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

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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, August 12, 2008
9:00 a.m.–12:30 p.m.

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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To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 30, 31, 32, 40, 50, 61, 62, and 70

RIN 3150–AI46

[NRC–2008–0397]

Administrative Changes

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Final rule.

SUMMARY: This final rule removes obsolete text, restores material removed inadvertently from the NRC's regulations, and makes administrative changes to the NRC's regulations to correct errors published in recent rulemaking documents. This final rule also updates the definition of a not-for-profit organization. This document is necessary to inform the public of these changes.

DATES: *Effective Date:* July 23, 2008.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rulemaking, Directives, and Editing Branch, Division of Administrative Services, Office of Administration, Telephone 301–415–6863, e-mail *Michael.Lesar@nrc.gov.*

ADDRESSES: You can access publicly available documents related to this document using the following methods:

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2008–0397]. Address questions about NRC dockets to Carol Gallagher 301–415–5905; e-mail *Carol.Gallagher@nrc.gov.*

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SUPPLEMENTARY INFORMATION:

Background

This final rule corrects miscellaneous errors contained in final rules published on October 16, 2007 (72 FR 58473) and January 31, 2008 (73 FR 5709). This final rule also removes obsolete text published in a final rule on January 16, 1996 (61 FR 1109), and makes minor administrative changes to the NRC's regulations and corrects erroneous authority citations.

Rulemaking Procedure

Because these amendments constitute minor administrative changes to the NRC's regulations, the notice and comment provisions of the Administrative Procedure Act do not apply pursuant to 5 U.S.C. 553(b)(B). The amendments are effective upon publication in the **Federal Register**. Good cause exists under 5 U.S.C. 553(d) to dispense with the usual 30-day delay in the effective date of the final rule, because the amendments are of a minor and administrative nature dealing with administrative changes to the NRC's regulations due to errors published in other NRC rulemaking documents. These amendments do not require action by any person or entity regulated by the NRC, and the final rule does not change the substantive responsibilities of any person or entity regulated by the NRC.

Summary of Changes

Section 2.280—The NRC increased the receipts-based small business size standard from $5 million to $6.5 million to conform to the standard set by the Small Business Administration (SBA). This size standard reflects the most commonly used SBA size standard for the nonmanufacturing industries. SBA adjusted this standard on January 23, 2002 (67 FR 3041) and on December 6, 2005 (70 FR 72577) to account for inflation. On August 10, 2007 (72 FR 44989), NRC amended 10 CFR 2.810(a)(1) and changed the size standard for a concern that provides a service for a concern not engaged in manufacturing but did not amend 10 CFR 2.810(b) to change the size standard for a small organization that is a not-for-profit organization which is independently owned and operated. This final rule updates the definition of a not-for-profit organization.

Sections 30.36(a), 40.42(a), and 70.38(a)—A final rule published on January 16, 1996 (61 FR 1109), extended certain types of licenses in effect at that time for an additional 5 years beyond their existing expiration date by revisions to §§ 30.36(a), 40.42(a), and 70.38(a). All of those licenses for which the expiration date was extended by this regulation have since expired. There is no longer a need for these provisions in the regulations. The text of these paragraphs reverts to the wording before the 1996 rulemaking.

Section 30.64—Removes reference to § 30.16.

The authority citation for part 31, and § 31.5 are revised to correct typographical errors.

Sections 32.12, 32.20, 32.25(c), and 32.29, were revised in a final rule published on October 16, 2007 (72 FR 58473), to change the reporting period for material transfers to annual, to change the content of the reports, and to remove the requirement to send copies to the Regional offices. Additionally, these sections were changed to reflect a reorganization within NRC. This administrative rule revises §§ 32.12, 32.20, 32.25(c), and 32.29 to restore the text as Originally stated in the October 16, 2007, rulemaking.

Section 32.15(d)(2)(ii) is revised to correct a typographical error.

Section 32.16 was revised in a final rule published on October 16, 2007 (72 FR 58473) to change the reporting period for material transfers to annual, to make minor changes to the content of the reports, to remove the requirement to send copies to the Regional offices, and to delete the reference to the deleted § 32.17. Additionally, the section was changed to reflect a reorganization within NRC. This

administrative rule revises § 32.16 to restore the text as Originally stated in the October 16, 2007, rulemaking.

Section 32.57—The term, "radium-226," was added to the introductory text of § 32.57 and should have been added to § 32.57(b)(1), (b)(3), (b)(4), (c) and the introductory text or paragraphs (d) and (d)(1). This was an omission in the October 1, 2007 (72 FR 55863) rulemaking. This final rule adds the term "or radium-226" after americium-241 in these paragraphs.

Section 32.303—Removes reference to § 32.17.

Appendix E to part 50—Two paragraphs from Section I, and Sections IV.F.2.d through IV.F.2.h. were inadvertently removed from the Code of Federal Regulations in the implementation of the final rule published on August 28, 2007 (72 FR 49351). These sections are restored in this final rule.

The authority cites for parts 61 and 62 are revised to correct typographical errors.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rule.

Paperwork Reduction Act Statement

This final rule does not contain information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Backfit Analysis

The NRC has determined that the backfit rule does not apply to this final rule; therefore, a backfit analysis is not required for this final rule because these amendments are administrative in nature and do not involve any provisions that would impose backfits as defined in 10 CFR Chapter I.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 31

Byproduct material, Criminal penalties, Labeling, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment.

10 CFR Part 32

Byproduct material, Criminal penalties, Labeling, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements. Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 61

Criminal penalties, Low-level waste, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 62

Administrative practice and procedure, Denial of access, Emergency access to low-level waste disposal, Low-level radioactive waste, Low-level radioactive waste treatment and disposal, Low-level waste policy amendments act of 1985, Nuclear materials, Reporting and recordkeeping requirements.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

■ For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Parts 2, 30, 31, 32, 40, 50, 61, 62, and 70.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

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

Authority: Secs.161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat.1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552; sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97–425, 96 Stat. 2213, as amended (42 U.S.C. 10143(f)); sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871).

Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200–2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948–951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201 (b), (i), (o), 2236, 2282); sec. 206, 88 Stat 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101–410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104–134, 110 Stat. 1321–373 (28 U.S.C. 2461 note). Subpart C also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Section 2.301 also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.712 also issued under 5 U.S.C. 557. Section 2.340 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.390 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553, and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154).

Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also

issued under sec. 184 (42 U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91–550, 84 Stat. 1473 (42 U.S.C. 2135).

§ 2.810 [Amended]

■ 2. In § 2.810, paragraph (b) is amended by revising "$5" to read "$6.5".

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

■ 3. The authority citation for part 30 continues to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 30.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 4. In § 30.36, paragraph (a) is revised to read as follows:

§ 30.36 Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas.

(a) Each specific license expires at the end of the day on the expiration date stated in the license, unless the licensee has filed an application for renewal under § 30.37 not less than 30 days before the expiration date stated in the existing license. If an application for renewal has been filed at least 30 days before the expiration date stated in the existing license, the existing license expires at the end of the day on which the Commission makes a final determination to deny the renewal application or, if the determination states an expiration date, the expiration date stated in the determination.

* * * * *

§ 30.64 [Amended]

■ 5. In § 30.64, paragraph (b) is amended by removing the reference to § 30.16.

PART 31—GENERAL DOMESTIC LICENSES FOR BYPRODUCT MATERIAL

■ 6. The authority citation for part 31 is revised to read as follows:

Authority: Secs. 81, 161, 183, 68 Stat. 935, 948, 954, as amended (42 U.S.C. 2111, 2201, 2233); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), P. Law 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

§ 31.5 [Amended]

■ 7. In § 31.5(c)(8)(iii), the reference "(c)(8)(I)" is revised to read "(c)(8)(i)".

