPF) testified in support of Proposals 1 and 3. The witness was of the opinion that productivity increases resulting from technological advances and the growth of dairy farms enable large producers to capture sufficient economies of scale in processing own-farm milk and thereby compete effectively with established, fully regulated handlers. In light of this, the witness testified that such producers can disrupt the orderly marketing of milk in a market, adding that dairy farmers "turned producer-handlers" could grow across a market causing even greater disruption to orderly marketing in other Federal milk marketing orders.

The witness asserted that NMPF's own analysis, and a plant study by Cornell University revealed that larger fluid milk bottling plants have exhibited decreasing processing costs on a per gallon basis as the size of processing facilities increase. The witness explained that as the scale of processing plants increase, average processing costs tend to remain fairly constant, with the lowest per unit cost levels being exhibited over a relatively wide range of processing capacities. The witness testified that the lower per unit processing cost advantages of larger plant sizes tend to be greatest for very large processing plants rather than among smaller plants. The witness said that significant cost and other competitive advantages attributed to economies of scale in fluid milk processing become evident at about the 3 million pound per month processing level.

According to the NMPF witness, the exemption of producer-handlers from the pooling and pricing provisions of Orders 124 and 131 allows producer-handlers to effectively pay the equivalent of the blend price for milk at their plants, a price lower than the Class I price that fully regulated competitors pay. The witness testified that by using the economic concept of "transfer pricing," the maximum price that a producer-handler "pays" for transferring milk from its farm production enterprise to its processing enterprise can be estimated even though the producer-handler does not actually sell raw milk to itself. According to the witness, transfer pricing in the context of the producer-handler issue, predicts that the price of milk assigned to milk from the producer-handler farm enterprise essentially becomes the price at which milk could be sold to a regulated handler—the Federal order blend price. Accordingly, the witness asserted that a producer-handler's advantage in raw milk procurement for processing, as compared to fully regulated handlers, would be the difference between the Federal order Class I price and the order's blend price.

The NMPF witness testified that their analysis reinforces the findings of the consultant witness for DFA regarding the magnitude of the pricing advantage producers-handlers enjoy over handlers who are subject to the pooling and pricing provisions of a Federal order. While noting that the DFA consultant witness' study used aggregated data that does result in a significant loss of information for analytical purposes, the witness stressed that even with this limitation it nevertheless remains the best data available to rely upon.

The NMPF witness was of the opinion that the producer-handler exemption from an order's pooling and pricing provisions also creates inequity among producers because it reduces the amount of milk pooled as a Class I use of milk, which in turn, lowers the total revenue of the marketwide pool to be shared among pooled producers. According to the witness, this threatens orderly marketing. The witness related that farms with over 3 million pounds of monthly production represent about 15 percent of the U.S. milk supply and may represent some 40 percent of U.S. fluid milk sales. According to the witness, the steadily increasing number of farms with this magnitude of monthly milk production suggests that large producers could exploit the producer-handler provision and thus further erode equity to both producers and handlers across the entire Federal milk marketing order system.

The NMPF witness stated that the 3 million pound per month route disposition limit proposed for producer-handlers as part of Proposals 1 and 3 is also consistent with the promotion assessment exemption of the Fluid Milk Promotion Program. According to the witness, the promotion exemption limit set by Congress was based on the impact that a handler had in a marketing area. Below 3 million pounds per month route disposition, the witness said, the impact of an individual handler is negligible and therefore rationalizes why smaller handlers are exempt from fluid milk promotion assessments.

A witness appearing on behalf of DFA testified in support of Proposals 1, 2, and 3. The witness viewed the exemption of producer-handlers from the pooling and pricing provisions of Federal orders as a loophole that threatens the economic viability of the Federal milk order system and the economic well-being of pooled producers. This witness, like the NMPF witness, testified that a growing interest by large dairy farmers in becoming producer-handlers is a major factor in DFA's interest in seeking to amend the producer-handler definition in Order 124 and 131. The witness testified that the exemption from the pooling and pricing provisions of these orders provides producer-handlers with a competitive advantage over fully regulated handlers by effectively permitting producer-handlers to purchase milk at an internal price at or below the Federal order blend price while fully regulated handlers must pay the usually higher Class I price for milk. According to this DFA witness, the difference between the Class I price and the Federal order blend price represents a significant windfall generated solely by the regulatory exemptions accorded to producer-handlers.

The DFA witness summarized that the proposed 3 million pound per month limitation on route disposition is based

on four considerations. According to the witness, the proposed limit is: (1) Consistent with the minimum volume of milk sales that triggers the fluid milk promotion assessment for handlers; (2) the level at which producer-handlers achieve competitive equity with fully regulated handlers in terms of plant processing efficiency; (3) the level of route disposition that has a significant impact on the pool value of milk; and (4) a significant impact on the order's pooled producers and fully regulated handlers. The witness indicated that if a producer-handler's volume is sufficient to reduce a pool's value by a penny (one-cent) per hundredweight it is significant and is of sufficient magnitude to warrant ending producer-handler exemption from the pooling and pricing provisions of the orders. The witness also concluded from the study conducted by the consultant witness for DFA that when a producer-handler reaches a 3 million pound per month distribution level, not only does the producer-handler reach similar plant processing cost efficiencies but it is also of sufficient size to service a considerable number of retail outlets on a competitive par with fully regulated handlers. According to the witness, continuing the exemption from an order's pooling and pricing provisions beyond the 3 million pound sales volume level causes serious market disruptions.

The DFA witness also testified that the exemption of producer-handlers from the pooling and pricing provisions of the orders is encouraging large producers to consider becoming producer-handlers in both Orders 124 and 131 and in other Federal order marketing areas. As an example, the witness testified that some retail outlets now seek packaged fluid milk supplies from producer-handlers in an effort to obtain lower cost milk supplies. The witness was of the opinion that without a limit on route disposition volume, producer-handlers will displace pooled producers and fully regulated handlers as the dominant suppliers of fluid milk not only in the Order 124 and 131 marketing areas, but ultimately throughout all other Federal milk marketing areas. The witness cautioned that the potential for the growth of producer-handlers gives rise to considering lowering Class I milk prices as a means to counter the competitive price advantage that producer-handlers are afforded by regulatory exemption from pooling and pricing provisions.

The DFA witness testified that the current producer-handler definition creates market disorder because it disrupts the flow of Class I milk from pooled producers to regulated handlers. In addition, the witness testified that pooled producers effectively subsidize the balancing costs of producer-handlers. In the opinion of the witness, these outcomes are destabilizing and are producing disorder in both Orders 124 and 131. In further explanations of these points, the witness expressed concern about the loss of Class I revenue that would otherwise accrue to pooled producers. As an example, relying on Market Administrator data in making professional inferences, the witness testified that the largest producer-handler in the Order 131 marketing area, Sarah Farms, had monthly route disposition in the range of 12.1 to 19.1 million pounds. According to the witness, the value of the sales revenue lost to the Order 131 pool by not subjecting Sarah Farms to the pooling and pricing provisions of the order averaged some $317,000 per month, or the equivalent of 12.5 cents per cwt.

The DFA witness testified that the producer-handler price advantage over fully regulated handlers provides a powerful incentive for customers to purchase milk from producer-handlers rather than fully regulated handlers. The witness testified that producer-handlers have as much as a 15-cent per gallon advantage over fully regulated handlers in Order 131. According to the witness, the advantage is based on the difference between the Order 131 Class I price and the order's blend price which ranged from 15.9 to as much as 18.3 cents per gallon during the period of January 2000 through July 2003.

The DFA witness related that wholesale milk buyers base procurement decisions on tenths and even hundredths of a cent difference in the price per gallon, indicating that price differences of more than 15 cents per gallon overwhelmingly favors the producer-handler in head-to-head price competition. The witness testified that lower-priced packaged fluid milk products from producer-handlers is used by wholesale buyers of milk as leverage in daily price negotiations with fully regulated handlers and is a form of disorderly marketing. Such market disorder, the witness said, causes all processors to receive lower prices for their packaged fluid milk products.

The DFA witness also expressed the opinion that the plant costs faced by a large producer-handler are similar to those faced by fully regulated handlers even though the witness had no direct knowledge of individual producer-handler businesses in Order 124 or 131. While agreeing with the characterization that producer-handlers are a single and seamless milk production and processing enterprise, the witness asserted that higher balancing and operational costs attributable to producer-handler operations are not significantly different than those associated with fully regulated handlers of the same processing plant size. The witness further asserted that the producer-handler price advantage combined with the ability to increase production volume at negligible additional costs per unit exaggerates the advantage to a point where a producer-handler can increase market share nearly at will.

Through a series of examples depicting scenarios of different plant sizes, the DFA witness testified that producer-handlers with 80 and 90 percent Class I utilization could operate profitably in spite of higher balancing costs associated with operating as a producer-handler. The witness explained that a large producer-handler experiencing increasing returns to its operation could continue to grow in size until it controlled a substantial share of the Class I market. The witness testified that a producer-handler with route disposition of 3 million pounds per month could supply a small regional grocery chain, but likely would not be able to diversify its marketing risk with sales to other customers.

According to the DFA witness, if producer-handlers are allowed to gain Class I sales without restraint, fully regulated handlers and pooled producers would likely come to view Federal milk marketing orders as ineffective. According to the witness, under these conditions producers possibly would seek to terminate the orders. The DFA witness characterized this potential scenario as a form of market disorder.

The DFA witness said that rising interest in the producer-handler option by large dairy farmers challenges the long-term viability of the entire Federal milk order system. The witness did acknowledge that no new producer-handler operations have entered either the Order 124 or 131 marketing areas in recent years. The witness also acknowledged that market information kept by the Department shows that the volume of sales by producer-handlers had declined nationally from 1.47 billion pounds per year to 1.16 billion pounds per year between 1988 and 1998.

The DFA witness offered modifications to Proposal 1 that would also be applicable to Proposal 3. Basically, in addition to limiting a producer-handlers route disposition to less than 3 million pounds per month, the modification made extensive

changes in terminology as to how producer-handlers are defined. The intent of these modifications, the witness said, is to clarify that the burden of proof and the responsibility for providing all the details to substantiate proof to the Market Administrator for producer-handler status rests with the producer-handler.

The DFA witness testified that Market Administrators will continue to be relied upon by Federal orders to use their discretion in determining producer-handler status. According to the witness, the proposed modifications for the producer-handler definitions are expected to provide flexibility for a Market Administrator to investigate and audit proposed producer-handler operations and to ensure qualification requirements are met. In addition, the witness said that if Proposals 1 and 3 are adopted, it was reasonable that existing producer-handlers in Orders 124 and 131 be given a period of time to adjust their operations to the proposed producer-handler requirements.

Another witness appearing on behalf of DFA testified in support of Proposals 1 and 3 on the basis that small and average-sized dairy farmers, including producer-handlers with milk production below 3 million pounds of milk per month, have higher production costs than larger dairy farms. The witness said that very large dairy farms tend to have management expertise and business sophistication, access to capital, access to veterinary services, and economies of size and scale that tend to lower their per unit costs of milk production. This DFA witness testified that a dairy farm would need approximately 1,800 cows to achieve a 3 million pound per month level of production available for bottling and route disposition.

The DFA witness did not know if 3 million pounds of route disposition per month was the precise number above which producer-handlers should become subject to the pricing and pooling provisions of Orders 124 and 131. Similarly, the witness did not know what economic impact adopting Proposals 1 and 3 would have on producer-handlers in the respective marketing areas. The witness did relate having knowledge of interest being expressed by dairy farmers who had monthly production in excess of 3 million pounds per month seeking possible producer-handler status.

A witness representing Northwest Dairy Association (NDA) testified that they market the milk of 603 milk producers traditionally associated with Order 124. The witness said that NDA also is the parent company of WestFarm Foods, an operator of three distributing plants located in Seattle, Washington, and Portland and Medford, Oregon. The witness added that NDA also operates four milk manufacturing plants in the Order 124 marketing area. The witness testified that while NDA does not have a direct connection to Order 131, it indirectly shares similar concerns with the proponents of Proposal 3 in that they share a border with California and share similar concerns regarding the Federal and State milk order systems. In addition, the witness noted that Order 124 has the second largest volume of producer-handler milk marketings of any Federal order—second only to Order 131.

The NDA witness was also appearing on behalf of Tillamook County Creamery Association, Farmers Cooperative Creamery, Inland Dairy, and Northwest Independent Milk Producers, herein after collectively referred to as NDA, in support of Proposals 1, 2, and 3. The witness testified that the producer-handler exemption from the pooling and pricing provisions of Order 124 provides an unfair competitive advantage to producer-handlers at the expense of pooled producers and fully regulated handlers. According to the witness, the historical justifications for exempting producer-handlers because such entities are small operators without significant market impact on prices and they do not provide significant competition with fully regulated handlers are no longer warranted. The witness testified that producer-handlers in Order 124 are now a significant force in the marketing area and are likely to continue to increase in size and market significance. The witness noted that Congress had effectively supported the Department's long-standing producer-handler exemption from pooling and pricing provisions of Federal orders since the 1960's. The witness stated that only a few large producer-handlers currently operate in the Order 124 marketing area.

The witness indicated agreement with other proponent testimony that a producer-handler's raw milk cost was the Federal order blend price. According to the witness, the blend price represents an alternative market price available to a producer-handler. Accordingly, the witness asserted, the only reason a producer-handler would seek to continue an exemption from an order's pooling and pricing provisions would be to maintain a competitive advantage. The witness related that from a producer viewpoint the competitive advantage is the ability to retain the entire Class I value and from the handler viewpoint, the competitive advantage is not accounting to the pool at the order's Class I price. The witness estimated the producer-handler advantage over the period of January 2000 through October 2003 to be the difference between the Order 124 Class I and blend prices which averaged about 15.4 cents per gallon or $1.79 per cwt.

The NDA witness asserted that during a period of rapidly rising milk prices, producer-handlers also have a competitive advantage by being able to enter into long-term fixed price contracts in a way fully regulated handlers cannot. In the opinion of the witness, by offering relatively long-term fixed price contracts, a producer-handler may be able to attract and retain customers using a pricing policy unavailable to fully regulated handlers. The witness stated that this represents a form of disorderly marketing.

According to the NDA witness, producer-handlers use pooled producers and pooled handlers to balance their milk supply. The witness testified that "balancing off of the pool" involves producer-handlers selling milk to retail outlets until their milk supply is exhausted with retail outlets buying additional milk supplies from fully regulated handlers to meet the shortfall. According to the witness, the fully regulated handler is not only the residual milk supplier but also effectively has the burden of balancing the Class I needs of the market not fulfilled by the producer-handler. Consequently, these burdens are transferred to the market's pooled producers by the regulated handlers. According to the witness, this tactic allows a producer-handler to maximize its revenue by obtaining the highest price available while essentially avoiding any costs of surplus milk disposal in lower-valued uses. This advantage is amplified, the witness said, when a producer-handler is able to balance its milk production and sales into areas not regulated by a Federal milk marketing order.

The NDA witness testified that the proposed 3 million pound per month route disposition limit for producer-handlers is also based on political considerations and on an intuitive notion. The witness explained that processing plants smaller than 3 million pounds per month are exempted by Congress from the 20-cent per hundredweight processor-funded fluid milk promotion program. As a result, the witness related that the proponents are of the opinion that this level would also prove to be acceptable in the context of its application to handlers regulated under the terms of a milk

marketing order. In addition, the witness testified that NDA's subsidiary's (WestFarm Foods) own study of processing plant size and costs suggests that the DFA plant size and cost study may actually understate when plant processing cost efficiencies are gained. According to the witness, NDA's study suggests that this occurs at about the 2.5 million pounds per month level indicating that plants of this size and larger lower their processing costs by about 10 cents per gallon. The witness related that a plant processing 3 million pounds per month would have a cost savings of approximately 11.4 cents per gallon. Accordingly, the witness concluded that producer-handler plants that dispose of Class I milk products in excess of 3 million pounds per month should therefore become subject to the pooling and pricing provisions of Order 124. The witness said this would ensure that all similar handlers would have the same raw milk costs.

The NDA witness also testified in support of Proposal 2. The witness viewed this as preventing producer-handlers from expanding the benefit of their regulatory status by balancing their supply on the market's pooled producers and at the same time tending to ensure that fully regulated handlers would not become residual suppliers of fluid milk products to the market.

The NDA witness speculated that the investment required for a processing plant to produce only milk packaged in gallons is relatively small when compared to a very large dairy farmer's existing investment in land, livestock, and equipment. The witness was of the opinion that the potentially higher returns on the additional investment for a processing plant producing only gallon containers of packaged fluid milk would be attractive to very large dairy farmers such that it would encourage large producers to become producer-handlers. According to the witness, such a scenario threatens the economic attractiveness of the Federal order program and the prevailing structure of the dairy industry.

While the NDA witness testified only to conditions affecting Order 124, the witness did indicate fluid milk marketing has been undergoing considerable structural changes for many years that are national in scope. The structural changes taking place throughout the dairy industry are most markedly exhibited by consolidation in the production, processing, marketing, and distribution of dairy products, the witness said. As an example, the witness illustrated that Vitamilk's decision to go out of business was a direct result of the acquisition of its two largest grocery store customers by Safeway and Kroger. The witness noted that Safeway and Kroger are both national companies that also process milk as fully regulated handlers for their own stores and other customers. The witness was of the opinion that Vitamilk could not find other profitable business because it was unable to compete effectively with existing producer-handlers and other competitors in the Pacific Northwest after losing a significant portion of its business by the Safeway and Kroger acquisition of their customers. The witness was of the opinion that as consolidation continues within the dairy industry, a Class I handler may find a declining number of marketing alternatives and thus give rise to market disorder. The witness was of the opinion that fully regulated handlers could be displaced by producer-handlers.

The NDA witness testified that the rise of warehouse and very high volume "super stores" also has contributed to the structural changes in the dairy industry with packaged fluid milk products being supplied as cheaply as possible. According to the witness, "super stores" and warehouse stores are able to exert market power in obtaining the lowest market prices available for fluid milk products at the wholesale level.

The NDA witness testified that there are approximately 800 pooled producers in the Pacific Northwest order. According to the witness, all of these producers are small businesses who would receive a benefit in the range of 2.4–4 cents per hundredweight for their milk if Proposal 1 were adopted. An increase in producer income would result, the witness said, from the sharing of Class I revenue by pooling the largest producer-handlers in the marketing area who individually have route disposition in excess of 3 million pounds per month. According to the witness, the additional total Class I revenue that would accrue to the Order 124 pool would be in the range of $2.8–$4.0 million per month.

The NDA witness addressed concerns regarding instances where handlers and dairy farmers have made investments based on the provisions of a Federal milk order. In rationalizing concerns about the impact a change in regulation may have on business decisions using current order provisions, the witness noted several past Federal order decisions where regulatory changes had an impact on persons that had built and designed their business practices on existing order provisions. For example, the witness noted that the elimination of the "bulk tank handler" provision in the Western milk marketing order by a tentative final decision would have effectively reduced the value that proprietary bulk tank handlers could assign to their facilities. In addition, the witness related how the implementation of Federal milk order reform eliminated individual handler pools and reduced the value of those investments. According to the witness, these changes occurred as a matter of course with the operators of those facilities absorbing the actual costs of the regulatory changes. The witness also testified that the elimination of "double dipping" in the Upper Midwest, Central, Mideast, Northeast, Pacific Northwest, and Western orders had negative impacts on the investments made by operators who were able to take advantage of those regulatory features before they were changed. These changes were made without compensation to those operators who engaged in the practice of double dipping.