PART 32—SPECIFIC DOMESTIC LICENSES TO MANUFACTURE OR TRANSFER CERTAIN ITEMS CONTAINING BYPRODUCT MATERIAL

■ 8. The authority citation for part 32 continues to read as follows:

Authority: Secs. 81, 161, 182, 183, 68 Stat. 935, 948, 953, 954, as amended (42 U.S.C. 2111, 2201, 2232, 2233); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

■ 9. In § 32.12, paragraph (a) is revised to read as follows:

§ 32.12 Same: Records and material transfer reports.

(a) Each person licensed under § 32.11 shall maintain records of transfer of byproduct material and file a report with the Director of the Office of Federal and State Materials and Environmental Management Programs by an appropriate method listed in § 30.6(a) of this chapter, including in the address: ATTN: Document Control Desk/Exempt Distribution.

(1) The report must clearly identify the specific licensee submitting the report and include the license number of the specific licensee.

(2) The report must indicate that the byproduct material is transferred for use under § 30.14 of this chapter or equivalent regulations of an Agreement State.

* * * * * .

§ 32.15 [Amended]

■ 10. In § 32.15(d)(2)(ii), the reference "(d)(2)(I)" is revised to read "(d)(2)(i)".

■ 11. In § 32.16, paragraph (a) is revised to read as follows:

§ 32.16 Certain items containing byproduct material: Records and reports of transfer.

(a) Each person licensed under § 32.14 shall maintain records of all transfers of byproduct material and file a report with the Director of the Office of Federal and State Materials and Environmental Management Programs by an appropriate method listed in § 30.6(a) of this chapter, including in the address: ATTN: Document Control Desk/Exempt Distribution.

(1) The report must clearly identify the specific licensee submitting the report and include the license number of the specific licensee.

(2) The report must indicate that the products are transferred for use under § 30.15 of this chapter, giving the specific paragraph designation, or equivalent regulations of an Agreement State.

* * * * *

■ 12. In § 32.20, paragraph (b) is revised to read as follows:

§ 32.20 Same: Records and material transfer reports.

* * * * *

(b) The licensee shall file a summary report with the Director of the Office of Federal and State Materials and Environmental Management Programs by an appropriate method listed in § 30.6(a) of this chapter, including in the address: ATTN: Document Control Desk/Exempt Distribution.

(1) The report must clearly identify the specific licensee submitting the report and include the license number of the specific licensee.

(2) The report must indicate that the materials are transferred for use under § 30.18 or equivalent regulations of an Agreement State.

* * * * *

■ 13. In § 32.25, the introductory text of paragraph (c) is revised to read as follows:

§ 32.25 Conditions of licenses issued under § 32.22: Quality control, labeling, and reports of transfer.

* * * * *

(c) Maintain records of all transfers and file a report with the Director of the Office of Federal and State Materials and Environmental Management Programs by an appropriate method listed in § 30.6(a) of this chapter, including in the address: ATTN: Document Control Desk/Exempt Distribution.

* * * * *

■ 14. In § 32.29, the introductory text of paragraph (c) is revised to read as follows:

§ 32.29 Conditions of licenses issued under § 32.26: Quality control, labeling, and reports of transfer.

* * * * *

(c) Maintain records of all transfers and file a report with the Director of the Office of Federal and State Materials and Environmental Management Programs by an appropriate method listed in § 30.6(a) of this chapter, including in the address: ATTN: Document Control Desk/Exempt Distribution.

* * * * *

§ 32.57 [Amended]

■ 15. In § 32.57, paragraphs (b)(1), (b)(3), (b)(4), (c), the introductory text of paragraph (d) and paragraph (d)(1) are amended by adding "or radium-226" after "americium-241".

§ 32.303 [Amended]

■ 16. Section 32.303(b) is amended by removing the reference to § 32.17.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

■ 17. The authority citation for part 40 continues to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95–604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97–415, 96 Stat. 2067 (42 U.S.C. 2022); sec. 193, 104 Stat. 2835, as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 40.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 18. In § 40.42, paragraph (a) is revised to read as follows:

§ 40.42 Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas.

(a) Each specific license expires at the end of the day on the expiration date stated in the license unless the licensee has filed an application for renewal under § 40.43 not less than 30 days before the expiration date stated in the existing license. If an application for renewal has been filed at least 30 days before the expiration date stated in the existing license, the existing license expires at the end of the day on which the Commission makes a final determination to deny the renewal application or, if the determination states an expiration date, the expiration date stated in the determination.

* * * * *

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 19. The authority citation for part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111). Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5841). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 20. In Appendix E to part 50, Section I is amended by adding two new paragraphs following the existing paragraphs and adding footnotes 1 and 2; and Sections IV.F.2.d through IV.F.2.h are added to read as follows:

Appendix E to part 50—Emergency Planning and Preparedness for Production and Utilization Facilities

I. Introduction.

* * * * *

The potential radiological hazards to the public associated with the operation of research and test reactors and fuel facilities licensed under 10 CFR parts 50 and 70 involve considerations different than those associated with nuclear power reactors. Consequently, the size of Emergency Planning Zones [1] (EPZs) for facilities other than power reactors and the degree to which compliance with the requirements of this section and sections II, III, IV, and V as necessary will be determined on a case-by-case basis.[2]

Notwithstanding the above paragraphs, in the case of an operating license authorizing only fuel loading and/or low power operations up to 5 percent of rated power, no NRC or FEMA review, findings, or determinations concerning the state of offsite emergency preparedness or the adequacy of and the capability to implement State and local offsite emergency plans, as defined in this Appendix, are required prior to the issuance of such a license.

* * * * *

IV. Content of Emergency Plans.

F. * * *

(2) * * *

d. A State should fully participate in the ingestion pathway portion of exercises at least once every six years. In States with more than one site, the State should rotate this participation from site to site.

e. Licensees shall enable any State or local Government located within the plume exposure pathway EPZ to participate in the licensee's drills when requested by such State or local Government.

f. Remedial exercises will be required if the emergency plan is not satisfactorily tested during the biennial exercise, such that NRC, in consultation with FEMA, cannot find reasonable assurance that adequate protective measures can be taken in the event of a radiological emergency. The extent of State and local participation in remedial exercises must be sufficient to show that appropriate corrective measures have been taken regarding the elements of the plan not properly tested in the previous exercises.

g. All training, including exercises, shall provide for formal critiques in order to identify weak or deficient areas that need correction. Any weaknesses or deficiencies that are identified shall be corrected.

h. The participation of State and local governments in an emergency exercise is not required to the extent that the applicant has identified those governments as refusing to participate further in emergency planning activities, pursuant to 10 CFR 50.479(c)(1). In such cases, an exercise shall be held with the applicant or licensee and such governmental entities as elect to participate in the emergency planning process.

* * * * *

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

■ 21. The authority citation for part 61 is revised to read as follows:

[1] 1 EPZs for power reactors are discussed in NUREG–0396; EPA 520/1–78–016, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," December 1978. The size of the EPZs for a nuclear power plant shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled nuclear reactors and for reactors with an authorized power level less than 250 MW thermal. Generally, the plume exposure pathway EPZ for nuclear power plants with an authorized power level greater than 250 MW thermal shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius.

[2] Regulatory Guide 2.6 will be used as guidance for the acceptability of research and test reactor emergency response plans.

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851) and Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

PART 62—CRITERIA AND PROCEDURES FOR EMERGENCY ACCESS TO NON-FEDERAL AND REGIONAL LOW-LEVEL WASTE DISPOSAL FACILITIES

■ 22. The authority citation for part 62 is revised to read as follows:

Authority: Secs. 81, 161, as amended, 68 Stat. 935, 948, 950, 951, as amended (42 U.S.C. 211, 2201; secs. 201, 209, as amended, 88 Stat. 1242, 1248, as amended (42 U.S.C. 5841, 5849); secs. 3, 4, 5, 6, 99 Stat. 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857 (42 U.S.C. 2021c, 2021d, 2021e, 2021f; sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

■ 23. The authority cite for part 70 continues to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282, 2297f); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846). Sec. 193, 104 Stat. 2835 as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.81 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.82 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

■ 24. In § 70.38, paragraph (a) is revised to read as follows:

§ 70.38 Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas.

(a) Each specific license expires at the end of the day on the expiration date stated in the license unless the licensee has filed an application for renewal under § 70.33 not less than 30 days before the expiration date stated in the existing license. If an application for renewal has been filed at least 30 days before the expiration date stated in the existing license, the existing license expires at the end of the day on which the Commission makes a final determination to deny the renewal application or, if the determination states an expiration date, the expiration date stated in the determination.

* * * * *

Dated at Rockville, Maryland, this 14th day of July 2008.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rulemaking, Directives, and Editing Branch, Division of Administrative Services, Office of Administration.

[FR Doc. E8–16730 Filed 7–22–08; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0665; Airspace Docket 08–ANE–100]

Removal of Class E5 Airspace; Madison, CT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action removes Class E5 airspace at Griswold Airport, Madison, CT, (N04). The VHF Omnidirectional Range (VOR) approach into Griswold Airport has been discontinued; eliminating the need for Class E5 700 foot controlled airspace.

DATES: Effective 0901 UTC, September 25, 2008. This rule is effective without further action, unless adverse comment is received by August 22, 2008. If adverse comment is received, the FAA will publish a timely withdrawal of the rule in the **Federal Register**. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building, Ground Floor, Room W12–140, 1200 New Jersey, SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202 493–2251. You must identify the Docket Number FAA–2008–0665; Airspace Docket No. 08–ANE–100, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the rule, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 101 Columbia Avenue, College Park, Georgia 30337.

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, Operations Support, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5610.

SUPPLEMENTARY INFORMATION:

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comments, and, therefore, issues it as a direct final rule. The FAA has determined that this rule only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. There will be no further action by the FAA unless a written adverse or negative comment or a written notice of intent to submit an adverse or negative comment is received within the comment period. If the FAA receives, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. An electronic copy of this document may be downloaded from and comments may be submitted and reviewed at *http://www.regulations.gov.* Recently

published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov.*, or the **Federal Register**'s Web page at *http://www.gpoaccess.gov/fr/index.html.* Communications should identify both docket numbers and be submitted in triplicate to the address specified under the caption **ADDRESSES** above or through the Web site. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. Those wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2008–0665; Airspace Docket No. 08–ANE–100." The postcard will be date stamped and returned to the commenter.

History

On June 23, 1994, the FAA amended Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class E5 airspace at Madison, CT, (59 FR 29939) to provide sufficient controlled airspace for the VOR approach into Griswold Airport. In August 2007, the FAA discontinued the use of the VOR approach into Griswold Airport. This action will remove the Class E5 700 foot controlled airspace at Griswold Airport, thereby providing a less restrictive airspace.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 removes Class E5 airspace at Madison, CT.

Class E5 airspace designations for airspace areas extending upward from 700 feet above the surface of the Earth are published in Paragraph 6005 of FAA Order 7400.9R, dated August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E5 airspace designations listed in this document will be published subsequently in the Order.

Agency Findings

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

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace at Centre, AL.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, Airspace Designations and Reporting Points, signed August 15, 2007, and effective September 15, 2007, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ANE CT E5 Madison, CT [REMOVE]

Madison, Griswold Airport, CT

* * * * *

Issued in College Park, Georgia, on July 3, 2008.

Mark D. Ward,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E8–16513 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

14 CFR Part 97

[Docket No. 30619; Amdt. No. 3279]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under

instrument flight rules at the affected airports.

DATES: This rule is effective July 23, 2008. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 23, 2008.

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

For Examination—

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

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

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

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

Availability—All SIAPs are available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

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

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

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

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

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

The Rule

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

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

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

Conclusion

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

List of Subjects in 14 CFR Part 97

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

Issued in Washington, DC on July 11, 2008.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

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

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

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

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

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35 [Amended]

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

. . . Effective Upon Publication

FDC date	State	City	Airport	FDC No.	Subject
07/02/08	CA	Salinas	Salinas Muni	8/4752	ILS OR LOC Rwy 31, Amdt 5B.
06/27/08	UT	Salt Lake City	Salt Lake City Intl	8/4753	RNAV (GPS) Rwy 17, Orig.
06/27/08	UT	Salt Lake City	Salt Lake City Intl	8/4754	VOR/DME Rwy 34R, Amdt 9.
06/27/08	MA	Hyannis	Barnstable Muni-Boardman/Polando Field	8/4859	Takeoff Minimums and (Obstacle) DP, Amdt 3.
06/27/08	GA	Atlanta	Hartsfield-Jackson Atlanta Intl	8/4864	VOR Rwy 27L, Amdt 4B.
06/27/08	MA	Hyannis	Barnstable Muni-Boardman/Polando Field	8/4865	VOR Rwy 6, Amdt 9.
06/30/08	GA	Dalton	Dalton Muni	8/5046	RNAV (GPS) Rwy 14, Orig.
06/30/08	GA	Dalton	Dalton Muni	8/5047	ILS OR LOC Rwy 14, Orig.
06/30/08	VA	Danville	Danville Regional	8/5129	VOR Rwy 2, Amdt 13.
06/30/08	SC	Myrtle Beach	Myrtle Beach Intl	8/5130	ILS OR LOC Rwy 18, Amdt 1G.
06/30/08	PA	Johnstown	John Murtha Johnstown-Cambria County	8/5138	VOR/DME Rwy 23, Amdt 1.
06/30/08	PA	Johnstown	John Murtha Johnstown-Cambria County	8/5139	VOR Rwy 23, Amdt 7.
07/01/08	WV	Clarksburg	North Central West Virginia	8/5239	ILS Rwy 21, Amdt 1.
07/01/08	FL	Titusville	Arthur Dunn Airpark	8/5288	Takeoff Minimums and (Obstacle) DP, Amdt 1.
07/01/08	AK	Egegik	Egegik	8/5335	RNAV (GPS) Rwy 12, Amdt 1.
07/01/08	AK	Egegik	Egegik	8/5336	RNAV (GPS) Rwy 30, Amdt 1.
07/01/08	OR	Redmond	Roberts Field	8/5340	RNAV (GPS) Rwy 28, Orig–A.
07/01/08	OR	Medford	Rogue Valley Intl	8/5343	VOR/DME Rwy 14, Amdt 5.
07/01/08	OR	Medford	Rogue Valley Intl	8/5344	VOR/DME C, Amdt 3.
07/01/08	OR	Medford	Rogue Valley Intl	8/5345	LOC/DME BC B, Amdt 6A.
07/01/08	OR	Medford	Rogue Valley Intl	8/5348	RNAV (GPS) D, Orig–A.
07/01/08	MI	Saginaw	Saginaw County H.W. Browne	8/5479	RNAV (GPS) Rwy 9, Orig.
07/02/08	GA	Augusta	Daniel Field	8/5532	NDB OR GPS Rwy 11, Amdt 3.
07/02/08	CA	Petaluma	Petaluma Muni	8/5572	VOR/DME Rwy 29, Orig.
07/09/08	AK	Anaktuvuk Pass	Anaktuvuk Pass	8/5573	RNAV (GPS) A, Orig.
07/09/08	AK	St Michael	St Michael	8/5574	RNAV (GPS) Rwy 2, Orig.
07/02/08	CA	San Diego	San Diego Intl	8/5575	ILS Rwy 9, Amdt 1.
07/02/08	CA	San Diego	San Diego Intl	8/5576	RNAV (GPS) Rwy 9, Orig.
07/09/08	AK	St George	St George	8/5586	RNAV (GPS) B, Orig.
07/09/08	AK	St George	St George	8/5587	RNAV (GPS) D, Orig.
07/03/08	MA	New Bedford	New Bedford Regional	8/5876	ILS Rwy 5, Amdt 25.
07/03/08	CA	Ukiah	Ukiah Muni	8/5916	VOR/DME RNAV OR GPS B, Amdt 4.
07/03/08	CA	Ukiah	Ukiah Muni	8/5917	VOR OR GPS A, Amdt 3.
07/03/08	CA	Ukiah	Ukiah Muni	8/5918	LOC Rwy 15, Amdt 5A.
07/09/08	AK	King Cove	King Cove	8/5921	RNAV (GPS) A, Orig–A.
07/07/08	AR	Little Rock	Adams Field	8/6150	VOR A, Orig–A.
07/07/08	AR	Little Rock	Adams Field	8/6151	ILS OR LOC Rwy 4L, Amdt 25B.
07/07/08	WI	Oshkosh	Wittman Rgnl	8/6190	VOR Rwy 9, Amdt 9.
07/07/08	WI	Oshkosh	Wittman Rgnl	8/6193	RNAV (GPS) Rwy 9, Orig.
07/07/08	CA	Sacramento	Sacramento Intl	8/6194	ILS Rwy 16L, Amdt 1.
07/07/08	CA	Sacramento	Sacramento Intl	8/6195	RNAV (GPS) Rwy 34R, Orig–B.
07/07/08	CA	Sacramento	Sacramento Intl	8/6196	RNAV (GPS) Rwy 16L, Orig–B.
07/07/08	CA	Sacramento	Sacramento Intl	8/6197	RNAV (GPS) Rwy 16R, Orig–C.