The NDA witness testified that opponents to placing a route disposition limit on producer-handlers incorrectly argue that as vertically integrated enterprises, producer-handlers face more risks and higher costs than do pooled producers and fully regulated handlers. The witness asserted that the Federal order program does not incorporate a value for risk in its regulatory framework. In addition, the witness noted that some producer-handlers are continuing to stay in business even as the total number of producer-handlers has declined in the last several years in the Order 124 marketing area. The witness related historical data from Market Administrator sources indicating that 10 of the 11 producer-handlers which have gone out of business in recent years in the Order 124 marketing area had monthly route disposition of less than 3 million pounds.

In other testimony, the NDA witness conceded that no handler is exempt from, or subject to, Federal milk order regulations on the basis of plant operating costs. In addition, the witness testified that a Federal milk order which had many producer-handlers supplying 10 percent of the Class I market would not represent a disruptive influence or create market disorder if the market share of the producer-handlers was stable (did not grow). Also, the witness indicated that if the market share supplied by producer-handlers was stable, but the number of producer-handlers supplying that market decreased, the impact of producer-handlers on the marketing conditions in the area would not be considered disorderly.

The NDA witness testified that a route disposition volume below 3 million pounds per month does not tend to lend a price or cost advantage to producer-handlers. The witness said that the impact of a producer-handler on a marketing area's blend price is directly related to the size of the marketing area. In this regard, the witness related that a 3 million pound milk bottling plant in the Upper Midwest Federal order, for example, would have a deminimus impact on that order's blend price but nevertheless maintained that a 3 million pound route disposition limit was a reasonable trigger to cause producer-handlers to become subject to the order's pooling and pricing provisions. The witness offered that an appropriate limit could be more than 3 million pounds, possibly as high as 4-million pounds, while still reasonably meeting the overall objectives sought in Proposal 1. The witness cautioned that setting a limit that is too low—for example at 500,000 pounds per month—would essentially close the marketing and regulatory option of market entry as a producer-handler.

In agreeing with other testimony, a 3 million pound limit was consistent with what the NDA witness characterized as a political settlement reached with the Department in determining when handlers would become subject to a fluid milk promotion program assessment. According to the witness, important consideration was given to the threat of handlers with route disposition of less than 3 million pounds per month being able to band together and vote to terminate the fluid milk promotion program. The witness indicated that a 3 million pound level is also a coincidentally useful volume as it supports the DFA's consultant witness' plant size and cost study and analysis.

A witness appearing on behalf of NDA's WestFarm Foods testified in support of Proposals 1 and 2. The witness provided data comparing the variable costs of WestFarm's Medford, Oregon, bottling plant that processes 12 million pounds of milk per month with a hypothetical plant processing less than 3 million pounds per month. The witness testified that the results of this comparison were similar to the results of the DFA's study. The witness testified that WestFarm Food's study similarly concluded that as plant sizes increase, per unit processing costs tend to decrease.

The NDA witness testified that WestFarm Foods has lost significant sales of packaged fluid milk products to grocery stores and school milk contracts to producer-handler competitors. The witness reported that WestFarm Foods competed with one producer-handler in the Pacific Northwest for shelf space in 11 different retail outlets. According to the witness, the total volume of these sales was approximately 8-million pounds per year. The witness indicated that the producer-handlers was able to offer longer term, fixed price contracts to retailers and thereby remove price volatility. The witness said that fully regulated handlers, like WestFarm Foods, do not have this ability because they must pay the Federal order Class I price which fluctuates every month.

The WestFarm Foods witness asserted that producer-handlers in Order 124 offer prices for fluid milk products that range from 15 to 45 cents per gallon cheaper than milk offered by fully regulated Class I handlers, depending on the monthly changes in the order's Class I price. The witness further asserted that producer-handlers are able to displace the Class I use of milk on the Order 124 pool by selling fluid milk products into Alaska, an area not subject to order regulation, at prices below the Class I price. According to the witness, when a producer-handler displaces potential fully regulated handler sales in Alaska, the fully regulated handler's milk is forced to a lower use value which lowers the blend price paid to pooled producers. The witness asserted that if producer-handler competition was absent in Alaska, WestFarm Foods would be the dominant supplier to customers in that market. While noting that producer-handlers continue to provide significant competition to WestFarm's bottling operations, the witness testified that none of the producer-handlers are selling fluid milk products below the Federal order minimum Class I price.

The WestFarm Foods witness testified that WestFarm Foods must meet a specified level of Class I sales to qualify all of its milk receipts for pooling on Order 124. According to the witness, producer-handlers in the marketing area have become very aggressive sellers of milk and have increased their sales volume to the point where fully regulated Class I handlers are having difficulty qualifying all of their producer milk receipts for pooling on the order. The witness attributed such pooling difficulties to the lack of growth in the Class I market combined with growing producer-handler route disposition. In addition, the witness testified that NDA charges its customers an over-order premium of between 30 and 45 cents per cwt.

A witness appearing on behalf of Dean Foods offered testimony in support of Proposals 1, 2, and 3. The witness asserted that exemptions to pooling and pricing provisions of Federal milk marketing orders should be few. According to the witness, the basic underlying objectives of an order are to efficiently assure an adequate supply of milk for fluid uses and to enhance returns to dairy farmers. The witness said that the Federal milk orders achieve these objectives by: Using a classified pricing plan; setting minimum class prices; marketwide pooling of the classified values of milk which returns a blend price to dairy farmers; and verifying handler reporting through audits. The witness stressed that absent uniform and universal application of an order to market participants, some market participants will reap competitive advantages due solely to selective exemption from regulation rather than for business reasons.

According to the Dean witness, only a few types of firms have been historically exempted from the pooling and pricing provisions of Federal orders which include government and university facilities, small processors, and producer-handlers—characterizing the producer-handler exemption as one of administrative convenience. The witness was of the opinion that producer-handlers should only be exempt from the pooling and pricing provisions of Federal orders when the effect of providing a regulatory exemption has a negligible effect on market participants. In this regard, the witness was of the opinion that a penny or more in the order's blend price was significant. Relating this opinion to conditions in Order 131, the witness determined that the order's blend price would be affected by a penny when the route distribution of a producer-handler was at the 950,000 pounds per month level.

The Dean witness testified that a dairy farmer operating as a producer-handler can receive a higher price than the alternative of an order's blend price, depending on the internal transfer price. The witness explained that a processor operating as a producer-handler essentially has the ability to "acquire" milk at a transfer price as the milk moves from the farm enterprise to the processing enterprise. In this regard, the witness related that such a transfer price can be represented by the difference between the order's blend price and the Class I price. However, the witness conceded that if the producer-handler is viewed as a single seamless entity, the application of transfer pricing may reveal less information than would an evaluation of all costs and revenues in determining the extent of the competitive advantage that a producer-

handler may enjoy by regulatory exemption from the pricing and pooling provisions of an order.

The Dean witness also noted that using an internal transfer price may be of limited value as it does not involve price discovery achieved through arms-length transactions. However, the witness was of the strong opinion that regardless of a measure of operating performance or efficiency, a producer-handler would always have a competitive advantage over a fully regulated handler. The witness asserted that the competitive advantage which accrues to the producer-handler is the difference between the order's Class I price and the blend price. In this regard the witness was of the opinion that producer-handlers would always be able to compete more effectively than fully regulated handlers because of their exemption from the pooling and pricing provisions of an order.

The witness offered an opinion as to why there has not been significant market entry of new producer-handlers if being exempt from the pricing and pooling provisions of an order confers significant competitive advantages over fully regulated handlers. In this regard, the witness offered that resources do not move easily between different enterprises within the dairy industry because of cost and regulatory risk. The witness also offered the opinion that if large companies, such as Kroger, attempted to become a producer-handler, legislative changes to prevent such outcomes would quickly result.

The Dean Foods witness was of the opinion that the notion of disorderly marketing should be seen to exist when the regulatory terms of trade between competitors are different. Along this theme, the witness testified that in Order 131, disorderly marketing conditions exist because the terms of trade between competitors are not the same, citing specifically the regulatory exemption from pooling and pricing for producer-handlers and no similar exemption for their fully regulated competitors. However, the witness contrasted the growing presence and market share, in the fluid milk distribution by producer-handlers in Order 131 with the stable market share of producer-handlers in Order 124.

A witness appearing on behalf of Alan Ritchey, Incorporated (ARI), a family-owned dairy farm business located in Texas and Oklahoma, testified in opposition to limiting route disposition of producer-handlers as advanced in Proposals 1 and 3. The witness testified that ARI marketed its milk through DFA because DFA is the only available buyer in the area. The witness testified that ARI opposed Proposals 1 and 3 because it would limit the option of becoming a producer-handler for those dairy farmers seeking alternative marketing options for their milk. The witness characterized the dairy industry as consolidating and forcing dairy farmers to consider abandoning their traditional relationships with cooperatives. The witness viewed becoming a producer-handler as a high-risk business venture but an important alternative that should continue to be available to dairy farmers.

The ARI witness also testified that cooperatives with membership and market presence which is national in scope have market power that may be reducing the revenue of individual dairy farmers who have no other milk marketing alternatives than through a cooperative. In the opinion of the witness, preserving the existing producer-handler definition provides dairy farmers with an alternative mechanism to market their milk directly and retain all of the revenue earned. In this regard, the witness indicated that ARI could see no reason why the route disposition of a producer-handler should be limited to 3 million pounds per month while regulated handlers have no limitations on route disposition.

A witness appearing on behalf of Baum's Dairy (Braum's), a producer-handler located in Tuttle, Oklahoma, testified in opposition to Proposals 1 and 3. The witness testified that Braum's milks approximately 10,000 cows and processes its milk production into fluid milk, and cultured and ice cream products. The witness said that all of the milk and milk products produced by Braum's Dairy are marketed exclusively through its own retail outlets. The witness further testified that Braum's does not have sales to wholesale customers and maintained that they do not directly compete with fully regulated handlers.

The Braum's witness is of the opinion that Proposals 1 and 3 seek to eliminate competition by producer-handlers for the benefit of fully regulated handlers and will result in many producer-handlers becoming fully regulated. The witness also was of the opinion that Proposals 1 and 3 were advanced as a means to ultimately seek amending the producer-handler provision in all Federal milk orders even though the provision has worked well for the past 66 years.

The witness indicated that Braum's had not always been a producer-handler but due to Federal order pooling rules for out-of-area milk that were detrimental to Braum's interests, the decision was made to become a producer-handler. The witness said that in addition to the problems posed by pooling rules when the company was a fully regulated handler, Braum's also attributed difficulty acquiring a reliable and sufficient quantity of high-quality milk on a timely basis as a reason for becoming a producer-handler.

A witness appeared in opposition to Proposals 1 and 3, on behalf of Mallorie's Dairy, Edalene Dairy, and Smith Brothers Dairy, all producers-handlers in the Order 124 marketing area. The witness was the owner of the Pure Milk and Ice Cream Company (Pure Milk), a large Texas producer-handler that is no longer in operation. This witness, hereinafter referred to as the SBEDMD witness, testified that Pure Milk was located in Waco, Texas, and had route disposition across a large part of Texas that is now part of the Southwest milk marketing area. According to the witness, Pure Milk was the combination of a profitable dairy farm whose milk was pooled on the Texas order and a profitable fluid distributing and manufacturing plant that produced an array of various fluid milk products, ice cream and ice cream mixes. The witness was of the opinion that limiting route disposition would render the option of becoming a producer-handler an unattractive business option under any circumstances. The witness stressed that without the ability to grow or otherwise attain economies of size and scale, the producer-handler business model could never be successful.

The SBEDMD witness testified to participating in a Federal milk order hearing that similarly sought to limit the route disposition of producer-handlers under the Texas order in 1989. According to the witness, the argument advanced at that time was that the competitive advantage of being exempt from the order's pooling and pricing provisions enjoyed by large producer-handlers would undermine the economic viability of the Federal milk order program by causing harm to pooled producers and fully regulated handlers. The witness indicated that Pure Milk, operating as a producer-handler, failed not as a result of any competitive advantage arising from exemptions from pooling and pricing provisions but from the unique risks and costs associated with operating as a producer-handler.

The SBEDMD witness testified that for a time, Pure Milk was convinced that there was an advantage to operating as a producer-handler instead of operating as a pooled producer or a fully regulated handler. The witness related that this

view was held until Pure Milk lost a major customer that caused it to become consistently unprofitable. In this regard, the witness testified that Pure Milk had an account with a very large grocery chain in Texas and explained that when the large grocery chain customer learned of Pure Milk's involvement in the 1989 milk order hearing the account was lost. The witness characterized and described this business loss as an example of the regulatory risk of being a producer-handler.

The SBEDMD witness also testified that Pure Milk was unable to obtain and retain significant long-term contracts except for some school business and prison sales. The witness said that as a producer-handler, there was simply too much marketing risk and insufficient long-term contract business to justify the additional required investment in plant and equipment to operate profitably. The witness testified that as a result of losing a large retail account after being its supplier for two years to a fully regulated handler, Pure Milk lost sufficient revenue and decided to end operations as a producer-handler.

The SBEDMD witness also related that in order to operate its plant profitably, Pure Milk would have had to achieve a volume of 1.2 million pounds per month, a level it never attained. In addition, the witness said, the company was never able to contain costs to a level at which it could compete effectively with large fully regulated handlers in the marketing area. The witness testified that Pure Milk's fully regulated competitors had larger plants and operated 24 hours a day, 7 days a week, while Pure Milk's plant, in contrast, operated about 17 hours a day, 5 days a week. The witness concluded that because their competitors operated at a higher capacity, they had plant efficiencies Pure Milk could not achieve. The witness attributed Pure Milk's inability to achieve the desired level of plant efficiency to the producer-handler definition which limited and constrained their ability to purchase additional milk supplies from others during their low production seasons. The witness also attributed Pure Milk's inability to achieve desired plant efficiencies to their inability to market surplus milk production at a profit during high milk production seasons. The witness described these as other examples of regulatory risk faced by a producer-handler.

At the closing of the Pure Milk plant, the witness indicated that he then managed Promised Land Dairy which operated as a small producer-handler from 1996–1999 supplying specialty packaged fluid milk products to health food and grocery stores. The witness said that Promised Land Dairy's specialty operation, selling Jersey cow milk in glass bottles, also failed to be profitable for the same reasons as the Pure Milk Company—the inability to balance supplies, the inability to achieve plant operating efficiencies, and the inability to obtain and retain a long-term customer base. The witness testified that Promised Land Dairy ended its operation as a producer-handler because it could not achieve profitability.

In additional testimony, the SBEDMD witness was of the opinion that relying on the concept of transfer pricing as a means for demonstrating that a pricing advantage accrues to producer-handlers by being exempt from the order's pooling and pricing provisions was misplaced. The witness maintained that as a producer-handler, the only measure of success is the profitability of the entire operation. However, the witness said that Pure Milk used the marketing order's blend price as a transfer price for the limited purpose of conducting internal evaluations of its production performance and to derive a measure of its plant's operating efficiency. The witness testified that the company did use Federal order minimum class prices as a basis for pricing milk to its customers and as a basis for making contract bids.

A second witness appearing on behalf of Smith Brothers Farms, Edalene Dairy, and Mallorie's Dairy, testified in opposition to Proposals 1, 2, and 3. This witness, herein after referred to as the SBEDMD second witness, was of the opinion that these proposals would adversely restrain competition in the dairy industry in both the Order 124 and 131 marketing areas. The witness testified that the producer-handler exemption from pooling and pricing in Orders 124 and 131 serve a needed and useful purpose by providing market niches and marketing alternatives for operators with dairy production and processing expertise as a means to remain competitive in an era of otherwise increasing industry consolidation. The witness was of the opinion that the best measure of orderliness in dairy markets should be on results rather than on the mechanics and operations of a milk marketing order. According to the witness, orderly marketing implies protecting the rights of producers to choose their market outlet freely without coercion or unreasonable barriers to market entry.

The SBEDMD second witness criticized the proponent's use of the Cornell University processing plant study, also relied upon by the NMPF witness, as a basis to support the proposed 3 million pound per month route disposition limit for producer-handlers. The witness was critical of the Cornell study, in part, because the minimum plant sizes considered in the study were four times or 12 million pounds larger than the 3 million pound limit contained as part of Proposals 1 and 3. The witness also was of the opinion that the Cornell plant study yielded results that were statistically insignificant because the number of plants used in the study was too small to reveal useful information. The witness explained that the sample of plants used in the study was not applicable to considerations regarding marketing conditions in Orders 124 and 131 because: (1) The data were improperly grouped into regions using the Consumer Price Index rather than the Producer Price Index, (2) the sample of plants did not include any plants located in the two marketing order areas, and (3) the sample of plants could not demonstrate any similarity to producer-handlers in either of the two marketing order areas.

The SBEDMD second witness also testified that DFA's plant cost study results were similarly based on faulty data. According to the witness, the statistical analyses used in the DFA plant cost study should have been based on observations of individual plant costs rather than by averaging plant cost across the various classes of plant sizes selected for inclusion in the study. In addition, the witness testified that the analyses should have considered all plant costs by region, labor type, and type of regulated handler rather than relying only on selected costs.

The SBEDMD second witness was of the opinion that the interest in advancing Proposals 1 and 3 stems from what the witness characterized as the arbitrary setting of higher than needed Class I differentials in all Federal milk orders. According to the witness, higher than needed Class I differential levels were set because of proponent lobbying efforts during Federal milk order reform. According to the witness, lowering Class I differential levels would effectively reduce the incentive for further business expansion of producer-handlers.

In addition, the SBEDMD second witness was of the opinion that producer-handlers add much needed competition in the Order 124 and 131 marketing areas. According to the witness, the high concentration ratio of handlers-to-dairy farmers in both orders has created a near monopsony of milk buyers that has negative implications for prices received by dairy farmers. The

witness also characterized the high concentration ratio of handlers-to-dairy farmers as contrary to the public interest because it may result in higher prices to consumers.

The SBEDMD second witness pointed to other changes in marketing conditions that warrant not changing the current regulatory exemptions of producer-handlers. The witness testified that the consolidation of cooperatives through mergers into fewer and larger-cooperatives, together with full-supply marketing contracts, has reduced dairy farmer income because cooperatives can re-blend and re-distribute revenue to their members at a value below the order's blend price. The witness also testified that cooperatives that are national in scope may not be meeting the local needs of their dairy farmer members in markets where such cooperatives are the dominant buyer of milk because it leaves producers without alternative marketing options except to sell their milk through the dominant cooperative. With such changes to marketing conditions, the witness concluded that becoming a producer-handler provides dairy farmers a useful and needed alternative to limited marketing options resulting from dairy industry consolidations.

The SBEDMD second witness characterized the application of the pooling and pricing provisions of Orders 124 and 131 as essentially an imposition of a tax on producer-handlers. The witness said that the pooling and pricing provisions of the orders should apply only to those handlers that purchase milk from producers. Along this theme, while acknowledging that producer-handlers are also handlers, the witness did not view an intra-firm transfer of milk from the farm production enterprise to the processing plant enterprise as equivalent to a purchase of milk by a handler from a dairy farmer. The witness testified to awareness of a court ruling equating intra-firm transfers of milk as identical to purchases of milk but considered such rulings not being relevant to the context of this proceeding for limiting the route disposition volume of a producer-handler.

A third witness appearing on behalf of Smith Brothers Farms, Edalene Dairy, and Mallorie's Dairy, also testified in opposition to Proposals 1 and 2. The witness provided financial information regarding efficient dairy processing plant size and costs. The witness indicated that successful long-term operators in the fluid processing business must operate their plants efficiently and process sufficient volumes to achieve a competitive cost structure. The witness said that establishing a maximum monthly processing limit of 3 million pounds for producer-handlers limits them to operating plants that would be unable to capitalize on the economies of scale required to further reduce per unit costs to more competitive levels.

A former Market Administrator of the pre-reform Central Arizona milk marketing order testified in opposition to Proposal 1, 2, and 3. The witness explained that if regulated, producer-handlers would be subject to the pooling and pricing provisions of an order by being required to pay into the producer-settlement fund of the order on the basis of their Class I sales in the marketing area.

A witness appearing on behalf of Smith Brothers Dairy (Smith Brothers), a producer-handler located in the Order 124 marketing area, testified in opposition to Proposals 1 and 2. According to the witness, Smith Brothers has been operating as a producer-handler for some 43 years. The witness testified that Smith Brothers is a family owned and operated enterprise that survives by serving niche markets not well served by other market participants, including fully regulated handlers. The witness testified that the largest single market niche served by Smith Brothers is home delivery, representing approximately 70 percent of its fluid milk sales. According to the witness, Smith Brothers purposely pursued this market niche beginning in 1980 when home delivery represented only a third of their fluid milk sales. The witness was of the opinion that the goal of the proponents advancing the adoption of Proposal 1 is to eliminate producer-handlers as competitors in the Order 124 marketing area.

The witness maintained that Smith Brothers has not been a disruptive factor in the Order 124 marketing area. The witness testified that Smith Brothers does not directly compete for customers with large fully regulated handlers as it does not have sales to grocery chains, convenience stores, or large commercial retailers in the marketing area. Relying on Market Administrator statistics for Order 124, the witness related the decline in the number of producer-handlers from 73 in 1997 to 11 in 2000, and a decline in route disposition by all producer-handlers of nearly 6 percent between 2000 and mid-2003 as evidence that clearly demonstrates that producer-handlers are not a source of market disorder. The witness also discounted the notion that producer-handlers enjoy a competitive advantage by noting the lack of entry of new producer-handlers in the Order 124 marketing area.

The Smith Brothers witness testified that the majority of regulated handlers in Order 124 are much larger, more diversified, and not interested in the niche market of home delivery that Smith Brothers serves. The witness testified that limiting a producer-handler's route disposition to less than 3 million pounds per month would cause them to not only lose their status as a producer-handler but may even result in Smith Brothers terminating operations altogether.

The Smith Brothers witness explained that producer-handlers face different costs and risks than do pooled producers and fully regulated handlers. According to the witness, producer-handlers have balancing risks, farm production risks, and processing risks that, when combined into a single business enterprise, are greater than those borne by either pooled producers or fully regulated handlers. The witness asserted that any pricing advantage the producer-handler may have is offset by the combination of these costs and by the loss of opportunity to produce, acquire and market other dairy products.

The witness testified that Smith Brothers, in part, balances its own milk production by selling surplus milk into Alaska, an area not regulated by a Federal milk order, and characterized Alaska as an underserved market.

A second witness, an independent milk distributor appearing on behalf of Smith Brothers, also testified in opposition to Proposals 1 and 2. The witness testified to operating a milk distribution business for more than 26 years and was one of approximately 60 other independent distributors selling Smith Brothers dairy products to market niches including coffee shops, independent convenience stores, the home delivery market, and daycare operations that larger market participants do not serve. The witness attributed long-term business success as a distributor to personal service, nostalgia, and product quality. The witness also attributed sales success by advertising that the milk distributed is produced without growth hormones and that the milk is produced and processed by a family farm business.

A third witness for Smith Brothers Dairy also testified in opposition to Proposals 1 and 2. The witness was of the opinion that these proposals are designed to eliminate producer-handlers as competitors of fully regulated handlers. The witness was also of the opinion that both proposals are intended to serve as an intentional

market entry barrier for other large producers who may seek to become producer-handlers as a means to re-gain control of their milk marketings.

The witness related that Smith Brothers evaluates itself as a single integrated enterprise. The witness testified that as the person responsible for measuring the efficiency of the operation, Smith Brothers does not rely on the concept of transfer pricing as a means to measure the efficiency or market value of their milk production. The witness testified that Smith Brothers does not compare its cost of production to the Federal order Class I price or the blend price in measuring the efficiency of its operations. According to the witness, Smith Brothers compares their total costs to the prices the company receives for its products (total receipts).

A witness appearing on behalf of Edalene Dairy, a producer-handler located in the Order 124 marketing area, testified in opposition to Proposals 1 and 2. The witness stated that as the milk production manager and co-owner of Edalene Dairy, their cost of milk production is higher than that estimated by those proposing a limit on the route dispositions of producer-handlers. The witness testified that Edalene Dairy's milk production costs exceeded a recent Order 124 blend price of $10.50 per cwt.

The witness testified that Edalene Dairy once held a milk supply contract with Starbucks by replacing Sunshine Dairy, a fully regulated handler. According to the witness, the contract provided more than a year's lead time for Edalene Dairy to develop additional milk production and processing capacities. The witness said that the Starbucks account was offered to Edalene Dairy on the basis of its customer service, product quality and price.

The witness testified that Edalene Dairy eventually lost its Starbucks contract to Safeway, a fully regulated handler, noting that Starbucks phased out Edalene Dairy as a supplier over a six-month period. The witness said that reasons given for the loss of the account was that Safeway offered to supply milk at a lower price and Starbucks' rapid growth gave rise to geographical supply needs that Edalene Dairy could not meet. The witness explained that the six-month phase-out of Edalene Dairy as a milk supplier to Starbucks was unusual in the dairy business. The witness said that more typically, account terminations are given with a month's notice or less.

The witness testified that Edalene Dairy's balancing costs are greater than that of the pooled producers of Order 124. The witness also testified that during periods of low market prices for milk, balancing costs are particularly difficult to manage. The witness related that Edalene Dairy's surplus milk production is sold to fully regulated handlers but they are paid $1.50 per cwt less than the Class III price.

The Edalene Dairy witness testified that there are several factors that tend to restrain the growth of producer-handlers. According to the witness, environmental regulations, marketing and production risks, and management risks all act to limit the ability for business expansion. The witness said that the size of potential customers also can constrain a producer-handler's operational flexibility and ability to expand the business. The witness said, for example, that a very large customer, such as a warehouse customer, may be such a large part of a producer-handler's capacity that losing such a customer can risk continued economic viability of the entire operation because it is so difficult to absorb the loss of revenue and to find new customers.

The Edalene Dairy witness testified that producer-handlers also serve market niches that fully regulated handlers do not service. The witness said that if a limit on producer-handler route disposition had been in place when the Starbucks account became available, for example, the opportunity to service that account would not have been possible. The witness asserted that limiting the sales volume of producer-handlers also would effectively eliminate servicing new market niches that might arise in the future. In this regard, the witness cited the example of coffee-kiosk shops that were not of interest to fully regulated handlers until the mid-1990's.

The Edalene Dairy witness testified that an important element of why their producer-handler operation is valued by their customers is because they have complete and total control of the production and processing of their milk. The witness testified that without the producer-handler exemption from the pooling and pricing provisions of Order 124, Edalene Dairy would not be able to offer such a differentiated fluid milk product to its customers.

A second witness, also appearing on behalf of Edalene Dairy, testified in opposition to Proposals 1, 2, and 3. The witness testified that Edalene Dairy operates an efficient dairy farm operation and processing plant as a producer-handler. The witness was of the opinion that a producer-handler operates a farm and a plant with risks that differ from the risks faced by dairy farmers and processing plant operators. According to the witness, a producer-handler differs from pooled dairy farmers in three different ways: (1) Pooled producers are guaranteed the minimum Federal order blend price, (2) pooled producers do not bear the marketing risk and additional costs involved in selling their milk, and (3) pooled producers do not bear the risks and costs of operating a processing plant. With regard to how a producer-handler differs from fully regulated handlers, the witness cited three important differences: (1) Fully regulated handlers purchase their milk supply and therefore do not incur the risk of production, (2) fully regulated handlers know the cost of raw milk before buying it from dairy farmers, and (3) a producer-handler bears the risk and cost of balancing its milk supply and operates at its sole risk and enterprise, a regulatory constraint not applicable to fully regulated handlers.

The Edalene Dairy witness amplified the above differences between producers-handlers, dairy farmers, and fully regulated handlers. With respect to dairy farmer and producer-handler differences, the witness noted that a pooled producer can deliver milk to alternative buyers if its primary buyer is not available but that a producer-handler can only deliver milk to its own plant and a dairy farmer has no legal requirement or economic responsibility for the viability of any particular processing plant or handler. With respect to the fully regulated handler and producer-handler differences, the witness noted that a fully regulated handler can acquire any quantity of milk from any number of dairy farmers and the business failure of any individual dairy farmer does not have an overwhelming impact on the economic viability of a fully regulated handler's operation.

The Edalene Dairy witness testified that combined risks—as a producer and as a handler—are not incurred by either a pooled producer or a fully regulated handler. The witness testified for example, that if a producer-handler loses a sale, it continues to have milk production that must be disposed of and the costs of that milk production must be paid regardless of whether a market exists for that milk. According to the witness, the risks and costs of production, processing, and marketing accrue to the entire operation because producer-handlers are a single operating enterprise.

Additionally, the Edalene Dairy witness said, there are inseparable links between the production and processing portions of the producer-handler because if either the milk production

process fails or the processing process fails, both processes affect the single operating entity. The witness testified that the regulation of the processing and marketing operations of a producer-handler coincidentally regulates the dairy farm portion of the producer-handler enterprise. According to the witness, the most important benchmark for a producer-handler is whether in the long-run the total revenue received for its milk exceeds the total costs of its operation.

The Edalene Dairy witness testified that the Federal order blend price is irrelevant to a successful producer-handler and bears no relation to the prices received from its milk sales. The witness expressed the irony of testimony concerning the importance of the blend price to producer-handlers by parties who do not operate as producer-handlers. The witness said that Edalene Dairy ignores what the Federal order blend price may be for the month and seeks to sell milk at the highest possible price, but never intentionally below the Federal order Class I price. The witness noted that during the past several years there have been times when the Class I price fell below the cost of production. During such times, the witness was of the opinion that fully regulated handlers have a distinct advantage over producer-handlers.

The Edalene Dairy witness testified that cooperatives have certain regulatory advantages by being able to re-blend pool proceeds and actually pay their members less than the order blend price. The witness claimed that re-blending allows cooperatives to use their bottling operations to essentially subsidize their processing operations. The witness testified that if a producer-handler's route disposition was more than 3 million pounds per month, the required payment into the producer-settlement fund would return no benefit to the producer-handler. According to the witness, the proceeds paid to the producer-settlement fund would simply be distributed to other pooled producers. This would, according to the witness, have an adverse impact on small businesses such as Edalene Dairy, a business with fewer than 500 employees.

In addition, the Edalene Dairy witness saw no justification for limiting the route disposition of producer-handlers in Order 124 because Market Administrator statistics indicate a declining market share of the Class I market by producer-handlers. The witness also asserted that limiting the route distribution of producer-handlers would essentially close the marketing option that becoming a producer-handler offers to large producers. The witness viewed such restrictions as acting to reduce competition among handlers rather than enhancing it.

A third witness, the founder of Edalene Dairy, also testified in opposition to Proposals 1, 2, and 3. The witness related that when acquiring financing, bank loan officers will only consider Edalene Dairy's cows as appropriate collateral for financing. The witness testified that bankers place no asset value for loan collateralization on Edalene Dairy's processing plant facilities.

A witness appearing on behalf of Mallorie's Dairy, a producer-handler located in the Order 124 marketing area, testified in opposition to Proposals 1 and 2. The witness said that Mallorie's Dairy markets its milk on a wholesale basis directly and through independent distributors and small independent retailing establishments ranging from grocery stores to coffee shops. According to the witness, the milk production enterprise of their producer-handler operation is very efficient, producing an average of 80 pounds of milk per day per cow. The witness testified that Mallorie's Dairy's largest customer is an independent distributor who has developed a niche market by supplying small companies that other fully regulated handlers do not serve.

According to the witness, Mallorie's Dairy lost a grocery store chain account which had been one of its large long-term customers to a fully regulated handler. The witness stressed that any price advantage that Mallorie's Dairy derives from the existing producer-handler exemption from the pooling and pricing provisions of Order 124 is offset by the cost of balancing its milk supply, about 20 percent of its production. The witness said that Mallorie's Dairy performs its balancing requirements by selling its surplus milk to a local cooperative at the lower of the Class III or Class IV price minus a substantial discount. According to the witness, balancing sales represents about 10 percent of Mallorie's' total sales, while specialty milk sales to commercial food processors represent the remainder.

The Mallorie's Dairy witness was unsure of the full impact that adoption of Proposals 1 and 2 would have on Mallorie's Dairy. However, the witness said that Mallorie's Dairy would lose its producer-handler status and thus be forced to expand its plant size in order to continue operating, to remain competitive and to exploit their current marketing strengths while seeking new business from warehouse stores such as Costco and Walmart.

The founder of Sarah Farms, a producer-handler located in the Order 131 marketing area, testified in opposition to Proposals 1, 2, and 3. The witness was of the opinion that the purpose of the public hearing was to eliminate Sarah Farms as a competitor in the Order 131 marketing area. The witness said that imposing a 3 million pound per month route disposition limit on producer-handlers would restrict the growth of Sarah Farms while leaving competing cooperatives and proprietary handlers free to compete without additional restraints. The witness was of the opinion that imposing a route disposition limit on producer-handlers as advanced in Proposal 3, was based on projected future conditions and was therefore both unjustified and speculative. According to the witness, a restriction on sales volume would force a dramatic change to Sarah Farms' business structure and practices when there was no evidence of an unfair regulatory advantage by being exempt from the Order 131 pooling and pricing provisions.

The witness testified that Sarah Farms' sales exceed 3 million pounds per month, noting that the majority of its current sales and sales since becoming a produce-handler in 1995 are in Arizona. The witness said that some major customers include Sam's Club, Basha's (a grocery store chain), Costco, and other smaller independent retailers. The witness said that Sarah Farms' growth was directly related to its ability to fill a market void left by competitors who exited the dairy business leaving an opportunity that others could not completely fill.

The witness asserted that Sarah Farms produces a differentiated product from that of its competitors by marketing its fluid milk products with tamper resistant caps and by delivering their fluid milk products to customers within 24 hours of milking which, according to the witness, adds up to 7 days to the shelf life of its products. The witness also said that Sarah Farms' gallon-sized fluid milk products are shipped in cardboard containers, which further differentiates these products from their competitors.

The Sarah Farms witness testified that being a producer-handler is a high-risk undertaking. Relying on Market Administrator data, the witness noted that the number of producer-handlers in Order 131 has declined from six in 1980 to only two in 2003, an important indicator of the high-risk nature of being a producer-handler.

The witness testified that Sarah Farms pays its own balancing costs and does not transfer these costs to other fully

regulated handlers or pooled producers of Order 131. In addition, the witness testified that as a producer-handler, Sarah Farms simultaneously bears all of its own production, marketing, and processing costs and risks unlike pooled producers and fully regulated handlers. The witness also was of the opinion that a fluid milk processing plant under construction in Clark County, Nevada, an area exempt from Federal milk regulation, poses a greater competitive threat to producers and fully regulated handlers than any other entity. The witness also testified that Sarah Farms does not sell its milk below the Order 131 Class I price plus the cost of transportation, packaging, and processing.

A witness representing Food City, a retail grocery chain, testified on behalf of Sarah Farms. The witness testified that Food City, and its parent company, the Basha's; operate some 144 stores in Arizona, New Mexico, and California. The witness said that Food City buys milk from Sarah Farms and from a fully regulated handler. The witness indicated that Food City's opposition to Proposal 3 was to help assure that Food City continues to have more than a single supplier for its fluid milk needs. The witness indicated that in the longer term, the availability of multiple suppliers tends to assure competitive pricing, reliable service, and product quality. The witness said that Food City's interest in multiple suppliers transcended the issue of whether the supplier is a fully regulated handler or a producer-handler.

Post Hearing Briefs and Motions

Post hearing briefs filed on behalf of proponents and opponents made extensive arguments as they relate to case law, arguing legal contexts for why large producer-handlers should or should not become subject to the pooling and pricing provisions of the Pacific Northwest and the Arizona-Las Vegas marketing orders. Presented herein are discussions of the briefs as they relate to the economic and marketing conditions of the two orders.

A brief filed on behalf of NDA reiterated its support for the adoption of Proposals 1, 2, and 3. They noted that both Orders 124 and 131 have fully regulated handlers operating plants whose route disposition of Class I milk are smaller than the largest producer-handlers in the two orders. NDA stressed that the Department cannot ignore a situation where the smallest regulated handlers in the market are not provided equitable minimum prices as intended by Congress when the AMAA established the requirement that classified pricing be uniform to all handlers.

In brief, NDA took issue with the notion by opponents that producer-handler balancing costs are greater than that of fully regulated handlers. NDA argued that the milk order program does not attempt to consider all costs or address issues of profitability. They noted that balancing costs are typically borne by regulated handlers over and above the minimum cost structure reflected in the orders. In this regard, NDA noted that opponents expanded on the burden of their own balancing costs but did not consider balancing costs incurred by fully regulated handlers. They further explained that balancing costs may also be absorbed by marketwide pooling through the mechanism of Class III and Class IV pricing, which stressed NDA, is not applicable to producer-handlers.

The rapid and extensive growth of Sarah Farms was also noted by NDA who claimed that Sarah Farms now has captured 15 to 20 percent of all the Class I sales in Order 131. This equates, the NDA brief said, to a reduction in Class I premium dollars by at least $2.5 million per year. In the Order 124 area, added NDA, producer-handlers account for about 10 percent of total in-area Class I sales and similarly reduce Class I premium dollars. A brief filed on behalf of DFA reiterated their support for the adoption of proposals 1, 2, and 3 stressing those small dairies that do not impact total pool value should be the only exempted producer-handlers. DFA noted that in Order 124 the three largest producer-handlers, which average nearly 5.0 million pounds of Class I sales each per month, are larger in size than one-third of the order's fully regulated distributing plants. According to the DFA brief, in Order 131, Sarah Farms has captured more than 15 million pounds of Class I sales per month. DFA was of the opinion that orderly marketing conditions can only be maintained if any exceptions to classified pricing are limited and justified. DFA emphasized that large producer-handlers in the two orders have captured a significant share of the Class I sales which thereby reduces returns to all producers while retaining substantial Class I proceeds for each producer-handler on an individual handler pool basis.