FDC date	State	City	Airport	FDC No.	Subject
07/07/08	CA	Sacramento	Sacramento Intl	8/6201	ILS Rwy 16R, Amdt 14A...ILS Rwy 16R (CAT II), Amdt 14A...ILS Rwy 16R (CAT III), Amdt 14A.
07/07/08	NE	Grand Island	Central Nebraska Regional	8/6211	ILS OR LOC Rwy 35, Amdt 9C.
07/07/08	CA	Livermore	Livermore Muni	8/6221	GPS Rwy 25R, Orig-A.
07/02/08	CO	Denver	Centennial	8/6226	NDB Rwy 35R, Amdt 10A.
07/02/08	CO	Denver	Centennial	8/6227	ILS Rwy 35R, Amdt 8A.
07/01/08	DE	Wilmington	New Castle	8/6228	ILS OR LOC Rwy 1, Amdt 21.
07/07/08	NV	Reno	Reno/Stead	8/6231	Take-Off Minimums And (Obstacle) Departure Procedures, Amdt 3.
07/09/08	AK	Anchorage	Ted Stevens Anchorage Intl	8/6232	ILS OR LOC/DME Rwy 7R, Orig.
07/09/08	AK	Anchorage	Ted Stevens Anchorage Intl	8/6233	ILS Rwy 14, Amdt 4.
07/09/08	AK	Anchorage	Ted Stevens Anchorage Intl	8/6234	RNAV (GPS) Rwy 14, Amdt 1.
07/09/08	AK	Anchorage	Ted Stevens Anchorage Intl	8/6235	ILS OR LOC/DME Rwy 7L, Orig.
07/09/08	AK	Anchorage	Ted Stevens Anchorage Intl	8/6236	VOR Rwy 7R, Amdt 13.
07/03/08	AL	Headland	Headland Muni	8/6282	RNAV (GPS) Rwy 27, Orig.
07/03/08	IA	Ames	Ames Muni	8/6314	RNAV (GPS) Rwy 13, Orig-A.
07/03/08	TX	Houston	George Bush Intercontinental/Houston	8/6315	ILS OR LOC Rwy 9, Amdt 7A.
07/03/08	WV	Summersville	Summersville	8/6323	GPS Rwy 4, Amdt 2.
07/03/08	NV	Las Vegas	Mc Carran Intl	8/6362	ILS Rwy 25L, Amdt 3A.
07/03/08	NV	Las Vegas	Mc Carran Intl	8/6363	ILS OR LOC Rwy 25R, Amdt 16H.
07/03/08	LA	Shreveport	Shreveport Downtown	8/6536	RNAV (GPS) Rwy 14, Orig.
07/07/08	KS	Wellington	Wellington Muni	8/6699	VOR/DME Rwy 17, Amdt 2.
05/31/08	MI	Saginaw	Saginaw County H.W. Browne	8/9533	RNAV (GPS) Rwy 9, Orig. This Notam Published In TI08-15 Is Hereby Rescinded In Its' Entirety.
05/31/08	NY	Albany	Albany Intl	8/9706	RNAV (GPS) Rwy 19, Orig. This Notam Published In TI08-15 Is Hereby Rescinded In Its Entirety.

[FR Doc. E8-16528 Filed 7-22-08; 8:45 am]
BILLING CODE 4910-13-P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 10, 24, 102, 162, 163 and 178

[Docket No. USCBP-2007-0063; CBP Dec. 08-28]

RIN 1505-AB81

United States-Bahrain Free Trade Agreement

AGENCIES: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with two technical corrections, interim amendments to title 19 of the Code of Federal Regulations which were published in the **Federal Register** on October 16, 2007, as CBP Dec. 07-81 to implement the preferential tariff treatment and other customs-related provisions of the United States-Bahrain Free Trade Agreement entered into by the United States and the Kingdom of Bahrain.

DATES: This final rule is effective on August 22, 2008.

FOR FURTHER INFORMATION CONTACT: Textile Operational Aspects: Robert Abels, Office of International Trade, (202) 863-6503. Other Operational

Aspects: Heather Sykes, Office of International Trade, (202) 863–6099. Legal Aspects: Karen Greene, Office of International Trade, (202) 572–8838.

SUPPLEMENTARY INFORMATION: On September 14, 2004, the United States and the Kingdom of Bahrain (the "Parties") signed the U.S.-Bahrain Free Trade Agreement ("BFTA"). The stated objectives of the BFTA include creating new employment opportunities and raising the standard of living for the citizens of the Parties by liberalizing and expanding trade between them; enhancing the competitiveness of the enterprises of the Parties in global markets; establishing clear and mutually advantageous rules governing trade between the Parties; eliminating bribery and corruption in international trade and investment; fostering creativity and innovation by improving technology and enhancing the protection and enforcement of intellectual property rights; strengthening the development and enforcement of labor and environmental laws and policies; and establishing an expanded free trade area in the Middle East, thereby contributing to economic liberalization and development in the region.

The provisions of the US–BFTA were adopted by the United States with the enactment on January 11, 2006, of the United States-Bahrain Free Trade Area Implementation Act (the "Act"), Public Law 109–169, 119 Stat. 3581 (19 U.S.C. 3805 note). Section 205 of the Act requires that regulations be prescribed as necessary.

On July 27, 2006, the President signed Proclamation 8039 to implement the provisions of the BFTA. The proclamation, which was published in the **Federal Register** on August 1, 2006 (71 FR 43635), modified the Harmonized Tariff Schedule of the United States ("HTSUS") as set forth in Annexes I and II of Publication 3830 of the U.S. International Trade Commission. The modifications to the HTSUS included the addition of new General Note 30, incorporating the relevant BFTA rules of Origin as set forth in the Act, and the insertion throughout the HTSUS of the preferential duty rates applicable to individual products under the BFTA where the special program indicator "BH" appears in parenthesis in the "Special" rate of duty subcolumn. The modifications to the HTSUS also included a new Subchapter XIV to Chapter 99 to provide for temporary tariff rate quotas and applicable safeguards implemented by the BFTA.

U.S. Customs and Border Protection ("CBP") is responsible for administering the provisions of the BFTA and the Act that relate to the importation of goods into the United States from Bahrain. Those customs-related BFTA provisions that require implementation through regulation include certain tariff and non-tariff provisions within Chapter One (Initial Provisions and Definitions), Chapter Two (National Treatment and Market Access for Goods), Chapter Three (Textiles and Apparel), Chapter Four (Rules of Origin), and Chapter Five (Customs Administration). On October 16, 2007, CBP published CBP Dec. 07–81 in the **Federal Register** (72 FR 58511), setting forth interim amendments to implement the preferential tariff treatment and customs-related provisions of the BFTA. For a more detailed discussion of the BFTA provisions that were implemented by the interim amendments, please see CBP Dec. 07–81.

In order to provide transparency and facilitate their use, the majority of the BFTA implementing regulations set forth in CBP Dec. 07–81 were included within new Subpart N in Part 10 of the CBP regulations (19 CFR Part 10). However, in those cases in which BFTA implementation was more appropriate in the context of an existing regulatory provision, the BFTA regulatory text was incorporated in an existing part within the CBP regulations. CBP Dec. 07–81 also set forth several cross-references and other consequential changes to existing regulatory provisions to clarify the relationship between those existing provisions and the new BFTA implementing regulations.

Although the interim regulatory amendments were promulgated without prior public notice and comment procedures and took effect on October 16, 2007, CBP Dec. 07–81 provided for the submission of public comments which would be considered before adoption of the interim regulations as a final rule, and the prescribed public comment period closed on December 17, 2007. No comments were received in response to the solicitation of public comments in CBP Dec. 07–81.

Conclusion

Accordingly, CBP has determined that the interim regulations published as CBP Dec. 07–81 should be adopted as a final rule with two technical corrections. The technical corrections to the interim regulatory text effected by this final rule involve § 10.804, which concerns the declaration, and § 10.822, which concerns the transshipment of non-Originating fabric or apparel goods. Paragraph (a)(2)(vi) of § 10.804 has been revised by adding the word "the" immediately before the word "territory" and paragraph (b) of § 10.822 has been revised by replacing the word "terms" with the word "term".

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 of September 30, 1993 (58 FR 51735, October 1993), because it pertains to a foreign affairs function of the United States and implements an international agreement and, therefore, is specifically exempted by section 3(d)(2) of Executive Order 12866.

Regulatory Flexibility Act

CBP Dec. 07–81 was issued as an interim rule rather than a notice of proposed rulemaking because CBP had determined that the interim regulations involve a foreign affairs function of the United States pursuant to § 553(a)(1) of the APA. Because no notice of proposed rulemaking was required, the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*), do not apply. Accordingly, this final rule is not subject to the regulatory analysis requirements or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The collection of information in this final rule has previously been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1651–0130. The collections of information in these regulations are in §§ 10.803, 10.804, 10.818, and 10.821. This information is required in connection with claims for preferential tariff treatment and for the purpose of the exercise of other rights under the BFTA and the Act and will be used by CBP to determine eligibility for a tariff preference or other rights or benefits under the BFTA and the Act. The likely respondents are business organizations including importers, exporters, and manufacturers.

The estimated average annual burden associated with the collection of information in this final rule is 0.2 hours per respondent or record keeper. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

Signing Authority

This document is being issued in accordance with § 0.1(a)(1) of the CBP Regulations (19 CFR 0.1(a)(1)) pertaining to the authority of the

Secretary of the Treasury (or his/her delegate) to approve regulations related to certain customs revenue functions.

List of Subjects

19 CFR Part 10

Alterations, Bonds, Customs duties and inspection, Exports, Imports, Preference programs, Repairs, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 24

Financial and accounting procedures.

19 CFR Part 102

Customs duties and inspections, Imports, Reporting and recordkeeping requirements, Rules of Origin, Trade agreements.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Penalties, Trade agreements.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 178

Administrative practice and procedure, Exports, Imports, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

■ Accordingly, the interim rule amending Parts 10, 24, 102, 162, 163, and 178 of the CBP regulations (19 CFR Parts 10, 24, 102, 162, 163, and 178), which was published at 72 FR 58511 on October 16, 2007, is adopted as a final rule with two technical corrections as discussed above and set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

■ 1. The general authority citation for Part 10 and the specific authority for Subpart N continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * *

Section 10.801 through 10.829 also issued under 19 U.S.C. 1202 (General Note 30, HTSUS) and Public Law 109–169, 119 Stat. 3581 (19 U.S.C. 3805 note).

§ 10.804 [Amended]

■ 2. In § 10.804, paragraph (a)(2)(vi) is amended by adding the word "the" immediately before the word "territory".

§ 10.822 [Amended]

■ 3. In § 10.822, paragraph (b) is amended by removing the word "terms" in the first sentence and adding, in its place, the word "term".

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

Approved: July 17, 2008.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. E8–16799 Filed 7–22–08; 8:45 am]

BILLING CODE 9111–14–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2007–0449; FRL–8696–6]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Reasonably Available Control Technology Under the 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Delaware. This SIP revision pertains to the requirements in meeting the reasonably available control technology (RACT) under the 8-hour ozone national ambient air quality standard (NAAQS). These requirements are based on: Certification that previously adopted RACT controls in Delaware's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available technically and economically feasible controls, and that they continue to represent RACT for the 8-hour implementation purposes; the adoption of new or more stringent regulations that represent RACT control levels; and a negative declaration that certain categories of sources do not exist in Delaware. This action is being taken under the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on August 22, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2007–0449. All documents in the docket are listed in the *http://www.regulations.gov* website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On May 30, 2008 (73 FR 31043), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. The NPR proposed approval of the requirements of RACT under the 8-hour ozone NAAQS. The formal SIP revision was submitted by Delaware on October 2, 2006. A supplement to this SIP revision was submitted on October 5, 2006.

II. Summary of SIP Revision

Delaware's SIP revision contains the requirements of RACT set forth by the CAA under the 8-hour ozone NAAQS. Delaware's SIP revision satisfies the 8-hour RACT requirements through (1) certification that previously adopted RACT controls in Delaware's SIP that were approved by EPA under the 1-hour ozone NAAQS are based on the currently available technically and economically feasible controls, and continues to represent RACT for the 8-hour implementation purposes; (2) the adoption of new or more stringent regulations that represent RACT control levels; and (3) a negative declaration that certain CTG or non-CTG major sources of VOC and NO_X sources do not exist in Delaware. Other requirements of the Delaware's 8-hour RACT and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

III. Final Action

EPA is approving the 8-hour RACT as a revision to the Delaware SIP. Delaware's SIP revision contains the requirements of RACT set forth by the CAA under the 8-hour ozone NAAQS. This SIP revision was submitted on October 2, 2006 and a supplement submittal on October 5, 2006.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L.104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 22, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, pertaining to the Delaware's RACT provisions under the 8-hour ozone NAAQS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 15, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart I—Delaware

■ 2. In § 52.420, the table in paragraph (e) is amended by adding the entry at the end of table for the Delaware RACT under the 8-hour ozone NAAQS.

§ 52.420 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Additional explanation
* * * * * * * *				
RACT under the 8-Hour NAAQS	Delaware (Statewide)	10/02/2006	[Insert FEDERAL REGISTER page number where the document begins] 07/23/2008.	.....

[FR Doc. E8–16833 Filed 7–22–08; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2002–0302; FRL–8372–5]

Dichlorvos (DDVP); Order Denying NRDC's Objections and Requests for Hearing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Order.

SUMMARY: In this order, EPA denies objections to, and requests for hearing on, a prior order denying a petition requesting that EPA revoke all pesticide tolerances for dichlorvos under section 408(d) of the Federal Food, Drug, and Cosmetic Act. The objections and hearing requests were filed on February 1, 2008, by the Natural Resources Defense Council ("NRDC"). The Original petition was also filed by NRDC.