The DFA brief also reiterated reasons why 3 million pounds of Class I route distribution should be established as the cap for producer-handler exemption from full regulation. They stated that there is a similar benchmark applicable in the Fluid Milk Promotion Act of 1990. They also indicated that volumes of milk sales from stores in the marketing areas indicate that at the 3 million pound level, a handler could supply a number of small stores. They noted that at this threshold size, producer-handlers' economies of scale are sufficient enough that as handlers, producer-handlers can be competitive with fully regulated handlers. Lastly, DFA maintained that, as producers, producer-handlers have substantial economies of scale in on-farm milk production that if exempt from pooling, gives producer-handlers a significant advantage in the marketplace for fluid milk sales.

A brief filed on behalf of UDA continued to iterate its support for the adoption of Proposal 3. They indicated that they did not support limiting producer-handlers sales to 3 million pounds per month on the basis that it was the same benchmark as in the Fluid Milk Promotion Act of 1990. Rather, UDA finds merit in regulating large producer-handlers above 3 million pounds per month in route sales because at such a size they are able to achieve economies of scale that enable them to be competitive factors in the market and able to compete with fully regulated handlers.

A brief was filed on behalf of Shamrock Foods Company, Shamrock Farms Company and the Dean Foods Company in continued support of the adoption of Proposal 3. They emphasized that Sarah Farms' doubling of Class I sales between 1998 and 2003 was not known and could not have been known during the time of adopting the consolidated orders as a part of Federal milk order reform. In this regard, they also noted that at the time of Federal milk order reform, the Department could not have known of the growing importance to integrated operations such as Kroger and Safeway of price competition from large warehouse box stores such as Costco caused by large producer-handler sales. Lastly, they indicated that no limit had been placed on producer-handlers during Federal milk order reform because it could not have been known that losses to pooled participants would increase by a multiple of nearly four from before to after implementation of order reform.

A brief filed on behalf of NMPF continued to iterate its support for adoption of proposals that would limit the size of producer-handlers. NMPF was of the opinion that the exemption for producer-handlers violates the principles of producer equity upon which the milk order program relies. In addition, they were of the opinion that producer-handler exemption threatens orderly marketing. They explained that

farms with over three million pounds of monthly production account for about 15 percent of the total U.S. milk supply which equates to about 40 percent of fluid milk sales. Continued exemption of producer-handlers from pooling and pricing, the NMPF maintained, threatens both producer and handlers.

A Statement of Interest was filed on behalf of two cooperatives, Select Milk Producers and Continental Dairy Products, indicating support for adoption of Proposal 3 as submitted by UDA. Select Milk Producers is a New Mexico milk marketing cooperative and Continental Dairy Products is an Ohio milk marketing cooperative.

A consolidated brief filed on behalf of Edalene Dairy, Mallorie's Dairy, Smith Brothers Farms, and Sarah Farms stressed that as producer-handlers who have sales in excess of three million pounds per month, adoption of any proposal that would subject them to the pooling and pricing provisions of the orders would cause their organizations to be severely affected. They stressed that if they become required to make equalization payments to the producer-settlement funds, this would take millions of dollars per year away from their operations and redistribute it to other producers with no return benefit to their operations.

In brief, Edalene Dairy, Mallorie's Dairy, Smith Brothers Farms, and Sarah Farms indicated that the advantages producer-handlers have as alleged by proponents, vanish when the financial benefits of not having to pay minimum prices and avoiding equalization payments to the producer-settlement fund are offset by their balancing costs. Any remaining advantage should be viewed as acceptable given the increased risks producer-handlers incur in the marketplace. They indicated that rational persons would not take on additional risk without the prospect of additional rewards.

In brief, Edalene Dairy, Mallorie's Dairy, Smith Brothers Farms, and Sarah Farms stressed that in their opinion, neither milk supply or prices for milk in the two marketing areas had fluctuated unreasonably, noting that milk was in such sufficient supply that with or without producer-handlers, supplies are plentiful. They did not view their fluid milk sales in the marketing area as contributing to the erosion of classified prices or blend prices. They cited hearing record statistics to assert that they are not a cause of market disorder or cause the inefficient movement of milk. They cited the reduction in the number of producer-handlers, emphasizing that between 1975 and 2000, Order 124 producer-handler numbers fell from 73 to 11 with average daily pounds of production increasing only 4.7 percent between 1985 and 2000. For Order 131, they noted that since 1982 to present, the number of producer-handlers fell from seven to two. According to the brief, on the basis of such statistics, there can be no finding that producer-handlers have unabated growth or that they are a source of market disruption.

A motion was filed on behalf of Edalene Dairy, Mallorie's Dairy, Smith Brothers Farms and Sarah Farms, all of whom are producer-handlers, to strike from the hearing record the testimony and related exhibits concerning plant costs offered by DFA's consultant witness. The presiding Administrative Law Judge received this motion after the certification of the hearing record on June 1, 2004. Given that the objection goes to the weight to be given to the testimony and exhibits and not to the their admissibility, the motion is denied.

Findings

Although producer-handlers have not been fully regulated as a general practice, the AMAA provides the authority to regulate handlers of milk to carry out the purposes of the AMAA. With respect to producer-handlers, the legislative history indicates that there is authority to regulate such operations if they are so large as to disrupt the market for producers. In the past, during other rulemaking proceedings, producer-handlers have been found not to disrupt the marketing of milk and milk products.

Nevertheless, restrictions have been placed on producer-handlers. Both the Pacific Northwest and the Arizona-Las Vegas orders currently permit producer-handlers to only purchase supplemental milk only from pool sources up to 150,000 pounds per month. In addition, the Arizona-Las Vegas order, prohibits the disposition of Class I products by a producer-handler to a wholesale customer who is also serviced by a pool distributing plant that supplies the same product in a same-sized package with a similar label in the same month. While each order has its own unique definition, it is accurate to say that in general, producer-handlers are required to operate their businesses at their own enterprise and risk, meaning that the care and management of the dairy animals and other resources necessary for the production, processing, and distribution of their Class I products are the sole responsibility of the producer-handlers.

Producer-handler exclusion from pooling and pricing provisions also has been historically based on the premise that the objectives of the AMAA (orderly marketing) could be achieved without extending regulation to this category of handler. The Department has articulated its authority to subject producer-handlers to further regulation, including being subject to marketwide pooling and minimum pricing provisions, if they singularly or collectively have an impact on the market in previous rulemakings. For example, in a Final Decision (31 FR 7062–7064; May 13, 1966) for the Puget Sound order, a predecessor to the Pacific Northwest order, the Department found that producer-handlers should continue to be exempt from pooling and pricing provisions of the order with the caveat that the producer-handlers could be subject to further regulation if justified by prevailing market conditions. This position was amplified in a subsequent Puget Sound Final Decision (32 FR 1073–10747; July 21, 1967) where the Department found that a hearing should be held to consider the regulation of producer-handlers if the marketing area is susceptible to being affected by producer-handlers or if producer-handler sales could disrupt or operate to the detriment of other producers in the market. Such policy was also articulated in another recommended decision concerning producer-handlers (Texas and Southwest Plains, Recommended Decision, 54 FR 27179, June 28, 1989). That decision concluded that subjecting producer-handlers to the pooling and pricing provisions of the order would be appropriate if it could be shown that producer-handlers cause market disruption to the market's dairy farmers or regulated handlers.

The proposals for fully regulating producer-handlers in this proceeding, specifically making them subject to the order's pooling and pricing provisions, are based primarily on issues relating to producer-handler size, specifically the volume of Class I route disposition. The producer-handler exemption from pooling and pricing provisions is proposed to end when the volume of Class I route disposition in the marketing area exceeds 3 million pounds per month.

In considering issues relating to size, producer-handlers are dairy farmers that generally process and sell only their own milk production. These entities are dairy farmers as a pre-condition to operating a processing plant as producer-handlers. Consequently, the size of the dairy farm determines the production level of the operation and is the controlling factor in the capacity of the processing plant and possible sales

volume. Accordingly, the major consideration in determining whether a producer-handler is a large or small business focuses on its capacity as a dairy farm. Under SBA criteria, a dairy farm is considered large if its gross revenue exceeds $750,000 per year with a production guideline of 500,000 pounds of milk per month. Accordingly, a dairy farm with sales of its own milk that exceeds 3 million pounds per month is considered a large business.

Another factor to consider regarding the size of producer-handlers is their ability to have an impact on the market's pooled participants. Indicators of market affect dairy farmers who pool their milk on the orders and by the orders' fully regulated handlers should be determined on the basis of prices that are uniform to producers and equitable among handlers. When these price conditions are present, milk marketing orders are considered to be exhibiting orderly marketing—a key objective of the AMAA that relies on the tools of classified pricing and marketwide pooling. In the absence of equity among producers and handlers, such conditions should be deemed to be disorderly.

As already discussed above, producer-handler exemptions from the pooling and pricing provisions of the orders are based upon the premise that the burden of surplus disposal of their milk production was borne by them alone. Consequently, they have not shared the additional value of their production that arose from Class I sales with pooled dairy farmers. In this regard, to the extent that producer-handlers are no longer bearing the burden of surplus disposal, specifically disposal of milk production in some form other than Class I, gives rise to considering regulatory measures that would tend to provide price equity among producers and handlers that arises when producer-handlers are permitted to retain the entire additional value of milk accruing from Class I sales.

The record supports finding that producer-handlers with more than 3 million pounds of route disposition per month in both the Pacific Northwest and the Arizona-Las Vegas marketing areas are the primary source of disruption to the orderly marketing of milk. This disorder is evidenced by significantly inequitable minimum prices that handlers pay and reduced blend prices that dairy farmers receive under the terms of each area's marketing order. Accordingly, producer-handler status under the Pacific Northwest and the Arizona-Las Vegas orders should end when a producer-handler exceeds 3 million pounds per month of in-area Class I route disposition.

Review of the intent of the producer-handler provision and the marketing conditions arising from this provision in these orders could warrant finding that the original producer-handler exemption is no longer valid or should be limited to 150,000 pounds per month Class I route disposition limit. However, the hearing notice for this proceeding constrains such a finding to a level of not less than 3 million pounds per month of Class I route dispositions.

Adopting a 3 million pound Class I route disposition limit on producer-handlers is supported in direct testimony by proponent witnesses and other marketing data, most notably the volume of Class I route disposition relative to the total volume of Class I sales, and structural changes in the markets. Producer-handlers with more than 3 million pounds of Class I route disposition significantly affect the blend price received by producers. This decision finds merit in DFA's and Dean's testimony that a blend price impact of one cent per cwt is significant. The negative affects on the blend prices received by producers in the Pacific Northwest and Arizona-Las Vegas orders, attributable to producer-handler route disposition are significant and greater than one cent per cwt. The record evidence supports a conclusion that the exemption of producer-handlers from pooling and pricing has reduced the blend price between $0.04 to $0.06 per cwt per month in the Arizona-Las Vegas marketing area and between $0.02 to $0.04 per cwt per month for the Pacific Northwest marketing area since implementation of Federal milk order reform in January 2000. The causes of the blend price reduction arises from a producer-handler's ability to price fluid milk at an amount between the blend price and the order's Class I price combined with the producer-handler's size relative to the total volume of Class I milk disposition in the respective marketing areas.

In general, the difference between the Class I price and the blend price not paid into the producer-settlement fund that is the pricing advantage enjoyed by producer-handlers over fully regulated handlers. While this has always been the case for producer-handlers, those with route disposition of more than 3 million pounds of milk per month or more in these 2 orders are large enough to have a negative impact on the prices received by pooled dairy farmers resulting from an iniquity exists with regard to prices paid for milk among similarly situated handlers. Since fully regulated handlers do not have the ability to escape payment into the producer-settlement fund of the difference in their use-value of milk and the order's blend price like producer-handlers, regulated handlers competing against large producer-handlers are at a competitive price disadvantage.

Even though producer-handlers argue otherwise, this decision agrees with proponent arguments, most notably by the NMPF witness, that the difference between the Class I price and the blend price is a reasonable estimate of the pricing advantage producer-handlers enjoy even if it is not possible to determine the precise pricing advantage of any individual producer-handler. This pricing advantage is compounded as producer-handler size, and the accompanying increase in the volume of Class I sales in the marketing area, begins to increasingly affect the blend price received by pooled producers.

The record contains specific examples that demonstrate that producer-handlers with route disposition of more than 3 million pounds per month have and are placing their fully regulated competitors at a comparative sales disadvantage. For example, Shamrock Foods, a regulated handler with substantial sales in the Arizona-Las Vegas marketing area is constrained in competing on a price basis for customers by the order's minimum prices that they must pay for milk procurement. Meanwhile the large producer-handler is able to compete for commercial customers at prices that a regulated handler is unable to match. The competitive pricing advantage of producer-handlers is clearly attributable to their exemption from paying the difference between the Class I and blend price into the producer-settlement fund. While this competitive pricing advantage has been recognized previously by the Department (Milk in the Texas Southwest Plains Marketing Area, 54 FR 27182) and determined not to cause disorderly marketing conditions. Marketing conditions and the overall dairy industry marketing structure have changed significantly in these orders resulting in disorderly marketing conditions. The producer-handlers are significantly larger in these two orders and while they are solely responsible for their production and processing facilities, they are not assuming the entire burden of balancing their production with their fluid milk requirements as will discussed later in this decision.

The record evidence supports concluding that the one large producer-handler represents between 12–18 percent of the total Class I sales volume in the Arizona-Las Vegas marketing area. The record evidence supports a

conclusion that the exemption of this producer-handler has reduced the blend price between $0.04 and $0.06 per cwt per month in the Arizona-Las Vegas marketing area. Similarly, record evidence reveals that producer-handler exemption from pooling and pricing in the Pacific Northwest reduces the blend price to all other dairy farmers by $.02-$.04 per cwt. The Pacific Northwest marketing area has eight producer-handlers, with four having Class I route disposition exceeding 3 million pounds per month. In the aggregate, all producer-handlers in the Pacific Northwest account for nearly 10 percent of the total Class I sales in the marketing area. Importantly, the impact on the marketing area's blend price by the exemption from the pooling and pricing provision by any of the individual producer-handlers whose sales exceed 3 million pounds per month on average exceeds $0.01, a level that found to be significant and disruptive to the orderly marketing. While the marketing conditions of the Pacific Northwest area differ from the Arizona-Las Vegas marketing area in the number of producer-handlers and the relative market share of producer-handlers, evidence of market disruption by producer-handlers resulting in lower blend prices is a common factor of both orders.

As in the Arizona-Las Vegas marketing area, producer-handlers in the Pacific Northwest similarly enjoy a competitive sales advantage because they do not procure milk at the order's Class I price as required of fully regulated handlers. This has resulted in fully regulated handlers not being able to compete with producer-handlers for Class I route sales. For example, Vitamilk testified that as regional grocery chains were acquired by national handlers in the Pacific Northwest marketing area, independent regulated handlers such as Vitamilk found themselves unable to compete for sales with large producer-handlers in the changed marketing environment of fewer wholesale customers on a price basis. Vitamilk demonstrated that the pricing advantages that accrue to producer-handlers from their exemption from pooling and pricing provisions created an insurmountable marketing situation that eliminated Vitamilk's ability to compete for available customers in the marketing area on the basis of minimum Class I prices established by the order.

For both the Pacific Northwest and the Arizona-Las Vegas marketing areas, record evidence demonstrates that producer-handlers have a comparative pricing advantage over fully regulated handlers that does not ensure equitable minimum prices to similarly situated handlers. Such an advantage has resulted in fully regulated handlers losing sales to producer-handlers. Producer-handlers have similarly lost accounts to fully regulated handlers, but for reasons other than price.

The record supports concluding that producer-handlers with more than 3 million pounds of route dispositions per month have gained the ability to no longer bear the burden of the surplus disposal of their milk production. This represents a significant development that warrants the need for regulatory action because producer-handler exemption from the pooling and pricing provisions of the orders has been rationalized on the basis that producer-handlers bear the entire burden of balancing their own production. A producer-handler not bearing the burden of balancing their milk production essentially shifts such burden to the market's pooled producers while simultaneously retaining the full value of Class I sales for themselves.

A changing retail environment gives rise to the potential of producer-handlers entering into sales agreements with retailers to furnish the retailer with as much milk as the producer-handler can deliver. Marketing milk to national grocery discounters creates an environment in which the producer-handlers are given the ability to sell nearly their entire production to such a retailer, bypassing the need to balance supplies. In such a marketing environment, the regulated market's pooled producers essentially become the residual suppliers of Class I milk to the market when a producer-handler's production is not able to satisfy the fluid milk demands of their customer. The retailer need only purchase milk from fully regulated handlers to offset what a producer-handler is not able to supply. This is of growing concern to both producer and regulated handler interests in the Pacific Northwest and the Arizona-Las Vegas marketing areas because consumers are buying an increasing share of their grocery needs from discount outlets.

The record evidence also reveals that producer-handlers in both the Pacific Northwest and the Arizona-Las Vegas marketing areas with route disposition of more than 3 million pounds per month enjoy sales of fluid milk products into unregulated areas such as Alaska and California. These examples contribute in demonstrating a shifting of the burden of balancing milk supplies onto the order's pooled producers. This outcome has the compounded disadvantage for regulated handlers and their producer-suppliers because fully regulated handlers must account to the marketwide pool for Class I sales outside of the marketing area at the Class I price. This yields a two-fold advantage to producer-handlers; the ability to eliminate balancing their milk production through Class I sales at the expense of the regulated market, and the ability to compete on a consistent basis at prices that fully regulated handlers are unable to meet.

This evidence contradicts the notion that balancing of their milk production is a burden borne exclusively by the producer-handler. Thus it is reasonable to find that producer-handlers with Class I route distribution in excess of 3 million pounds per month in the Pacific Northwest and the Arizona marketing areas are not truly balancing their production. Accordingly, this decision finds that as the burden of balancing has been essentially shifted to the market's pooled participants and producer-handler status should be limited.

This decision considered the relevance of a 3 million pound route disposition threshold for producer-handlers. The relative impact on the market's pooled participants by producer-handlers having more than 3 million pounds of route disposition in the market is measurable and significant in both the Pacific Northwest and Arizona-Las Vegas marketing areas. When considered in the aggregate, producer-handlers in the Pacific Northwest with over 3 million pounds of route disposition are able to have a compound impact on the market because they represent an even more significant share of the Class I market which negatively affects the blend price received by dairy farmers.

All handlers have different production and processing costs. These differences may be due to differing levels of plant operating efficiencies related to their size or to that portion of their milk supply that may be produced and supplied from their own farms. Whatever the cost differences, all fully regulated handlers must pay their use-value of milk (generally, the difference between the Class I price and the blend price) into the order's producer-settlement fund. Similarly, all producers have differing milk production costs. Producer cost differences, for example, may be the result of farm size or differing milk production levels attributable to management ability. Nevertheless, producers, regardless of their costs, receive the same blend price.

The record supports finding that disorderly marketing conditions exist in the Pacific Northwest and Arizona-Las Vegas marketing areas. The source of the

disorder is directly attributable to the producer-handler exemption from the pooling and pricing provisions of the orders. The record evidence for full regulation of producer-handlers in excess of 3 million pounds per month of route disposition support finding that market disruption is present because the blend price paid to producers in both orders are measurably and significantly lowered.

Additionally, this recommended decision finds that producer-handlers with route disposition in excess of 3 million pounds per month enjoy significant competitive sales advantages because they do not pay the Class I price for raw milk procurement. This clearly gives producer-handlers a pricing advantage over fully regulated handlers when competing for sales. This pricing advantage becomes amplified when producer-handler size increases and further affects the minimum price producers receive. Adoption of a 3 million pound per month threshold for producer-handlers should tend to significantly reduce disorderly marketing conditions that arise from inequitable Class I prices to handlers. It should also increase the blend prices to producers whose milk is pooled under the orders.

A 3 million pound per month limitation on route disposition will result in the full regulation of a current producer-handler in the Arizona-Las Vegas marketing area. Of the producer-handlers operating in the Pacific Northwest marketing area, four producer-handlers will become regulated by adopting the 3 million pound per month limitation on route disposition. Adoption of this limitation will not completely eliminate the impact of the other producer-handlers in the Pacific Northwest marketing area, but should nevertheless result in a significant and immediate reduction in market disruption.

The hearing notice contained a proposal that for all intents and purposes would make the producer-handler definition of the Pacific Northwest order the same as that for the Arizona-Las Vegas order, most notably the requirement that would not permit a producer-handler to market to the same client the same product in a similar package with a similar label in the same month as a regulated handler. The record does not contain sufficient evidence of disorderly marketing conditions that would support recommending a prohibition on producer-handlers in marketing to the same client the same product in a similar package with a similar label in the same month as a regulated handler.

Additionally, the proposals contained in the hearing notice seeking the full regulation of producer-handlers when they surpass a 3 million pound per month threshold in Class I route dispositions in the marketing area were substantially modified during the hearing. The modifications re-describe producer-handlers and harmonize the producer-handler definitions between the two orders with changed terminology. The record evidence does not support finding that a compelling need to make the Pacific Northwest producer-handler definition the same as that for the Arizona-Las Vegas order. The current producer-handler definitions of both orders adequately describe those entities that qualify as producer-handlers.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Pacific Northwest and the Arizona-Las Vegas orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(A) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(B) The parity prices of milk as determined pursuant to Section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area(s), and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(C) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in marketing agreements upon which a hearing has been held; and

(D) All milk and milk products handled by handlers, as defined in the tentative marketing agreement and the order as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Recommended Marketing Agreements and Order Amending the Orders

The recommended marketing agreements are not included in this decision because the regulatory provisions thereof would be the same as those contained in the orders, as hereby proposed to be amended. The following order amending the orders, as amended, regulating the handling of milk in the Pacific Northwest and the Arizona-Las Vegas marketing areas is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Parts 1124 and 1131

Milk marketing orders.

For the reasons set forth in the preamble 7 CFR parts 1124 and 1131 are amended as follows:

1. The authority citation for 7 CFR parts 1124 and 1131 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

2. Section 1124.10 is revised to read as follows:

§ 1124.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route distribution within the marketing area during the month not to exceed 3 million pounds and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

(a) *Requirements for designation.* Designation of any person as a producer-handler by the market administrator shall be contingent upon meeting the conditions set forth in paragraphs (a)(1) through (a)(5) of this section. Following the cancellation of a previous producer-handler designation, a person seeking to have their producer-handler designation reinstated must demonstrate that these conditions have been met for the preceding month.

(1) The care and management of the dairy animals and the other resources and facilities designated in paragraph (b)(1) of this section necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) are under the complete and exclusive control, ownership and management of the producer-handler and are operated as the producer-handler's own enterprise and its own risk.

(2) The plant operation designated in paragraph (b)(2) of this section at which the producer-handler processes and packages, and from which it distributes, its own milk production is under the complete and exclusive control, ownership and management of the producer-handler and is operated as the producer-handler's own enterprise and at its sole risk.

(3) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes, or distributes at or through any of its designated milk handling, processing, or distributing resources and facilities other source milk products for reconstitution into fluid milk products or fluid milk products derived from any source other than:

(i) Its designated milk production resources and facilities (own farm production);

(ii) Pool handlers and plants regulated under any Federal order within the limitation specified in paragraph (c)(2) of this section; or

(iii) Nonfat milk solids which are used to fortify fluid milk products.

(4) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(5) No milk produced by the herd(s) or on the farm(s) that supply milk to the producer-handler's plant operation is:

(i) Subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program under the authority of a State government maintaining marketwide pooling of returns, or

(ii) Marketed in any part as Class I milk to the non-pool distributing plant of any other handler.

(b) *Designation of resources and facilities.* Designation of a person as a producer-handler shall include the determination of what shall constitute milk production, handling, processing, and distribution resources and facilities, all of which shall be considered an integrated operation, under the sole and exclusive ownership of the producer-handler.

(1) Milk production resources and facilities shall include all resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk which are solely owned, operated, and which the producer-handler has designated as a source of milk supply for the producer-handler's plant operation. However, for purposes of this paragraph, any such milk production resources and facilities which do not constitute an actual or potential source of milk supply for the producer-handler's operation shall not be considered a part of the producer-handler's milk production resources and facilities.

(2) Milk handling, processing, and distribution resources and facilities shall include all resources and facilities (including store outlets) used for handling, processing, and distributing fluid milk products which are solely owned by, and directly operated or controlled by the producer-handler or in which the producer-handler in any way has an interest, including any contractual arrangement, or over which the producer-handler directly or indirectly exercises any degree of management control.

(3) All designations shall remain in effect until canceled, pursuant to paragraph (c) of this section.

(c) *Cancellation.* The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraphs (a)(1) through (a)(5) of this section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (c)(2) or (c)(3) of this section. Cancellation of a producer-handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.

(1) Milk from the milk production resources and facilities of the producer-handler, designated in paragraph (b)(1) of this section, is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the milk production facilities and resources designated in paragraph (b)(1) of this section, except that it may receive at its plant, or acquire for route disposition, fluid milk products from fully regulated plants and handlers under any Federal order if such receipts do not exceed 150,000 pounds monthly. This limitation shall not apply if the producer-handler's own-farm production is less than 150,000 pounds during the month.

(3) Milk from the milk production resources and facilities of the producer-handler is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing plan operating under the authority of a State government.

(d) *Public announcement.* The market administrator shall publically announce:

(1) The name, plant location(s), and farm location(s) of persons designated as producer-handlers;

(2) The names of those persons whose designations have been cancelled; and

(3) The effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) *Burden of establishing and maintaining producer-handler status.* The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.27 that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of the designation do not exist.

PART 1131—MILK IN THE ARIZONA-LAS VEGAS MARKETING AREA

3. Section 1131.10 is revised to read as follows:

§ 1131.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route distribution within the marketing area during the month not to exceed 3 million pounds and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

(a) *Requirements for designation.* Designation of any person as a producer-handler by the market administrator shall be contingent upon meeting the conditions set forth in paragraphs (a)(1) through (a)(5) of this section. Following the cancellation of a previous producer-handler designation, a person seeking to have their producer-handler designation reinstated must demonstrate that these conditions have been met for the preceding month.

(1) The care and management of the dairy animals and the other resources and facilities designated in paragraph (b)(1) of this section necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) are under the complete and exclusive control, ownership and management of the producer-handler and are operated as the producer-handler's own enterprise and its own risk.

(2) The plant operation designated in paragraph (b)(2) of this section at which the producer-handler processes and packages, and from which it distributes, its own milk production is under the complete and exclusive control, ownership and management of the producer-handler and is operated as the producer-handler's own enterprise and at its sole risk.

(3) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes, or distributes at or through any of its designated milk handling, processing, or distributing resources and facilities other source milk products for reconstitution into fluid milk products or fluid milk products derived from any source other than:

(i) Its designated milk production resources and facilities (own farm production);

(ii) Pool handlers and plants regulated under any Federal order within the limitation specified in paragraph (c)(2) of this section; or

(iii) Nonfat milk solids which are used to fortify fluid milk products.

(4) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(5) No milk produced by the herd(s) or on the farm(s) that supply milk to the producer-handler's plant operation is:

(i) Subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program under the authority of a State government maintaining marketwide pooling of returns, or

(ii) Marketed in any part as Class I milk to the non-pool distributing plant of any other handler.

(6) The producer-handler does not distribute fluid milk products to a wholesale customer who is served by a plant described in § 1131.7(a), (b), or (e), or a handler described in § 1000.8(c) that supplied the same product in the same-sized package with a similar label to a wholesale customer during the month.

(b) *Designation of resources and facilities.* Designation of a person as a producer-handler shall include the determination of what shall constitute milk production, handling, processing, and distribution resources and facilities, all of which shall be considered an integrated operation, under the sole and exclusive ownership of the producer-handler.

(1) Milk production resources and facilities shall include all resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk which are solely owned, operated, and which the producer-handler has designated as a source of milk supply for the producer-handler's plant operation. However, for purposes of this paragraph, any such milk production resources and facilities which do not constitute an actual or potential source of milk supply for the producer-handler's operation shall not be considered a part of the producer-handler's milk production resources and facilities.

(2) Milk handling, processing, and distribution resources and facilities shall include all resources and facilities (including store outlets) used for handling, processing, and distributing fluid milk products which are solely owned by, and directly operated or controlled by the producer-handler or in which the producer-handler in any way has an interest, including any contractual arrangement, or over which the producer-handler directly or indirectly exercises any degree of management control.

(3) All designations shall remain in effect until canceled pursuant to paragraph (c) of this section.

(c) *Cancellation.* The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraphs (a)(1) through (a)(5) of this section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (c)(2) or (c)(3) of this section. Cancellation of a producer-handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were not met or the conditions for cancellation occurred.

(1) Milk from the milk production resources and facilities of the producer-handler, designated in paragraph (b)(1) of this section, is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the milk production facilities and resources designated in paragraph (b)(1) of this section, except that it may receive at its plant, or acquire for route disposition, fluid milk products from fully regulated plants and handlers under any Federal order if such receipts do not exceed 150,000 pounds monthly. This limitation shall not apply if the producer-handler's own-farm production is less than 150,000 pounds during the month.

(3) Milk from the milk production resources and facilities of the producer-handler is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing plan operating under the authority of a State government.

(d) *Public announcement.* The market administrator shall publicly announce:

(1) The name, plant location(s), and farm location(s) of persons designated as producer-handlers;

(2) The names of those persons whose designations have been cancelled; and

(3) The effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) *Burden of establishing and maintaining producer-handler status.* The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.27 that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of the designation do not exist.

Dated: April 7, 2005.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 05–7295 Filed 4–12–05; 8:45 am]

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Federal Register

Wednesday,
April 13, 2005

Part IV

Department of Housing and Urban Development

24 CFR Part 200
Revised Guidelines for Previous Participation Certification; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 200

[Docket No. FR–4870–F–02]

RIN 2502–AI10

Revised Guidelines for Previous Participation Certification

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations to require all participants in HUD's Multifamily Housing Programs to file their Previous Participation Certificates by a specified date using the Active Partner Performance System on HUD's secure Internet site. This rule follows publication of a proposed rule and takes into consideration the public comments received on the proposed rule. This rule makes no substantive change to the proposed rule, but provides for a six-month delay in the effective date of the electronic submission requirement.

DATES: *Effective Date:* May 13, 2005.

FOR FURTHER INFORMATION CONTACT: James E. Collins, Management Analyst, Housing Policy and Participation Standards Division, Office of the Deputy Assistant Secretary for Multifamily Housing, Room 6180, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000; telephone 202–708–1320, extension 3279 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Previous Participation Certification process is to ensure that prospective participants in HUD's Multifamily Housing Programs have a history of carrying out their past financial, legal, and administrative obligations in a satisfactory and timely manner. The current system requires HUD's business partners that want to participate in multifamily housing programs to file a paper Previous Participation Certificate using form HUD–2530 together with a description of all previous participation in multifamily programs every time they wish to do business with HUD.

II. The April 19, 2004, Proposed Rule

On April 19, 2004 (69 FR 21036), HUD published a proposed rule that advised of HUD's intention to amend 24 CFR 200.217(a) to require that filing, by a specific date, of the Previous Participation Certificate by participants in HUD's Multifamily Housing programs be done electronically rather than by completing a paper form (form HUD–2530). In the proposed rule, HUD advised that the electronic filing would be accomplished by using a secure Internet-based application developed by HUD known as the Active Partner Performance System (APPS). The proposed rule also clarified the types of transactions for which a principal or participant in HUD multifamily mortgage insurance and project-based subsidy programs must complete an electronic Previous Participation Certificate.

The proposed rule stated that APPS will provide participants with a secure environment within the HUD firewall where participants will record pertinent information about their specific relationship to any property. Using the APPS application, participants will be able to ensure that their individual records are complete, correct, and accurate at all times. APPS will provide participants with information about the physical condition of properties with which they are associated and will highlight any problems that may exist. Further, APPS will assist HUD in monitoring participants. APPS will allow HUD to maintain a history of participants, their various roles in property operations, and properties with which they are or were involved. A clear benefit of using APPS is that risk assessment of a party's new or revised participation will occur faster, as paper is not required to be sent back and forth across the country. Risk information will be shared automatically with participants, which will make the issues resolution process more efficient.

III. This Final Rule

This final rule implements the proposed rule without substantive change, except that HUD has adopted the suggestion that there be a six-month transition period. Hence, while the rule as a whole is effective 30 days from the date of publication, the effective date of the provision requiring electronic submission of the Previous Participation Certificate is 180 days from the date of publication in the **Federal Register**. Prior to that date, participants are required to continue to file form HUD–2530 as a condition prerequisite to new or revised participation.

IV. Discussion of Public Comments

The public comment period for the proposed rule closed on May 19, 2004. HUD received seven comments in response to the rule: One from a local residential services association; three from national associations representing management groups and builders; one from a government sponsored enterprise; one from a mortgage group; and one from a national law firm. Each of the seven commenters expressed their general support for HUD's effort to require electronic filing of multifamily Previous Participation Certificates. One commenter supported "any procedural changes that reduce the paperwork burden." One commenter agreed that "there are clear benefits to an electronic submission, including faster reviews by HUD staff, which is critical to the timely approval of FHA mortgage insurance for new projects."

The following presents the significant issues raised by the commenters and HUD's response to the comments.

Comment: Alternate Form for Submission: One comment noted a desire to see a provision in the rule for transmission of participation data in a form other than through APPS: "HUD electronic systems are often less than user friendly. If HUD–2530s could be sent via the Internet to local offices, the process would be faster and less cumbersome."

HUD Response: At this time HUD does not plan to provide such alternatives. HUD has explored other forms of submission, but has so far found none as effective as APPS. HUD has continued to develop some alternatives within the system to ease the burden of initial inputs of organization and participant data. For example, HUD now makes data regarding the participant's portfolio available on-line and has adjusted the system to remove some redundant and repetitive steps. The Department continues to work to make the system efficient and easy to use. HUD believes, based on its experience, that the solution that the commenter suggests would actually decrease the system's efficiency.

Comment: Effective Date and Transition Period: Three commenters stated their concern of being required to use the electronic system immediately, beginning 30 days following the date the final rule is published in the **Federal Register**. One comment requested an effective date of at least six months because "[t]he effective date of this rule should recognize that experience with [APPS] varies across the affordable housing industry." Two commenters

suggested a transition period during which the applicants could submit certifications on paper while any difficulties or technical issues with the system are being resolved. One commenter also suggested that "HUD must allow itself sufficient time to make this requirement practical," and two commenters noted that training on the electronic system should be widely available prior to the effective date.

HUD Response: HUD plans a transition period of six months from the effective date of this final rule. This will allow time for registration and entry of data by participants and for participants to become familiar with the processes. The APPS process requires the entry of baseline data about individuals and companies, collectively known as participants. It is similar in nature to the paper process where the parties listed on the paper form HUD–2530 listed names, addresses, employer identification, taxpayer identification, and other data. After the baseline is entered, the participant is responsible to keep the data updated at all times. The second and final step is to link individual property experience to the participant. All work is on-line through HUD's secure servers. During the transition period, participants will be required to file paper form HUD–2530 Previous Participation Certifications for all new business. On and after the effective date, paper forms will not be accepted.

In order to facilitate the transition, HUD is providing informational materials, including the APPS user guide, on HUD's Web site at *http://www.hud.gov/offices/hsg/mfh/apps/appsmfhm.cfm*. The APPS online application itself has on-line help functions to assist while the participant is entering data.

Comment: Information Collection: Three commenters discussed the issue of information collection generally. One commenter "urge[d] HUD to carefully review all information requested under the new submission procedure to ensure that it is consistent with current 2530 regulations." Another commenter noted "[t]he computerized system should clearly allow for similar entries to the system as currently structured, and not increase the scope of entities subject to submission." The commenters also suggested that HUD use the new electronic system to communicate to users, for example, any changes that affect the system should be promptly posted. Two commenters suggested specifically for HUD to be able to notify participants when flags are placed and/or resolved to their account.

HUD Response: HUD does not believe that the requirements of this final rule seek information beyond the scope of what is required now. The APPS will reduce the burden on the public through on-line storage of all required data, which will be secure, accessible, and able to be updated by the participant.

On the point raised about electronic communication, HUD agrees that digital communications to participants about APPS-related events would be beneficial. HUD is considering this functionality for the future. Presently, HUD communicates with participants using various methods. Inspection report information is presently sent to participants by e-mail.

Comment: Definition of "Participant": Three commenters expressed their concern over the lack of a definition for "participant." One commenter noted that " 'principal' is defined under 24 CFR 200.215, but 'participant' is not, and there is no definition for that term in the Proposed Rule." One commenter stated they were advised that the "three-tier rule in the 2530 handbook would be effectively eliminated and thus numerous additional (undefined) 'participants' would be required to file certifications." Because "principal" and "participant" are important terms, the commenters suggested that they should be clearly defined in the regulations.

HUD Response: "Participant" is the term that refers generically to all principals, affiliates, etc. referred to in existing regulations. So as not to confuse users, HUD has replaced references to "participant" with "principal."

As to the so-called "three-tier rule," that "rule" is not based on a regulation promulgated after notice-and-comment rulemaking, but rather is a procedural guideline. A careful reading of HUD's codified regulations does not include any limitation on organizational levels that must file certifications. HUD Handbook 4065.1 will be updated to reflect this regulation and more current policy.

Comment: Program References: Two commenters noted that the proposed rule appears to reference HUD programs which no longer exist and fails to reference current HUD program activities. One commenter suggested that HUD should "delete or revise 24 C.F.R. Section 200.213."

HUD Response: This change would be beyond the scope of the current rulemaking. HUD plans to update this section in the future.

Comment: Limited Liability Companies (LLCs) and Limited Partnerships (LPs): Two commenters stated that it is unclear whether the proposed rule would apply to LLCs and LPs equally or whether different standards would apply. Both commenters suggested that the final rule should clarify that equal requirements apply to both LLCs and LPs. Moreover, one commenter maintained that "passive investors," such as Limited Partners, should not be made to track some of the information required in the HUD–2530 because they are not actively involved in the management of the property.

HUD Response: HUD is considering changes to 24 CFR, Subpart H that will clarify treatment of "passive investors" and recently created business entity types. Under existing regulations at 24 CFR part 200.215, other public and private entities proposing to participate in HUD programs are covered. Therefore, even where not specifically mentioned, LLCs and LPs are covered.

At the present time, the Department has chosen to treat LLCs as if they were partnerships. The Managing Member will be considered a general partner and the members limited partners for participation clearance purposes.