DATES: This order is effective July 23, 2008.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2002–0302. To access the electronic docket, go to *http://www.regulations.gov*, and search for the docket number. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: Susan Bartow, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: 703-603-0065; e-mail address: *bartow.susan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

In this document EPA denies objections and hearing requests by the Natural Resources Defense Council ("NRDC") concerning EPA's denial of NRDC's petition to revoke pesticide tolerances. This action may also be of interest to agricultural producers, food manufacturers, or pesticide manufacturers. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (North American Industrial Classification System ("NAICS") code 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS code 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS code 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS code 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

This listing is not intended to be exhaustive, but rather to provide 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 NAICS codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Acronyms

The following is a list of acronyms used in this order:

CSFII - Continuing Survey of Food Intakes by Individuals
CNS - Central Nervous System
DDVP - dichlorvos
EDSTAC - Endocrine Disruptor Screening and Testing Advisory Committee
EPA - Environmental Protection Agency
FACA - Federal Advisory Committee Act
FDA - Food and Drug Administration
FIFRA - Federal Insecticide, Fungicide, and Rodenticide Act
FFDCA - Federal Food, Drug, and Cosmetic Act
FQPA - Food Quality Protection Act of 1996
HSRB - Human Studies Review Board
IRED - Interim Reregistration Eligibility Decision
LOAEL - Lowest Observed Adverse Effect Level
MOE - Margin of Exposure
MRID - Master Record Identification
NOAEL - No Observed Adverse Effect Level
NRDC - Natural Resources Defense Council
OECD - Organisation for Economic Co-operation and Development
PAD - Population Adjusted Dose
ppm - parts per million
RBC - red blood cell
RED - Reregistration Eligibility Decision
RfD - Reference Dose
SDWA - Safe Drinking Water Act
SOP - Standard Operating Procedure
USDA - United Stated Department of Agriculture

II. Introduction

A. What Action Is the Agency Taking?

In this order, EPA denies objections, and requests for a hearing on those objections, to an earlier EPA order, (72 FR 68662 (December 5, 2007)), denying a petition to revoke all tolerances established for the pesticide dichlorvos ("DDVP") under the Federal Food, Drug, and Cosmetic Act ("FFDCA"), 21 U.S.C. 346a. (Refs. 1 and 2). Both the objections and hearing requests, as well as the petition, were filed with EPA by NRDC.

NRDC's petition, filed on June 2, 2006, pursuant to FFDCA section 408(d)(1), asserted numerous grounds as to why the DDVP tolerances allegedly fail to meet the FFDCA's safety standard. This petition was filed as EPA was completing its reassessment of the safety of the DDVP tolerances pursuant to FFDCA section 408(q). (Ref. 3). In response to the petition, EPA undertook an extensive review of its DDVP safety evaluation in the tolerance reassessment decision. Based on certain concerns raised by NRDC, EPA determined it was necessary to incorporate updated data on numerous points and to adopt revised and more conservative assumptions, in its DDVP risk assessments. This led to complete revisions of both EPA's assessments of

dietary and residential risks from exposure to DDVP. (72 FR at 68678, 68687-68691). Nonetheless, EPA concluded that its revised risk assessments demonstrated that DDVP met the FFDCA safety standard and, therefore, denied the petition. (Id. at 68695). EPA's denial was issued in the form of an order under FFDCA section 408(d)(4)(iii). (21 U.S.C. 346a(d)(4)(iii)).

NRDC then filed objections with EPA to the petition denial order and requested a hearing on its objections. These objections and hearing requests were filed pursuant to the procedures in the FFDCA section 408(g)(2). (21 U.S.C. 346a(g)(2)). The objections narrowed NRDC's claims to two main topics - that, in assessing the risk to DDVP, EPA unlawfully reduced the statutory safety factor for the protection of infants and children and EPA unlawfully relied on a human toxicity study. As to these claims, NRDC largely repeats the arguments as presented in its petition without addressing EPA's substantial revisions to the DDVP risk assessment and proffers little to no evidence in support of its requests for a hearing. After carefully reviewing the objections and hearing requests, EPA has determined that NRDC's hearing requests do not satisfy the regulatory requirements for such requests and that its substantive objections are without merit. Therefore, EPA, in this final order, denies NRDC's objections and its requests for a hearing on those objections.

B. What Is the Agency's Authority for Taking This Action?

NRDC petitioned to revoke the DDVP tolerances pursuant to the petition procedures in FFDCA section 408(d)(1). (21 U.S.C. 346a(d)(1)). Under section 408(d), EPA may respond to such a petition by either issuing a final or proposed rule modifying or revoking the tolerances or issuing an order denying the petition. (21 U.S.C. 346a(d)(4)). Here, EPA responded by issuing an order under section 408(d)(4)(iii) denying the petition. (72 FR 68622 (December 5, 2007)).

Orders issued under section 408(d)(4)(iii) are subject to a statutorily-created administrative review process. (21 U.S.C. 346a(g)(2)). Any person may file objections to a section 408(d)(4)(iii) order with EPA and request a hearing on those objections. (Id.). EPA is required by section 408(g)(2)(C) to issue a final order resolving the objections to the section 408(d)(4)(iii) order. (21 U.S.C. 346a(g)(2)(C)).

III. Statutory and Regulatory Background

In this Unit, EPA provides background on the relevant statutes and regulations governing NRDC's objections and requests for hearing as well as on pertinent Agency policies and practices. As noted, NRDC's objections and requests for hearing raise two main claims: (1) that EPA has unlawfully failed to retain the full tenfold safety factor for the protection of infants and children; and (2) that it was unlawful for EPA to rely on a toxicity study for DDVP that was conducted with humans. The children's safety factor claim is based on assertions regarding DDVP's potential endocrine effects and the adequacy of EPA's data and risk assessments pertaining to exposure to DDVP in food as a result of the use of DDVP (and similar pesticides) in agriculture or food storage and through use of DDVP in residential settings. The human studies claim involves a challenge to the EPA regulation governing reliance on human studies as well as to EPA's application of that rule to a particular human study. The human study in question measured cholinesterase inhibition in humans resulting from administration of DDVP. Background information on each of these topics is included in this Unit.

Unit III.A. summarizes the requirements and procedures in section 408 of the FFDCA and applicable regulations pertaining to pesticide tolerances, including the procedures for petitioning for revocation of tolerances and challenging the denial of such petitions and the substantive standards for evaluating the safety of pesticide tolerances. This unit also discusses the closely-related statute under which EPA regulates the sale, distribution, and use of pesticides, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), (7 U.S.C. 136 *et seq.*).

Unit III.B. provides an overview of EPA's risk assessment process. It contains an explanation of how EPA identifies the hazards posed by pesticides, how EPA determines the level of exposure to pesticides that pose a concern ("level of concern"), how EPA measures human exposure to pesticides, and how hazard, level of concern conclusions, and human exposure estimates are combined to evaluate risk. Further, this unit presents background information on two Agency policies with particular relevance to this action, EPA's policy with regard to the statutory safety factor for the protection of infants and children and its policy with regard to cholinesterase inhibition.

Unit III.C. summarizes EPA's program for implementing the statutory requirement to screen pesticides for potential endocrine effects. Unit III.D. describes the EPA regulation on use of human studies.

A. FFDCA/FIFRA and Applicable Regulations

1. *In general.* EPA establishes maximum residue limits, or "tolerances," for pesticide residues in food under section 408 of the FFDCA. (21 U.S.C. 346a). Without such a tolerance or an exemption from the requirement of a tolerance, a food containing a pesticide residue is "adulterated" under section 402 of the FFDCA and may not be legally moved in interstate commerce. (21 U.S.C. 331, 342). Monitoring and enforcement of pesticide tolerances are carried out by the U.S. Food and Drug Administration ("FDA") and the U.S. Department of Agriculture ("USDA"). Section 408 was substantially rewritten by the Food Quality Protection Act of 1996 ("FQPA"), which added the provisions discussed below establishing a detailed safety standard for pesticides, additional protections for infants and children, and the estrogenic substances screening program. (Public Law 104-170, 110 Stat. 1489 (1996)).

EPA also regulates pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), (7 U.S.C. 136 et seq). While the FFDCA authorizes the establishment of legal limits for pesticide residues in food, FIFRA requires the approval of pesticides prior to their sale and distribution, (7 U.S.C. 136a(a)), and establishes a registration regime for regulating the use of pesticides. FIFRA regulates pesticide use in conjunction with its registration scheme by requiring EPA review and approval of pesticide labels and specifying that use of a pesticide inconsistent with its label is a violation of federal law. (7 U.S.C. 136j(a)(2)(G)). In the FQPA, Congress integrated action under the two statutes by requiring that the safety standard under the FFDCA be used as a criterion in FIFRA registration actions as to pesticide uses which result in dietary risk from residues in or on food, (7 U.S.C. 136(bb)), and directing that EPA coordinate, to the extent practicable, revocations of tolerances with pesticide cancellations under FIFRA. (21 U.S.C. 346a(l)(1)).