Comment: Interest Reduction Payment Contract: One commenter requested clarification as to whether the HUD–2530 would have to be filed by the owner of the property or the lender, in connection with the assumption of an Interest Reduction Contract. The commenter suggested that only the owner should be required to file the HUD–2530.

HUD Response: The previous participation process requires a HUD–2530, Previous Participation Certification, to be submitted when there is new or significantly expanded participation. To determine whether a submission or application is required, Field Offices have been advised to require a Previous Participation Certification when there is any apparent change in control, including introduction of new entities. Each case must be evaluated on its own terms as to whether it requires a new filing.

Comment: 30-Day Advance Filing: One commenter stated that the existing rule requires only that a HUD–2530 be filed prior to the date of the proposed transaction, whereas the proposed rule requires that the HUD–2530 be filed a least 30 days prior to the transaction. The commenter requested clarification on this apparent discrepancy.

HUD Response: HUD is making this change because recent experience has shown that in order to prevent delays from occurring in business transactions, HUD needs this material to be filed earlier than previously.

Comment: Disclosure of Principals: One commenter noted that "the proposed rule places no limitation or qualification for disclosure and places companies at risk of violating a rule unless they spend significant time documenting information clearly relevant to a transaction." The commenter suggested that the disclosure of up to "three tiers" in the organizational structure, per guidance contained in HUD Handbook 4065.1, be required. Additionally, the commenter suggested that disclosure of principals in large public entities should be limited to "affiliates, persons or divisions with operational control over the property at issue."

HUD Response: As stated earlier, the so-called "three-tier rule" is derived from Handbook policy and is not a rule promulgated under the Administrative Procedure Act. A careful reading of the regulations does not include any limitation on organizational levels. HUD Handbook 4065.1 will be updated to reflect this regulation and current policy. HUD Handbook 4065.1 allows the Department to limit disclosure of the principals in large public entities. HUD may clarify this distinction in future rule changes.

Comment: Definition of Interest: One commenter noted that the proposed rule does not contain a definition of interest. The commenter stated "[t]he previous participation procedures require submission for all limited partners with more than 25% interest and stockholders with more than 10% interest in the property. However, there is no definition of what constitutes an interest."

HUD Response: The definition of "interest" in this regulation is the ordinary legal definition: "A legal share in something; all or part of a legal or equitable claim to or right in property" (Black's Law Dictionary 828 (8th ed. 2004)). Because the commonly-understood definition of "interest" is being used, it is not necessary to specifically define the term in this rule.

Comment: Migration of Data: One commenter stated that APPS should allow the migration of data from other commonly-used databases.

HUD Response: HUD does not plan to provide this functionality at this time due to budgetary constraints.

Comment: Task Force: One commenter states that a task force review should be completed prior to requiring the use of a computerized system, and that such a delay would provide for a transitional period.

HUD Response: HUD has considered this comment, and believes that it is appropriate at this time to go forward with the transition to electronic filing. HUD has built a six-month transition period into the rule, making any further delay unnecessary.

V. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in § 200.217 have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2502–0118. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact remains applicable to this final rule and is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This rule does not impose a federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Impact on Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule does not change informational obligations for entities, but simply provides for electronic filing of the same information that is currently required.

Therefore, the undersigned certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number is 14.117.

List of Subjects in 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Lead poisoning, Loan programs-housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 200 as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 12 U.S.C. 1702–1715z–21; 42 U.S.C. 3535(d).

■ 2. Amend § 200.217 by revising paragraph (a) to read as follows:

§ 200.217 Filing of previous participation certificate on prescribed form.

(a) Effective October 11, 2005, or on such later date as may be allowed by HUD, all principals in HUD multifamily mortgage and project based subsidy programs must submit an electronic Previous Participation Certificate (form HUD–2530) via HUD's secure web server as a condition prerequisite to new or revised participation. Prior to this date, principals are required to file form HUD–2530 as a condition prerequisite to new or revised participation. Filing requirements are as prescribed by the Assistant Secretary for Housing-Federal Housing Commissioner at the occurrence of any of the events below:

(1) With an Application for a Site Appraisal/Market Analysis Letter, Feasibility Letter, Conditional Commitment for Mortgage Insurance, or Firm Commitment for Mortgage Insurance, whichever application is first filed, for projects to be financed or refinanced with mortgages insured under the National Housing Act;

(2) With an Application for a Fund Reservation for projects financed or to be financed with direct loans or capital advances under section 202 of the Housing Act of 1959 (Housing for the Elderly and Handicapped);

(3) With an Application for a Fund Reservation for projects financed or to be financed with direct loans or capital advances under Section 811 of the Cranston-Gonzales National Affordable Housing Act (Supportive Housing for Persons with Disabilities);

(4) With the first request for a reservation of funds for assistance payments for projects in which 20 percent or more of the units are to receive a subsidy described in § 200.213(c);

(5) With an Application for any Transfer of Physical Assets;

(6) With a request to assume any existing Housing Assistance Payments Contract, Interest Reduction Contract, Rent Supplement Contract, or Rental Assistance Payments Contract;

(7) With a request to change ownership of a property regulated or controlled by a HUD "use agreement";

(8) With an application or request to change the approved lessee operating a nursing home, assisted living, or skilled care facility;

(9) With a bid to purchase a project being sold at foreclosure by HUD or by a foreclosure commissioner acting for HUD, when the terms of the sale permit HUD to disapprove a bidder;

(10) With a bid to purchase a Secretary-owned project;

(11) With a bid to purchase a mortgage note held by the Commissioner;

(12) At least 30 days prior to the date of any proposed substitution or addition of a new principal in an existing project, such as management agents, LLC members, directors, or partners, or proposed participation in a different capacity from that previously approved for the same project;

(13) At least 30 days prior to the proposed acquisition by an existing limited partner, stockholder, or any principal of additional interests resulting in a total interest of at least 25 percent (partners) or 10 percent (non-partners); or

(14) Certificates of participation must be submitted for interests acquired by any party or organization by inheritance or court decree within 30 days after said acquisition or decree, but will not be subject to review or disapproval.

* * * * *

Dated: April 4, 2005.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 05–7351 Filed 4–12–05; 8:45 am]

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Federal Register

Wednesday,
April 13, 2005

Part V

Department of Housing and Urban Development

24 CFR Part 203
Schedule for Submission of One-Time and Up-Front Mortgage Insurance Premiums; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 203

[Docket No. FR–4690–F–02]

RIN 2502–AH67

Schedule for Submission of One-Time and Up-Front Mortgage Insurance Premiums

AGENCY: Office of Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This rule makes final a proposed rule that would have, in recognition of the increased efficiencies created by the electronic processing of payments, shortened the remittance period for mortgage insurance premiums (MIPs) from 15 calendar days to three business days (Monday through Friday, exclusive of Federal holidays) for both one-time and up-front MIPs. In response to public comment, the remittance period is set at 10 calendar days in this final rule. This final rule also, in response to public comment, delays the effective date for six months from the date of publication in the **Federal Register** to allow lenders to adapt their electronic systems to the new requirements.

DATES: *Effective Date:* October 11, 2005.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, at (202) 708–2121 (this is not a toll-free number). Persons with hearing or speech impairments may access these numbers through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

A. Background

Section 203(c)(1) of the National Housing Act authorizes the Secretary to set the premium charge for insurance of mortgages under Title II of the National Housing Act. In a June 23, 1983, final rule (48 FR 28804) that followed a proposed rule and public comment, HUD established the one-time MIP for single-family programs, citing improved cash management for HUD without increased burdens on borrowers. The specific programs affected by this one-time MIP are listed in 24 CFR 203.259a, and include loans for refinancing loans insured under the National Housing Act (*see* 24 CFR 203.43(c)); mortgages in Hawaiian Home Lands (*see* 24 CFR 203.43i); and loans which are obligations of the Mutual Mortgage Insurance Fund which were executed before July 1, 1991.

Section 203(c)(2) of the National Housing Act authorizes the up-front MIP, implemented at 24 CFR 203.284 (and 24 CFR 203.285 for 15-year loans), which applies to all other mortgages executed on or after July 1, 1991 that are obligations of the Mutual Mortgage Insurance Fund. The up-front MIP requires the payment of a single premium of up to 2.25 percent of the original insured principal balance of the mortgage, and annual payments of .50 percent of the remaining insured principal balance for stated periods of time that vary depending on the original principal obligation of the mortgage.

Since April 7, 1993, it has been mandatory for lenders to make up-front MIP payments in the single-family insurance program through an electronic system. (*See, e.g.*, Mortgagee Letter 94–25.) The one-time MIP is remitted electronically as well. (*See, e.g.*, Mortgagee Letter 96–33.) Electronic submission allows for MIPs to be paid more quickly than the 15-day period allowed prior to the effective date of this rule.

B. The Notice of Proposed Rulemaking (NPRM)

The NPRM, published on August 21, 2002 (67 FR 54313), proposed amending 24 CFR 203.280 and 203.282 to reduce the remittance period for the up-front and one-time MIP in affected single-family programs from 15 calendar days to 3 business days (Monday through Friday, excluding Federal holidays), and to adjust the late charge provisions accordingly. Affected single family programs include mortgages that are obligations of the Mutual Mortgage Insurance Fund and refinancings under 24 CFR 203.43(c) (*see* 24 CFR 203.259a). The time period was proposed to be calculated from the date of loan closing. However, in the case of refinancing, the NPRM proposed that the three-day period would be counted from the date of disbursement of the mortgage proceeds rather than the date of loan closing, in order to take into account the fact that refinancing borrowers have three days to exercise a right of rescission.

Current 24 CFR 203.284 and 285 include the remittance rules in 203.280 by cross reference (*see* 24 CFR 203.284(f) and 203.285(c)). The NPRM proposed to clarify this relationship by referencing 24 CFR 203.284 and 203.285 in 24 CFR 203.280.

C. This Final Rule

This final rule amends 24 CFR 203.280 and 203.282 to reduce the remittance period for the up-front and one-time MIP in affected single-family programs from 15 calendar days to 10 calendar days, and to adjust the late charge provisions accordingly. While the NPRM had proposed 3 days, HUD has reconsidered that time limit in response to considerations raised by public commenters. In addition, after considering alternatives proposed by commenters, the rule provides that, for both original loans and refinancings, the 10-day remittance period will be counted from the date of disbursement of the mortgage proceeds or the date of loan closing, whichever is later. Finally, in order to accommodate the need for lending institutions to adjust their systems, HUD is delaying the effective date of this final rule for 180 days.

D. Public Comments

The public comment period closed on October 21, 2002. HUD received 24 comments on the proposed rule. Comments were received from mortgage lenders, a state housing development authority, a national association of mortgage lenders, and a national association of community banks.

Comment: Three days is an insufficient time for remittance of MIPs. All commenters made comments criticizing the three-day remittance period. Most of these commenters stated that the three-day period is not realistic or practical given actual business practices. Two commenters stated that even with the 15-day period, "we sometimes have to fund these out of our operating funds while waiting for the arrival of the checks." Four commenters stated that three days is not realistic, as the closing packages are not even back from the attorney's office within three days. Four commenters stated that the process of getting the closed loan documents from the settlement agents can take up to five days. Then, an audit is performed and checks are processed which takes another three days. One commenter stated that it believed that no lender would be able to comply with this rule, because, typically, a title company does not return closed files to lenders in a sufficient time.

Several commenters stated that the three-day rule would not be appropriate because it could result in MIPs having to be paid before the loan proceeds are disbursed. One commenter stated that a vast number of purchase loans do not close and fund all on the same date. Title Companies take anywhere from two to four days to return papers and

checks to the lenders. HUD would then be requiring those lenders to pay the UFMIP before they have even received the cash from the loan funding. Three days is not practical for all lenders. Another commenter similarly observed that in 50% of its retail loan closings, three days or more elapse between closing and disbursement of proceeds. Three commenters stated that HUD assumes that the lender has the closed loan package the day of closing, but in reality, the lender will not have the package until a minimum of one day after the closing, possibly longer. No lender should be forced into submitting the MIP until it has the closed loan package and the security instrument.

Three commenters stated that the period should be shortened to seven business days, instead of three. Another commenter stated that its up-front funds are included in closing packages that arrive in seven business days from closing regardless of transaction type.

Two commenters stated that the proposed remittance period would only work if the overall process was changed. One of these commenters suggested that three days would only work if HUD required the closing agents to electronically transfer the funds when they disburse. Another commenter stated that until the remittance process is streamlined, there should be no reduction in the 15-day period.

Response: HUD agrees in principle with the comments that three business days may be inadequate for submission of the mortgage insurance premiums. Consequently, HUD will extend the submission period from the proposed three business days to 10 calendar days. In place of the 3 business days originally proposed, this will be less disruptive to existing lender processes. HUD disagrees that the remittance process should be streamlined as a condition for this rule. In fact, the process was streamlined in 1993 to require electronic funds transfer while the 15 calendar days remittance period, which dated from prior, non-electronic paper processes, remained in effect.

Comment: Eleven commenters stated that the proposed three-day remittance period would have a significant impact on their businesses. Three commenters stated that the proposal would have a major impact on lenders and closing agents, since lenders might need to increase staff, or transfer staff, to be able to make the 3-day rule and avoid penalties. Another commenter similarly stated that a three-day remittance period would have a significant negative impact on the company. Shortening the period would require a complete revision of procedures and an increase in expenses, which would either have to be absorbed by the company or passed on to the borrower. Two commenters stated that the short time frame would unfairly require lenders either to have to advance funds out of their own accounts or pay a penalty.

Two commenters quantified the economic impact. One commenter stated that if the rule changes from 15 to 3 days, this translates to an approximate corporate loss of $16,000.00 monthly from payments of late fees to HUD. Another commenter stated that data shows that the commenter paid 8% in three days, 72% within 10 calendar days, 91% within 13 days and 94% within 15 calendar days. Under the proposed rule, the remaining premiums would cost the company $656,702.

One commenter stated that the rule could be a large enough financial burden that FHA lenders could possibly re-think their business models and ultimately stop originating HUD/FHA loans.

One commenter stated that shortening the transmittal time frame would not allow lenders to properly validate data coming in from front-end systems and outside title companies.

One commenter stated that the shorter time frame would negatively impact first-time and low- and moderate-income borrowers because the three-day remittance period would reduce the number of FHA loans that lenders could originate.

Response: HUD has no way of determining the accuracy of reported expenses that would be incurred by lenders, including late fees, should the three-day remittance rule be put into effect. However, HUD does agree that the three-day submission period as proposed could require submission of the upfront MIP from the lender's corporate funds. Consequently, HUD is adopting a ten-calendar days remittance period. This longer remittance period will avoid potential economic burdens.

Comment: Ten commenters suggested alternatives to the proposed 3-day remittance period. Three commenters suggested that 5 days would be preferable. Three other commenters stated that a 10-day remittance period would meet HUD's objectives while allowing lenders to maintain a high level of accuracy, reduce refund requests and not further jeopardize the insuring process. One commenter stated that the time could feasibly be shortened to 10 calendar days or 8 business days. One commenter stated that Home Equity Conversion Mortgage (HECM) lenders should be given seven business days to remit their MIPs. One commenter stated generally that HUD should adopt a more reasonable time period.

Response: As stated in response to other comments, HUD has agreed to adopt a 10-day remittance period. HUD believes that a 10-day remittance period is practical for lenders and will meet HUD's policy goals as stated in the NPRM. Initial premiums on HECM loans were not covered by the proposed rule, but may be addressed in a separate rulemaking.

Comment: Six commenters stated that there was increased risk for lenders with "cancelled" loans (loans that do not close because of borrower rescission).

Two commenters stated that loans that are scheduled to close do not always close. Loan companies will pay the up-front MIP from corporate funds for these "cancelled close" loans because the three-day period is too short for the cancelled status to be communicated to the company. For loans that are cancelled, the company will have to request a refund, which takes several months.

Fives commenters (including one of the above commenters) stated that with the shorter time period, lenders risk remitting funds for a loan that has cancelled. Refunds from HUD are not timely, and in some cases, are made to the applicant instead of the lender.

Response: HUD accepts the arguments of lenders that on refinances the remittance of MIP could occur on a loan where the borrower has exercised the right of rescission notwithstanding that the MIP remittance period begins following the right of rescission. However, HUD believes that ten calendar days should prove sufficient for lenders to communicate with their closing and post-closing staff that the right to rescind has been invoked by the borrower and, thus, eliminate payment of the MIP on a mortgage that has been rescinded. In addition, this final rule will start the MIP remittance period on the later of the date of loan closing or the date of disbursement of the mortgage proceeds. This change should also help prevent a conflict between the remittance of the MIP and the borrower's right of rescission.

Comment: Three commenters disagreed with the proposal in the NPRM that the beginning of the time period for remittance of the MIP for loans, except for refinancings, would be the date of loan closing.

Commenters suggested that the beginning date should be the recording of the mortgage; the actual funding of the loan; or the disbursement date of the loan proceeds, since the disbursement date is the most consistent easily

identified date representing the date amortization of the loan begins.

Response: HUD does not agree that recordation of the mortgage should start the MIP remittance period. Most lenders do not know when the mortgage is recorded and requiring entry of that date into HUD's system of records would be an unnecessary burden to the lender. HUD does agree, however, that the date of disbursement of the loan proceeds, for both purchase money mortgage and refinance transactions, would be an easily understood and recognizable trigger date for starting the remittance period and will thus adopt this suggestion as a possible alternative to the date of loan closing. The date of disbursement of the loan proceeds may occur later than the closing date in the case of refinancings. The loan disbursement date is easily identifiable on the HUD–1 settlement statement by the date of the beginning of per diem interest charges. HUD will look to that entry when auditing lenders for compliance with this revised remittance period.

HUD is modifying its data collection systems to require lenders to enter the date of disbursement (*i.e.*, the date the closing agent transfers control of the loan proceeds, at which time the borrower becomes liable for interest charges) into the system. This final rule provides that the remittance period will start on the date of closing or the date of disbursement of the mortgage proceeds, whichever is later. Once this final rule becomes effective, lenders will have to input the loan disbursement date in order to use the electronic system.

Comment: Six commenters stated that a three-day remittance period will be much more difficult for mortgage companies with decentralized offices.

Five commenters stated that it will be much more difficult to control the accuracy of mortgage insurance payments in the decentralized environment (from main office to branches), possibly leading to a need for refunds from HUD (which are slow to be paid), or additional late fees.

One commenter stated that its automated system requires a minimum of three business days to get the data into transmission form. As a nationwide lender, that commenter stated that it does not receive the necessary documents until day two or three.

Response: HUD is adopting a ten-calendar day remittance period. HUD believes that such a period will be adequate for data transmission within decentralized lender environments.

Comment: One commenter stated that, in the Commonwealth of Virginia, settlement agents cannot disburse funds collected at closing for the MIP until after recordation of the deed of trust, which in the Commonwealth of Virginia could be two days after closing. (Virginia Code 6.1–2.13)

Response: HUD recognizes this issue and believes that the ten-day remittance rule, along with the adoption of the later of date of closing or date of disbursement of the loan proceeds as the beginning of the remittance period, accommodates the needs of lenders making FHA loans in Virginia.

Comment: One commenter commented that if the rule does go into effect, HUD should give an assurance that refunds will be handled in a timely manner. In addition, it would be helpful to have a contact person at HUD for refund issues.