2. *Safety standard for pesticide tolerances.* A pesticide tolerance may only be promulgated by EPA if the tolerance is "safe." (21 U.S.C. 346a(b)(2)(A)(i)). "Safe" is defined by the statute 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." (21 U.S.C. 346a(b)(2)(A)(ii)). Section 408(b)(2)(D) directs EPA, in making a safety determination, to:

consider, among other relevant factors- ...

(v) available information concerning the cumulative effects of such residues and other substances that have a common mechanism of toxicity;

(vi) available information concerning the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances, including dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources;

(viii) such information as the Administrator may require on whether the pesticide chemical may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen or other endocrine effects. ...

(21 U.S.C. 346a(b)(2)(D)(v), (vi) and (viii)).

EPA must also consider, in evaluating the safety of tolerances, "safety factors which . . . are generally recognized as appropriate for the use of animal experimentation data." (21 U.S.C. 346a(b)(2)(D)(ix).

Risks to infants and children are given special consideration. Specifically, section 408(b)(2)(C) states that EPA:

shall assess the risk of the pesticide chemical based on— ...

(II) available information concerning the special susceptibility of infants and children to the pesticide chemical residues, including neurological differences between infants and children and adults, and effects of in utero exposure to pesticide chemicals; and

(III) available information concerning the cumulative effects on infants and children of such residues and other substances that have a common mechanism of toxicity. ...

(21 U.S.C. 346a(b)(2)(C)(i)(II) and (III)).

This provision also creates a presumptive additional safety factor for the protection of infants and children. Specifically, it directs that "[i]n the case of threshold effects, ... an additional tenfold margin of safety for the pesticide chemical residue and other sources of exposure shall be applied for infants and children to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children." (21 U.S.C. 346a(b)(2)(C)). EPA is permitted to "use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children." (Id.). The additional safety margin for infants and children is referred to throughout this order as the "children's safety factor."

3. *Procedures for establishing, amending, or revoking tolerances.* Tolerances are established, amended, or revoked by rulemaking under the unique procedural framework set forth in the FFDCA. Generally, a tolerance rulemaking is initiated by the party seeking to establish, amend, or revoke a tolerance by means of filing a petition with EPA. (See 21 U.S.C. 346a(d)(1)). EPA publishes in the **Federal Register** a notice of the petition filing and requests public comment. (21 U.S.C. 346a(d)(3)). After reviewing the petition, and any comments received on it, EPA may issue a final rule establishing, amending, or revoking the tolerance, issue a proposed rule to do the same, or deny the petition. (21 U.S.C. 346a(d)(4)).

Once EPA takes final action on the petition by either establishing, amending, or revoking the tolerance or denying the petition, any person may file objections with EPA and seek an evidentiary hearing on those objections. (21 U.S.C. 346a(g)(2)). Objections and hearing requests must be filed within 60 days. (Id.). The statute provides that EPA shall "hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections." (21 U.S.C. 346a(g)(2)(B). EPA regulations make clear that hearings will only be granted where it is shown that there is "a genuine and substantial issue of fact," the requestor has identified evidence "which, if established, resolve one or more of such issues in favor of the requestor," and the issue is "determinative" with regard to the relief requested. (40 CFR 178.32(b)). EPA's final order on the objections is subject to judicial review. (21 U.S.C. 346a(h)(1)).

4. *Tolerance reassessment and FIFRA reregistration.* The FQPA required that EPA reassess the safety of all pesticide tolerances existing at the time of its enactment. (21 U.S.C. 346a(q)). EPA was given 10 years to reassess the approximately 10,000 tolerances in existence in 1996. In this reassessment, EPA was required to review existing pesticide tolerances under the new "reasonable certainty that no harm will result" standard set forth in section 408(b)(2)(A)(i). (21 U.S.C. 346a(b)(2)(A)(i)). This reassessment was substantially completed by the August 3, 2006 deadline. Tolerance reassessment was generally handled in conjunction with a similar program involving reregistration of pesticides under FIFRA. (7 U.S.C. 136a-1). Reassessment and reregistration decisions were generally combined in a document labeled a Reregistration Eligibility Decision ("RED").

5. *Estrogenic substances screening program.* The FQPA also imposed requirements regarding creation of an estrogenic substances screening program. Section 408(p) gives EPA 2 years from enactment of the FQPA to "develop a screening program ... to determine whether [pesticide chemicals and certain other substances] may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect as the Administrator may designate." (21 U.S.C. 346a(p)(1)). This screening program must use "appropriate validated test systems and scientifically relevant information." (Id.). Once the program is developed, EPA is required to take public comment and seek independent scientific review of it. Following the period for public comment and scientific review, and not later than 3 years following enactment of the FQPA, EPA is directed to "implement the program." (21 U.S.C. 346a(p)(2)).

The scope of the estrogenic screening program was expanded by an amendment to the Safe Drinking Water Act ("SDWA") passed contemporaneously with the FQPA. That amendment gave EPA the authority to provide for the testing, under the FQPA estrogenic screening program, "of any other substance that may be found in sources of drinking water if the Administrator determines that a substantial population may be exposed to such substance." (42 U.S.C. 300j-17).

B. EPA Risk Assessment for Tolerances—Policy and Practice

1. *The safety determination - risk assessment.* To assess risk of a pesticide tolerance, EPA combines information on pesticide toxicity with information regarding the route, magnitude, and duration of exposure to the pesticide. The risk assessment process involves four distinct steps: (1) Identification of the toxicological hazards posed by a pesticide; (2) determination of the "level of concern" with respect to human exposure to the pesticide; (3) estimation of human exposure to the pesticide; and (4) characterization of risk posed to humans by the pesticide based on comparison of human exposure to the level of concern.

a. *Hazard identification.* In evaluating toxicity or hazard, EPA reviews toxicity studies, primarily in laboratory animals,

to identify any adverse effects on the test subjects. Animal studies typically involve investigating a broad range of endpoints including gross and microscopic effects on organs and tissues, functional effects on bodily organs and systems, effects on blood parameters (such as red blood cell count, hemoglobin concentration, hematocrit, and a measure of clotting potential), effects on the concentrations of normal blood chemicals (including glucose, total cholesterol, urea nitrogen, creatinine, total protein, total bilirubin, albumin, hormones, and enzymes such as alkaline phosphatase, alanine aminotransfersase and cholinesterases), and behavioral or other gross effects identified through clinical observation and measurement. EPA examines whether adverse effects are caused by either short-term (e.g., "acute") or longer-term (e.g., "chronic") pesticide exposure and the effects of pre-natal and post-natal exposure in animals.