Response: The adoption of a 10-day remittance period will generally eliminate the need for additional refunds that might have occurred had the rule gone into effect as proposed. Since this final rule makes no change in refunds, refunds will continue to be handled as they are currently, in accordance with the instructions on HUD's web site at *http://www.hud.gov/offices/hsg/comp/premiums/at_ref.cfm*

Comment: One commenter asked, if the rule is published as proposed, that HUD impose a six-month delayed implementation time to allow lenders enough time to update systems and change processes.

Response: HUD recognizes that lenders face significant systems issues whenever their trading partners make such changes. For this reason HUD agrees that the implementation of this final rule will not take place for six months following publication of the final rule in the **Federal Register**.

Comment: One commenter stated that Home Equity Conversion Mortgage (HECM) loans should be specifically excluded from this rule in final form. This commenter stated that its understanding was that HECM loans were not intended to be covered by the rule.

Response: Initial premiums on HECM loans were not covered by the proposed rule, but may be addressed in a separate rulemaking. Since there is no indication in the rule that HECM loans are covered, it is not necessary to explicitly exclude them.

Comment: One commenter stated that HUD should leave the 15-day rule in effect, or simply impose a penalty on those lenders that HUD has deemed to have abused the rule.

Response: The purpose of this rule is not to penalize lenders or adopt harsher measures. Rather, HUD seeks to both clarify when the remittance period begins, and to revise its procedures to reflect electronic MIP remittance rather than the mailing of checks to a lock-box upon which the original 15-calendar day period was based. As to those few lenders that have abused the existing 15-calendar day remittance period, HUD prefers to prevent such abuse rather than attempt to take action after discovering the abuse. Therefore, HUD declines to adopt the suggested approach.

In addition to these comments, one commenter supported the overall goals of the rule. No response to this comment is required.

Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2502–0423. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. Because of the streamlining of operations and the changes made by this final rule to accommodate current business practices, this final imposes no significant burdens on business.

Environmental Impact

This final rule does not direct, provide for assistance of loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an

agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number applicable to this rule is 14.117.

List of Subjects for 24 CFR Part 203

Hawaiian Natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

■ For the reasons stated in the preamble, HUD amends 24 CFR part 203 as follows:

PART 203—SINGLE FAMILY HOUSING MORTGAGE INSURANCE

■ 1. The authority citation for 24 CFR part 203 continues to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, and 1715u; 42 U.S.C. 3535(d).

Subpart B—Contract Rights and Obligations

■ 2. Revise 24 CFR 203.280 to read as follows:

§ 203.280 One-time or Up-front MIP.

For mortgages for which a one-time or up-front MIP is to be charged in accordance with §§ 203.259a, 203.284, or 203.285, the mortgagee shall, as a condition to the endorsement of the mortgage for insurance, pay to the Commissioner for the account of the mortgagor, in a manner prescribed by the Commissioner, a premium representing the total obligation for the insuring of the mortgage by the Commissioner or the up-front portion of the total obligation, as applicable, within 10 calendar days after the date of loan closing or within 10 calendar days after the date of disbursement of the mortgage proceeds, whichever is later.

■ 3. Revise 24 CFR 203.282 to read as follows:

§ 203.282 Mortgagee's late charge and interest.

(a) Payment of a one-time or up-front MIP is late if not received by HUD within 10 calendar days after the date of loan closing or within 10 calendar days after the date of disbursement of the mortgage proceeds, whichever is later. Late payments shall include a late charge of four percent of the amount of the MIP.

(b) If payment of the MIP is not received by HUD within 30 days after the date of loan closing or within 30 calendar days after the date of disbursement of the mortgage proceeds, whichever is later, the mortgagee will be charged additional late fees until payment is received at an interest rate set in conformity with the Treasury Fiscal Requirements Manual.

Dated: April 4, 2005.

John C. Weicher,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 05–7352 Filed 4–12–05; 8:45 am]

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Federal Register

Wednesday,
April 13, 2005

Part VI

Securities and Exchange Commission

17 CFR Parts 231, 241, and 271
Commission Guidance Regarding Prohibited Conduct in Connection With IPO Allocations; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 231, 241, and 271

[Release Nos. 33–8565; 34–51500; IC–26828; File No. S7–03–05]

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation; solicitation of comments.

SUMMARY: The Securities and Exchange Commission (Commission) is publishing this interpretive release with respect to prohibited conduct in connection with securities distributions, particularly with a focus on initial public offering (IPO) allocations. The Commission is soliciting comment on the issues discussed here.

DATES: *Effective Date:* April 7, 2005.

Comment Due Date: Comments should be received on or before June 7, 2005.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/interp.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–03–05 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 S7–03–05. This file number should be included on the subject line if e-mail is used. To help us 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/interp.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Any of the following attorneys in the Office of Trading Practices, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001, at (202) 942–0772: James Brigagliano, Assistant Director; Joan Collopy, Special Counsel; Elizabeth Sandoe, Special Counsel; Liza Orr, Special Counsel; or Elizabeth Marino, Attorney.

Executive Summary: The purpose of this release is to provide guidance under Regulation M with respect to the process known as book-building, including the process for allocating shares in initial public offerings ("IPOs"). The Commission recently brought three enforcement cases alleging abuses in the offering process in contravention of Regulation M. Based on these cases, the Commission seeks to highlight certain prohibited activities that underwriters should avoid during restricted periods. These include:

- Inducements to purchase in the form of tie-in agreements or other solicitations of aftermarket bids or purchases prior to the completion of the distribution.
- Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ("aftermarket interest") or immediate aftermarket buying would help them obtain allocations of hot IPOs.
- Soliciting customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock.
- Proposing aftermarket prices to customers or encouraging customers who provide aftermarket interest to increase the prices that they are willing to place orders in the immediate aftermarket.
- Accepting or seeking expressions of interest from customers that they intend to purchase an amount of shares in the aftermarket equal to the size of their IPO allocation ("1 for 1") or intend to bid for or purchase specific amounts of shares in the aftermarket that are pegged to the allocation amount without any reference to a fixed total position size.
- Soliciting aftermarket orders from customers before all IPO shares are distributed or rewarding customers for aftermarket orders by allocating additional IPO shares to such customers.
- Communicating to customers in connection with one offering that expressing an interest in the aftermarket or buying in the aftermarket would help them obtain IPO allocations of other hot IPOs.

SUPPLEMENTARY INFORMATION:

I. Introduction

Solicitations or other attempts to induce aftermarket bids or purchases during a distribution undermine the integrity of the market as an independent pricing mechanism for the offered securities by giving purchasers the impression that there is a scarcity of the offered securities. This improper conduct by underwriters of IPOs erodes investor confidence in the capital raising process. In recognition of the serious adverse impact of these activities, the Commission has adopted rules, most recently embodied in Regulation M, which prohibit these activities as a prophylactic matter.[1]

Attempts to induce aftermarket bids or purchases during a Regulation M restricted period, or a cooling-off period as it was known under its predecessor, Rule 10b-6, have always been prohibited under these rules.[2] We first provided guidance under Rule 10b-6 concerning abusive practices in connection with IPO allocations in 1961.[3] In 2000, the Division of Market Regulation staff reminded underwriters that restricted period solicitations and tie-in agreements for aftermarket purchases are prohibited conduct under Regulation M.[4] Recent enforcement actions suggest that during the hot IPO market of the late 1990s and 2000, some underwriters and other market participants failed to comply with Regulation M or previous guidance.[5] As

[1] Regulation M (17 CFR 242.100–105) generally prohibits inducements of any transactions other than those necessary to conduct the offering. In the context of IPOs, the prohibition is generally discussed in terms of the "aftermarket," *i.e.*, trading after the distribution period is over. Regulation M is the successor to former Rules 10b–6, 10b–6A, 10b–7, 10b–8, and 10b–21, and includes the basic prohibitions of those rules. *See* Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520 (January 3, 1997) (Regulation M Adopting Release). Recently, the Commission published for comment proposed amendments to Regulation M. Securities Exchange Act Release No. 50831 (December 9, 2004), 69 FR 75774 (December 17, 2004) (Regulation M Proposing Release). *See infra* notes 6 and 11.

[2] Regulation M defines the term restricted period in Rule 100(b) (17 CFR 242.100(b)). *See infra* note 11.

[3] Securities Exchange Act Release No. 6536 (April 24, 1961) (stating that practice of distribution participants of IPOs making "allotments to their customers only if such customers agree to make comparable purchases in the open market after the issue is initially sold" violated Rule 10b-6).

[4] Staff Legal Bulletin No. 10, "Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases," August 25, 2000.

[5] *See SEC* v. *J.P. Morgan Securities, Inc.*, No. 1:03CV02028 (ESH) (Complaint) (October 1, 2003). *See also SEC* v. *Goldman Sachs Group, Inc.*, No. 05 SV 853 (SAS) (Complaint) (January 25, 2005); *SEC* v. *Morgan Stanley & Co., Inc.*, No. 1:05 CV 00166 (HHK) (Complaint) (January 25, 2005). In "hot" IPOs, investor demand significantly exceeds the supply of securities in the offering and the stock

a result, we find it appropriate to remind distribution participants and their affiliated purchasers that attempting to induce aftermarket bids or purchases during a restricted period violates Regulation M. Such guidance is necessary at this time to forestall improper conduct while continuing to promote legitimate underwriting practices that will facilitate capital formation.

II. Regulation M Prohibits Attempts To Induce Aftermarket Bids or Purchases

As a prophylactic rule, Regulation M precludes activities that could influence artificially the market for an offered security.[6] Specifically, Rule 101[7] makes it unlawful for any distribution participant[8] or its affiliated purchasers,[9] "directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security"[10] during the distribution's restricted period.[11] Like its predecessor, Rule 10b-6, Regulation M is intended "to assure that distributions of securities are free of the market effects of bids, purchases, and inducements to purchase by those who have an interest in the success of a distribution."[12] Regulation M therefore addresses direct and indirect market activity by distribution participants and conduct by distribution participants "that causes or is likely to cause another person to bid for or purchase covered securities."[13]

Attempts to induce bids or purchases of covered securities directed at aftermarket transactions fundamentally interfere with the independence of the market dynamics that are essential to the ability of investors to evaluate the terms on which securities are offered. Among other things, attempts to induce aftermarket bids or purchases can give prospective IPO purchasers the impression that there is a scarcity of the offered securities and the balance of their buying interest therefore can only be satisfied in the aftermarket.[14] As discussed below, attempts to induce aftermarket bids or purchases are prohibited throughout the restricted period.

First, Regulation M applies to "attempts," thus proscribing a distribution participant's conduct irrespective of whether it actually results in market activity by others.[15] It is the inducement or the attempt to induce during the restricted period that Regulation M prohibits. The induced activity (*i.e.*, aftermarket bids or purchases) may occur during or after the restricted period, or indeed may never occur at all. Second, we have said that "inducement to purchase" broadly refers to "activity that causes or is likely to cause another person to bid for or purchase covered securities."[16] The prophylactic prohibitions of Regulation M apply to such conduct regardless of intent of the distribution participant or affiliated purchaser. Therefore, no proof of scienter is necessary.[17] Whether

trades at a premium in the immediate aftermarket. See NYSE/NASD IPO Advisory Committee, Report and Recommendations (*http://www.nasdr/com/pdf-text/ipo_report.pdf*) (May 2003) (IPO Advisory Committee Report).

[8] *See* Regulation M Adopting Release, *supra* note 1. On October 13, 2004, the Commission proposed amendments that would extend the scope of Regulation M. Regulation M Proposing Release, 69 FR 75774. The guidance provided in this release, which addresses misconduct that currently violates Regulation M, is consistent with those proposed amendments.

[7] 17 CFR 242.101(a).

[8] *Distribution participants* include underwriters, prospective underwriters, brokers, dealers, or other persons who have agreed to participate or are participating in a distribution. 17 CFR 242.100(b).

[9] *Affiliated purchasers* include, among others, persons acting, directly or indirectly, in concert with distribution participants, issuers, or selling security holders in connection with the acquisition or distribution of any covered security. 17 CFR 242.100(b).

[10] A *covered security* is the security in distribution or any reference security. A *reference security* is any security into which the security in distribution may be converted. 17 CFR 242.100(b).

[11] 17 CFR 242.101(a). *Restricted period*, as defined in Rule 100(b) of Regulation M, means: "(1) For any security with an ADTV value of $100,000 or more of an issuer whose common equity securities have a public float value of $25 million or more, the period beginning on the later of one business day prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution; and (2) For all other securities, the period beginning on the later of five business days prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution. (3) In the case of a distribution involving a merger, acquisition, or exchange offer, the period beginning on the day proxy solicitation or offering materials are first disseminated to security holders, and ending upon the completion of the distribution." 17 CFR 242.100(b). Among other things, the proposed amendments to Regulation M would lengthen the "restricted period" for IPOs beyond the current 5-day period, and update the ADTV and public float values in the definition of restricted period to reflect changes in the value of the dollar since Regulation M's adoption in 1996. The proposed amendments would also incorporate into Regulation M's restricted period definition the Commission's long-standing interpretation that valuation and election periods in connection with mergers, acquisitions, and exchange offers are included in a restricted period. Regulation M Proposing Release, 69 FR 75774.

[12] *See* Securities Exchange Act Release No. 21332 (September 19, 1984), 49 FR at 37572, Research Reports (September 25, 1984). Similarly, the Regulation M Adopting Release states that Regulation M is "intended to preclude manipulative conduct by persons with an interest in the outcome of an offering." Regulation M Adopting Release, 62 FR at 520. The scope of the prohibition is so comprehensive that a specific exception is included in Regulation M to permit underwriters to solicit purchases of securities in the offering itself. 17 CFR 242.101(b)(9) (excepting from Rule 101(a) "[o]ffers to sell or the solicitation of offers to buy the securities being distributed (including securities acquired in stabilizing), or securities offered as principal by the person making such offer or solicitation").

[13] Securities Exchange Act Release No. 33924 (April 19, 1994), 59 FR 21681 at 21687 (April 26, 1994) (Regulation M Concept Release). *See* 17 CFR 242.101(a) and Regulation M Adopting Release, *supra* note 1. *See also Americorp Securities, Inc.*, Securities Exchange Act Release No. 41728 (August 11, 1999) (broker-dealer firm and CEO violated Rule 10b–6 by directing registered representatives to solicit and accept aftermarket purchase orders for an IPO from numerous retail customers before the effective date of the IPO). *See also SEC* v. *Wexler*, Securities Exchange Act Release No. 14489 (September 21, 1995); *P.N. MacIntyre & Co., Inc.*, Securities Exchange Act Release No. 10694 (March 20, 1974) (broker-dealer firm violated Rule 10b–6 by bidding for, purchasing or attempting to induce others to purchase securities in an offering underwritten by the broker-dealer firm before completion of the firm's participation in the distribution).

[14] *See* Report of the Special Study of the Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 88–95, pt. 1 at 520–21, 556 (1 Sess. 1963) (Special Study). The Special Study found that "[t]raders and customers both stated that prior to the effective date [of the registration statement] retail firms received buy orders or indications of interest from customers to purchase new issues at premium prices in the after-market and that these orders were then transmitted to trading firms for execution in the after-market." The Special Study then notes: "[I]f broker-dealers are prospective underwriters or have agreed to participate in the distribution, they may, by soliciting such orders, be attempting to induce customers to purchase the security prior to completion of the distribution and thereby violate rule 10b-6 under the Exchange Act [now Rule 101 of Regulation M]." *See also Report of the Securities and Exchange Commission Concerning the Hot Issues Markets* at 37–38 (August 1984) (1984 Hot Issues Report) (requiring customers who receive IPO allocations to purchase shares in the aftermarket stimulates demand for the security and causes shares to trade at a premium in the aftermarket). As Staff Legal Bulletin No. 10. discussed: "Solicitations and tie-in agreements for aftermarket purchases are manipulative because they undermine the integrity of the market as an independent pricing mechanism for the offered security. Solicitations for aftermarket purchases give purchasers in the offering the impression that there is scarcity of the offered securities. This can stimulate demand and support the pricing of the offering."

[15] *See SEC* v. *Burns*, 614 F. Supp. 1360 (S.D.Cal. 1985), *aff'd on other grounds*, 816 F.2d 471, 477 (9th Cir. 1987) (finding that "[s]o long as the participant attempted to induce purchases of those securities involved in the distribution, and did so before he completed his participation in the distribution, the attempt to induce comes within the scope of Rule 10b-6"). *See also Michael J. Markowski*, Securities Exchange Act Release No. 44086 (March 20, 2001) (finding a Rule 10b–6 violation when a broker-dealer firm instructed its brokers to solicit aftermarket orders during the distribution).

[16] Regulation M Concept Release, 59 FR at 21687.

[17] "Regulation M proscribes certain activities that offering participants could use to manipulate the price of an offered security * * *. The Commission continues to believe that a prophylactic approach to anti-manipulation regulation is the most effective means to protect the integrity of the offering process

Continued

particular conduct is a proscribed attempt to induce to bid for or purchase a covered security requires an analysis of all of the facts and circumstances surrounding the distribution participant's activity.

We are not addressing here the full spectrum of conduct prohibited by Regulation M. Rather, our discussion is focused on applying Regulation M to particular facts and circumstances that we have observed occurring in the most recent hot IPO market and providing guidance on some types of activities that are impermissible in light of the requirements of Regulation M.

III. Regulation M and IPOs

A. "Hot" IPO Periods

In the context of an IPO, Regulation M's prohibition on attempts to induce bids and purchases focuses on impermissible conduct during the restricted period that could stimulate others to engage in transactions when the trading market in the newly issued securities first commences (*i.e.*, the "aftermarket"). "Hot" IPO markets present special problems in this context.[18] By definition, hot IPO markets are characterized by high levels of demand for an allocation of the IPO shares in the original distribution, and therefore the shares are a valuable commodity. Underwriters may therefore be tempted to demand, require, solicit, encourage, or otherwise attempt to induce investors to engage in immediate aftermarket transactions in order to obtain an allocation of IPO shares.[19] Such activity violates Regulation M and also may violate the general antifraud and anti-manipulation provisions of the securities laws.[20]

The Special Study in 1963 that focused on the "hot issue" market from 1959–1961[21] found that "[i]n the pricing of new issues, underwriters could not help but be influenced by the knowledge that the prices of many issues would subsequently rise in the immediate after-market * * *"[22] The Special Study identified a number of problems and abuses that resulted from this knowledge, including the solicitation of aftermarket purchases.[23] The Special Study found that, while it was often difficult to determine whether solicitation of purchases in the aftermarket occurred prior to or immediately following the effective date of the offering, customers of certain distribution participants engaged in significant market purchases on the first day of trading, thus suggesting that the participants actively solicited or recommended purchases at least as early as the notice of effectiveness.[24]

Subsequent studies also discussed underwriters' conduct in connection with IPOs.[25] We issued a report in 1984 analyzing the hot issue market from 1980–1983.[26] Among other things, the 1984 Report found that underwriters used "tie-in" arrangements requiring customers, as a condition of participation in a hot issue offering, either to agree to purchase additional shares of the same issue at a later time, or to participate in another offering.[27] Most recently, the NYSE/NASD IPO Advisory Committee issued a report in May 2003 discussing underwriters' conduct during the IPO "bubble" of the late 1990s and 2000, a period in which there were an unusually large number of IPOs that traded "at extraordinary and immediate aftermarket premiums."[28] The report found that among the most harmful practices that artificially inflated aftermarket prices were "allocating IPO shares based on a potential investor's commitment to purchase additional shares in the aftermarket at specified prices," which the report referred to as "laddering."[29]

B. Book-Building

Book-building refers to the process by which underwriters gather and assess potential investor demand for an offering of securities and seek information important to their determination as to the size and pricing of an issue.[30] When used, the IPO book-building process begins with the filing of a registration statement with an initial estimated price range. Underwriters and the issuer then conduct "road shows" to market the offering to potential investors, generally institutions. The road shows provide investors, the issuer, and underwriters the opportunity to gather important information from each other. Investors seek information about a company, its management and its prospects, and underwriters seek information from investors that will assist them in determining particular investors' interest in the company, assessing demand for the offering, and improving pricing accuracy for the offering. Investors' demand for an offering necessarily depends on the value they place, and the value they expect the market to place, on the stock, both initially and in the future. In conjunction with the road shows, there are discussions between the underwriter's sales representatives and prospective investors to obtain investors' views about the issuer and the offered securities, and to obtain indications of the investors' interest in purchasing quantities of the underwritten securities in the offering at particular prices.[31] As the IPO Advisory

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by precluding activities that could influence artificially the market for the offered security." Regulation M Adopting Release, 62 FR at 520. *See also* Regulation M Proposing Release, 69 FR at 75775 (stating " * * * Regulation M does not require the Commission to prove in an enforcement action that distribution participants have a manipulative intent or purpose").

[18] *See* IPO Advisory Committee Report at 1–2, stating:

In recent years, however, public confidence in the integrity of the IPO process has eroded significantly. Investigations have revealed that certain underwriters and other participants in IPOs at times engaged in misconduct contrary to the best interests of investors and our markets * * * Instances of this behavior became more frequent during the IPO "bubble" of the late 1990s and 2000 * * *.

[19] *See* IPO Advisory Committee Report at 1 (discussing underwriters' misconduct during the IPO "bubble" of the late 1990s and 2000).

[20] "Any transaction or any series of transactions, whether or not effected pursuant to the provisions of Regulation M * * * remain subject to the antifraud and antimanipulation provisions of the securities laws * * *." 17 CFR 242.100(a).

[21] Special Study, pt. 1.

[22] Special Study, pt. 1, at 554. *See also* IPO Advisory Committee Report, similarly noting that during the late 1990s and 2000, the "large first-day price increases affected the allocation process by creating a pool of instant profits for underwriters to distribute." *Id.* at 1.

[23] Special Study, pt. 1, at 520–21, 556. *See supra* note 14.

[24] Special Study, pt. 1, at 556 (also finding that "[t]o add to the aftermarket excitement, some managing underwriters arranged for solicitation of customers at premium prices through nonparticipating firms.") *See also* David Clurman, *Controlling a Hot Issue Market*, 56 Cornell L. Rev. 74, 76 (1970).

[25] *See, e.g.*, IPO Advisory Committee Report.

[26] "Report of the Securities and Exchange Commission Concerning Hot Issues Markets" (August 1984) (1984 Hot Issues Report).

[27] 1984 Hot Issues Report, at 37–39. "This practice stimulates demand for a hot issue in the aftermarket thereby facilitating the process by which stock prices rise to a premium." *Id.* at 37–38. We have stated that "making allotments to customers only if such customers agree to make some comparable purchase in the open market after the issue is initially sold" may violate the anti-manipulative provisions of the Securities Exchange Act of 1934 (Exchange Act), particularly Rule 10b–6 (which was replaced by Rules 101 and 102 of Regulation M), and may violate other provisions of the federal securities laws. Securities Exchange Act Release No. 6536 (April 24, 1961).

[28] IPO Advisory Committee Report, at 1.

[29] IPO Advisory Committee Report, at 2. The Report described "laddering" as inducing investors to give orders to purchase shares in the aftermarket at pre-arranged, escalating prices in exchange for receiving IPO allocations, and stating that "[t]his conduct distorts the offering and the aftermarket and impairs investor confidence in the IPO process." *Id.* at 6.

[30] *See In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 388 n. 106 (S.D.N.Y. 2003) (book-building "entails the lead underwriter gathering and assessing potential investors" demand for the offering").

[31] *See* IPO Advisory Committee Report, at 5–6. Actual sales or contracts for sale are prohibited

Committee Report stated: "[C]ollecting information about investors" long-term interest in, and valuation of, a prospective issuer is an essential part of the book-building process." [32] By aggregating information obtained during this period from investors with other information, the underwriters and the issuer will agree on the size and pricing of the offering, and the underwriters will decide how to allocate the IPO shares to purchasers.[33]

Information that underwriters typically attempt to gather from prospective investors during the book-building process for an IPO, whether in high demand or not, includes: [34]

- A customer's evaluation of the issuer's products, earnings, history, management, and prospects.
- A customer's valuation of the securities being offered.
- The amount of shares a customer seeks to purchase *in the offering* at particular price levels (*i.e.*, indications of interest or conditional offers to buy).
- Whether the customer owns similar securities in his portfolio.
- At what prices the customer expects the shares will trade after the offering is completed (*e.g.*, where the stock will be trading three to six months after the offering).
- Whether the customer intends to hold the securities as an investment (be a long-term holder), or, instead, expects to sell the shares in the immediate aftermarket (also known as "flipping").
- The customer's desired long-term future position in the security being offered or in the relevant industry, and the price or prices at which the customer might accumulate that position.

C. The Application of Regulation M to Book-Building Activities

While we recognize the importance of the book-building process in obtaining and assessing demand for an offering and in pricing the securities, we remind market participants that there is no "book-building exception" to Regulation M for inducing or attempting to induce aftermarket bids or purchases.[35] Although a distribution participant's obtaining and assessing information about demand for an offering during the book-building process would not, by itself, constitute an inducement or attempt to induce, accompanying conduct or communications, including one or more of the activities described below, may cause the collection of information to be part of conduct that violates Regulation M.

Underwriters and other distribution participants must take care that their activities do not cross the line into prohibited attempts to induce aftermarket bids or purchases by prospective investors or others. Regulation M's proscription of attempts to induce bids and purchases "covers activity that causes or is likely to cause another person to bid for or purchase covered securities." [36] The determination as to whether an activity or communication constitutes legitimate book-building or an attempt to induce a bid or purchase in violation of Regulation M depends on the particular facts and circumstances surrounding such activity or communication.

D. Prohibited Attempts To Induce

As we previously stated, the purpose of this release is to provide guidance under Regulation M with respect to book-building and the process for allocating shares in IPOs. The activities we emphasize are prohibited do not represent an exhaustive list of conduct that violates Regulation M because the facts and circumstances of particular communications or activities will determine whether there is a Regulation M violation. This release is a reminder that certain conduct that causes or is likely to cause an undertaking, a promise, a commitment, or an understanding on the part of a customer to make aftermarket bids or purchases of an offered security, in relation to an expected allocation of IPO shares, is impermissible under Regulation M. We are not suggesting however that conduct is improper simply because it ascertains an investor's interest in purchasing an issuer's securities or leads to the development by an investor of an interest in purchasing securities of an issuer, whether in the offering or the aftermarket, including as a result of communications between the investor and a distribution participant regarding the issuer or the offering.

IV. Commission Guidance

The Commission has determined in the context of recent enforcement actions that the following activities and conduct during the Regulation M restricted period violated Regulation M:[37]

1. *Inducements to purchase in the form of tie-in agreements* [38] *or other solicitations of aftermarket bids or purchases prior to the completion of the distribution.*

2. *Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ("aftermarket interest") or immediate aftermarket buying would help them obtain allocations of hot IPOs.* The focus of this communication is clearly to attempt to induce customers to bid for or purchase securities in the immediate aftermarket in return for an allocation. However, inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct.

3. *Soliciting customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock.*[39]

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during the period prior to the registration statement for the offering becoming effective. 15 U.S.C. 77e.

[32] IPO Advisory Committee Report, at 6.

[33] *See* IPO Advisory Committee Report, at 4 (stating "[t]he pricing of an IPO is a business decision reached by the issuer in consultation with the underwriter"). *See also* Jay R. Ritter, *Initial Public Offerings*, Contemporary Finance Digest, Vol. 2, No. 1 (Spring 1998), pp. 5–30, at § 7.1 at pp. 19–21.

[34] This is not an exhaustive list of all the information gathered during the book-building process.

[35] The exception in Rule 101(b)(9) of Regulation M for offers to sell or the solicitation of offers to buy the security being distributed does not extend to inducements or attempts to induce bids or purchases in the aftermarket while the distribution is occurring.

[36] Regulation M Concept Release, 59 FR at 21687.

[37] The Commission has recently brought enforcement cases alleging violations of Regulation M. *See SEC* v. *Morgan Stanley & Co.*, (Compl.) (2005); *SEC* v. *Goldman Sachs & Co.*, (Compl.) (2005); *SEC* v. *J.P. Morgan Securities, Inc.*, (Compl.) (2003). *See also Michael J. Markowski, supra* note 16 and Securities Exchange Act Release No. 6536, *supra* note 3 (describing violations of Rule 10b–6, the predecessor to Regulation M).

[38] In this context, tie-in agreements are agreements or contracts for the purchase of shares in the aftermarket in exchange for an allocation. Such contracts may also violate the antifraud provisions of the Securities Act of 1933 (Securities Act) and the Exchange Act, and Section 5 of the Securities Act. *See* Special Study, pt. 1, at 521 n. 93. *See also* Staff Legal Bulletin No. 10. The solicitation of a tie-in is prohibited, irrespective of whether an agreement or contract to purchase results.

[39] We note that the district court in *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497 (S.D.N.Y. Nov. 3, 2003), appeal pending, *Billing* v. *Credit Suisse First Boston*, Nos. 03–9284, 03–9288 (2d Cir.) stated that "inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for the shares' are actions that are "expressly permitted during the 'road show' period." Id. at 508. However, no provision of the federal securities laws expressly permits the conduct described in the quotations during the "road show" period. In fact, depending on the facts and circumstances, if the "road show" period overlaps with a restricted period defined in Regulation M, then such actions may represent

Continued

Where the sales representative inquires whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities, the clear expectation and understanding is that the customer will submit aftermarket orders at the prices and quantities discussed if the customer receives an allocation of shares. However, inquiring as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct. Soliciting aftermarket interest from customers that the distribution participant knows, or should know, have no interest in long-term holdings of the stock of IPO companies, may show that the firm or salesperson was attempting to induce aftermarket activity.

4. *Proposing aftermarket prices to customers or encouraging customers who provide aftermarket interest to increase the prices that they are willing to place orders in the immediate aftermarket.* Proposing aftermarket prices to customers creates the impression of a strong offering demand and a scarcity of offering shares, which can facilitate a distribution. Encouraging customers who provide aftermarket interest to increase the price level at which they were willing to place orders in the aftermarket conveys to customers that bidding for or purchasing in the immediate aftermarket at price levels higher than their own initial price level or higher than other customers' aftermarket price levels is expected in consideration for an allocation or an improved allocation in the IPO. Communication to customers of information obtained from third parties regarding their valuation of an issuer or the offering price is not violative where the conduct would not be likely to cause the customer to express an interest in paying a higher price in the immediate aftermarket. Encouraging an increase in prices, including by communication of prices of aftermarket interest of third parties would be viewed as improperly conveying to a customer that a commitment in the aftermarket at higher price levels is expected as described above.

5. *Accepting or seeking expressions of interest from customers that they intend to purchase an amount of shares in the aftermarket equal to the size of their IPO allocation ("1 for 1") or intend to bid for or purchase specific amounts of shares in the aftermarket that are pegged to the allocation amount without any reference to a fixed total position size.* By seeking this type of aftermarket interest from customers, the underwriter would be attempting to induce customers to place orders or buy in the aftermarket. In contrast, it is possible that a customer could express a desire to purchase in the aftermarket without prompting from the salesman. Where the customer's statement is spontaneous, there may be no "attempt to induce" by the salesperson. However, if, for example, there had been a prior course of dealing between the firm and the investor through which the firm communicated that the investor was expected to provide this type of aftermarket price and quantity information, the seemingly spontaneous statement of an intention to make aftermarket purchases may in fact have been induced by the firm. In any event, whether or not the customer's statement is spontaneous, if a sales representative accepts a customer's offer to purchase shares in the immediate aftermarket that is expressly linked to the receipt of an allocation, this is a prohibited tie-in agreement and violates Regulation M.[40]

6. *Soliciting aftermarket orders from customers before all IPO shares are distributed or rewarding customers for aftermarket orders by allocating additional IPO shares to such customers.* If all of the IPO shares have not been distributed, an underwriter is still in a restricted period and prohibited from attempting to induce aftermarket activity.[41] By soliciting orders or rewarding customers who place orders in the immediate aftermarket with additional IPO shares in the same offering, the underwriter is improperly stimulating aftermarket purchases during the restricted period.

7. *Communicating to customers in connection with one offering that expressing an interest in the aftermarket or buying in the aftermarket would help them obtain IPO allocations of other hot IPOs.* In this scenario, the broker would be inducing or attempting to induce aftermarket bids or purchases by linking an expectation of aftermarket bids or purchases to the customer's desire to receive allocations in future hot IPOs. However, determining that a customer is or may be a long-term investor in the securities of an issuer or one or more other issuers and communications with a customer in connection with that determination do not, in and of themselves, violate Regulation M, whether or not a customer engages in aftermarket bids or purchases.

Each of the above activities is an improper attempt to induce investors to bid for or purchase covered securities in the aftermarket in order to receive IPO allocations.[42] These solicitations or attempts to induce aimed at aftermarket transactions tend to: (1) Create offering demand; (2) cause artificial aftermarket price escalation; and (3) erode market integrity. As we have stated before, when offerings are sold based upon an artificially manufactured perception of scarcity and priced on stimulated buying pressure, IPO investors are unable to evaluate the offering to determine that it has been appropriately priced.[43] Moreover, other investors who bid for or purchase shares in the aftermarket would not know that the aftermarket demand had been stimulated by the underwriters' unlawful conduct.

In addition, certain conduct occurring after the restricted period, while not of itself illegal, could be evidence that a distribution participant attempted during the restricted period to induce customers to bid for or purchase stock in the aftermarket.[44] Recent

attempts to induce aftermarket bids or purchases in violation of Rule 101 of Regulation M.

[40] By accepting such a commitment, the firm also may violate Section 5 under the Securities Act. *See* Special Study, pt. 1, at 521 n. 93. *See also* note 38 *supra*. In contrast, for example, where a sales representative rejects the offer to make aftermarket purchases linked to the receipt of an allocation, and informs the customer that firm policy prohibits allocations on that basis, the firm would not have engaged in activity that constitutes a prohibited tie-in agreement in violation of Regulation M, notwithstanding that the customer ultimately was allocated IPO shares.

[41] The definition of restricted period in Rule 100 of Regulation provides that a restricted period ends upon "such person's completion of participation in the distribution." In the Adopting Release the Commission stated, "[u]nder Regulation M, a person determines when its completion of participation in the distribution occurs based on the person's role in the distribution. An underwriter is deemed to have completed its participation in a distribution when its participation has been distributed * * * and after any stabilization arrangements and trading restrictions in connection with the distribution have been terminated. The definition contains a provision that an underwriter's participation is not deemed to be completed, however, if a syndicate overallotment option is exercised in an amount that exceeds the net syndicate short position at the time of such exercise." Regulation M Adopting Release, 62 FR at 522.

[42] We note, however, that allocating offering shares in an amount less than the investor's indication of interest for shares in the offering in response to a solicitation to purchase in the offering would not, in and of itself, be considered an attempt to induce aftermarket purchases.

[43] *See* 1984 Hot Issue Report, at 37–39.

[44] As discussed above, while aftermarket transactions can serve as evidence that there had been an attempt to induce aftermarket bids or purchases, such evidence is not required to establish an attempt to induce in violation of Regulation M. Additionally, oral attempts to induce aftermarket activity can be evidenced in a variety of ways. *See, e.g., Americorp, Inc.*, Securities

enforcement cases contain examples of such activity including: (1) Follow-up solicitations for immediate aftermarket orders from customers who had provided aftermarket interest earlier; and (2) tracking or monitoring customers' aftermarket purchases to see whether they had followed through on their aftermarket interest.[45] We recognize that there are legitimate reasons to monitor customer activity. However, tracking customers' aftermarket purchases in the first few days of trading following an IPO could be evidence supporting a claim that the customers' expressions of desire to purchase in the aftermarket were induced.

V. Policies and Procedures

Underwriters should have effective policies and procedures to detect and prevent prohibited solicitations, tie-in agreements, and other attempts to induce aftermarket bids or purchases during the Regulation M restricted period.[46] Firms should implement policies that, at a minimum, prohibit and monitor for the activities discussed in this release. Procedures and systems for applying policies should be in place so that sales representatives and other firm employees are reasonably supervised with a view to preventing and detecting improper attempts to induce aftermarket bids or purchases during a restricted period. Firms also should take corrective action if breaches occur.

VI. General Request for Comment

We will continue to monitor developments in IPO allocation practices. We invite anyone who is interested to submit written comments on this release. Additionally, the Commission solicits comment generally concerning underwriter conduct in connection with IPOs and other distributions. The Commission will take these comments into consideration as it considers future rulemaking.

List of Subjects in 17 CFR Parts 231, 241, and 271

Securities.

Amendments to the Code of Federal Regulations

■ For the reasons set out in the preamble, the Commission is amending Title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 231—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ Part 231 is amended by adding Release No. 33–8565 and the release date of April 7, 2005 to the list of interpretive releases.

PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ Part 241 is amended by adding Release No. 34–51500 and the release date of April 7, 2005 to the list of interpretive releases.

PART 271—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT COMPANY ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ Part 271 is amended by adding Release No. IC–26828 and the release date of April 7, 2005 to the list of interpretive releases.

By the Commission.

Dated: April 7, 2005.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–7366 Filed 4–12–05; 8:45 am]

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Exchange Act Release No. 41728 (August 11, 1999) (broker dealer representatives prepared order tickets for aftermarket orders prior to the IPO becoming effective).

[45] For example, the sales representative may call the investor when aftermarket trading begins and ask why an order had not been received from the investor; or the investor may be informed that he is being penalized for not making aftermarket purchases by being denied allocations in future IPOs.

[46] *See, e.g.*, Exchange Act Section 15(b)(4)(E), 15 U.S.C. 78o(b)(4)(E). *See also* NASD Rule 3010(a) (requiring member firms to establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable NASD rules, federal securities laws and rules); NASD Notice to Members 03–72, *Request for Comment on Regulatory Approaches to Enhance IPO Pricing Transparency* (November 2003); IPO Advisory Committee Report, at 6, 19 (encouraging underwriters to develop effective internal policies and procedures to prevent prohibited secondary market activity and recommending that underwriters impose additional requirements to promote the highest standards of conduct, including: (1) enhanced periodic internal review by the underwriter of its IPO supervisory procedures; and (2) a heightened focus on the IPO process in SRO examinations for investment banking personnel)

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html.*

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H.R. 1270/P.L. 109–6

To amend the Internal Revenue Code of 1986 to extend the Leaking Underground Storage Tank Trust Fund financing rate. (Mar. 31, 2005; 119 Stat. 20)

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