EPA also considers whether the adverse effect has a threshold - a level below which exposure has no appreciable chance of causing the adverse effect. For non-threshold effects, EPA assumes that any exposure to the substance increases the risk that the adverse effect may occur. At present, EPA only considers one adverse effect, the chronic effect of cancer, to potentially be a non-threshold effect. (Ref. 4 at 8-9). Not all carcinogens, however, pose a risk at any exposure level (i.e., "a non-threshold effect or risk"). Advances in the understanding of the mode of action of carcinogenesis have increasingly led EPA to conclude that some pesticides that cause carcinogenic effects in animal studies only cause such effects above a certain threshold of exposure. EPA has traditionally considered non-cancer adverse effects on the endocrine system to be threshold effects; that determination is being reexamined in conjunction with the endocrine disruptor screening program.

b. *Level of concern/dose-response analysis.* Once a pesticide's potential hazards are identified, EPA determines a toxicological level of concern for evaluating the risk posed by human exposure to the pesticide. In this step of the risk assessment process, EPA essentially evaluates the levels of exposure to the pesticide at which effects might occur. An important aspect of this determination is assessing the relationship between exposure (dose) and response (often referred to as the dose-response analysis). EPA follows differing approaches to identifying a level of concern for threshold and non-threshold hazards.

i. *Threshold effects.* In examining the dose-response relationship for a pesticide's threshold effects, EPA evaluates an array of toxicity studies on the pesticide. In each of these studies, EPA attempts to identify the lowest observed adverse effect level ("LOAEL") and the next lower dose at which there are no observed adverse affect levels ("NOAEL"). Generally, EPA will use the lowest NOAEL from the available studies as a starting point (called "the Point of Departure") in estimating the level of concern for humans. (Ref. 4 at 9 (The Point of Departure "is simply the toxic dose that serves as the 'starting point' in extrapolating a risk to the human population.")). At times, however, EPA will use a LOAEL from a study as the Point of Departure when no NOAEL is identified in that study and the LOAEL is close to, or lower than, other relevant NOAELs. The Point of Departure is in turn used in choosing a level of concern. EPA will make separate determinations as to the Points of Departure, and correspondingly levels of concern, for both short and long exposure periods as well as for the different routes of exposure (oral, dermal, and inhalation).

In estimating and describing the level of concern, the Point of Departure is at times used differently depending on whether the risk assessment addresses dietary or non-dietary exposures. For dietary risks, EPA uses the Point of Departure to calculate an acceptable level of exposure or reference dose ("RfD"). The RfD is calculated by dividing the Point of Departure by all applicable safety or uncertainty factors. Typically, EPA uses a baseline safety/uncertainty factor equal to 100. That value includes a factor of ten ("10X") where EPA is using data from laboratory animals to reflect potentially greater sensitivity in humans than animals and a factor of 10X to account for potential variations in sensitivity among members of the human population as well as other unknowns. Additional safety factors may be added to address data deficiencies or concerns raised by the existing data. Under the FQPA, an additional safety factor of 10X is presumptively applied to protect infants and children, unless reliable data support selection of a different factor. This FQPA additional safety factor largely replaces pre-FQPA EPA practice regarding additional safety factors. (Ref. 5 at 4-11).

In implementing FFDCA section 408, EPA's Office of Pesticide Programs, also calculates a variant of the RfD referred to as a Population Adjusted Dose ("PAD"). A PAD is the RfD divided by any portion of the FQPA safety factor that does not correspond to one of the traditional additional safety factors used in general Agency risk assessments. (Ref. 5 at 13-16). The reason for calculating PADs is so that other parts of the Agency, which are not governed by FFDCA section 408, can, when evaluating the same or similar substances. easily identify which aspects of a pesticide risk assessment are a function of the particular statutory commands in FFDCA section 408. Today, RfDs and PADs are generally calculated for both acute and chronic dietary risks although traditionally a RfD or PAD was only calculated for chronic dietary risks. Throughout this document general references to EPA's calculated safe dose are denoted as a RfD/PAD.

For non-dietary, and combined dietary and non-dietary, risk assessments of threshold effects, the toxicological level of concern is not expressed as a RfD/PAD but rather in terms of an acceptable (or "target") margin of exposure ("MOE") between human exposure and the Point of Departure. The "margin" of interest is the ratio between human exposure and the Point of Departure which is calculated by dividing human exposure into the Point of Departure. An acceptable MOE is generally considered to be a margin at least as high as the product of all applicable safety factors for a pesticide. For example, if a pesticide needs a 10X factor to account for inter-species differences, 10X factor for intra-species differences, and 10X factor for the FQPA children's safety provision, the safe or target MOE would be a MOE of at least 1,000. What that means is that for the pesticide to meet the safety standard, human exposure to the pesticide would have to be at least 1,000 times smaller than the Point of Departure. Like RfD/PADs, specific target MOEs are selected for exposures of different durations. For non-dietary exposures, EPA typically examines short-term, intermediate-term, and long-term exposures. Additionally, target MOEs may be selected based on both the duration of exposure and the various routes of non-dietary exposure - dermal, inhalation, and oral.

ii. *Non-threshold effects.* For risk assessments for non-threshold effects, EPA does not use the RfD/PAD or MOE approach to choose a level of concern if quantification of the risk is deemed appropriate. Rather, EPA calculates the slope of the dose-response curve for the non-threshold effects from relevant studies using a linear, low-dose extrapolation model that assumes that any amount of exposure will lead to some degree of risk. This dose-response

analysis will be used in the risk characterization stage to estimate the risk to humans of the non-threshold effect. Linear, low-dose extrapolation is typically used as the default approach for estimating the risk to carcinogens, unless there are mode of action data indicating a threshold response (or nonlinearity).

c. *Estimating human exposure.* Risk is a function of both hazard and exposure. Thus, equally important to the risk assessment process as determining the hazards posed by a pesticide and the toxicological level of concern for those hazards is estimating human exposure. Under FFDCA section 408, EPA is concerned not only with exposure to pesticide residues in food but also exposure resulting from pesticide contamination of drinking water supplies and from use of pesticides in the home or other non-occupational settings. (See 21 U.S.C. 346a(b)(2)(D)(vi)).

i. *Exposure from food.* There are two critical variables in estimating exposure in food: (1) The types and amount of food that is consumed; and (2) the residue level in that food. Consumption is estimated by EPA based on scientific surveys of individuals' food consumption in the United States conducted by the USDA. (Ref. 4 at 12). Information on residue values comes from a range of sources including crop field trials, data on pesticide reduction (or concentration) due to processing, cooking, and other practices, information on the extent of usage of the pesticide, and monitoring of the food supply. (Id. at 17).

In assessing exposure from pesticide residues in food, EPA, for efficiency's sake, follows a tiered approach in which it, in the first instance, assesses exposure using the worst case assumptions that 100 percent of the crop in question is treated with the pesticide and 100 percent of the food from that crop contains pesticide residues at the tolerance level. (Id. at 11). When such an assessment shows no risks of concern, a more complex risk assessment is unnecessary. By avoiding a more complex risk assessment, EPA's resources are conserved and regulated parties are spared the cost of any additional studies that may be needed. If, however, a first tier assessment suggests there could be a risk of concern, EPA then attempts to refine its exposure assumptions to yield a more realistic picture of residue values through use of data on the percent of the crop actually treated with the pesticide and data on the level of residues that may be present on the treated crop. These latter data are used to estimate what has been traditionally referred to by EPA as "anticipated residues."

Use of percent crop treated data and anticipated residue information is appropriate because EPA's worst-case assumptions of 100 percent treatment and residues at tolerance value significantly overstate residue values. There are several reasons this is true. First, all growers of a particular crop would rarely choose to apply the same pesticide to that crop; generally, the proportion of the crop treated with a particular pesticide is significantly below 100 percent. (70 FR 46706, 46731 (August 10, 2005)). Second, the tolerance value represents a high end or worst case value. Tolerance values are chosen only after EPA has evaluated data from experimental crop field trials in which the pesticide has been used in a manner, consistent with the draft FIFRA label, that is likely to produce the highest residue in the crop in question (e.g., maximum application rate, maximum number of applications, minimum pre-harvest interval between last pesticide application and harvest). (Refs. 4 and 6). These crop field trials are generally conducted in several fields at several geographical locations. (Id. at 5, 7 and Tables 1 and 5). Several samples are then gathered from each field and analyzed. (Id. at 53). Generally, the results from such field trials show that the residue levels for a given pesticide use will vary from as low as non-detectable to measurable values in the parts per million ("ppm") range with the majority of the values falling at the lower part of the range. (70 FR at 46731). EPA uses a statistical procedure to analyze the field trial results and identify the upper bound of expected residue values. This upper bound value is used as the tolerance value. (Ref. 7). There may be some commodities from a treated crop that approach the tolerance value where the maximum label rates are followed, but most generally fall significantly below the tolerance value. If less than the maximum legal rate is applied, residues will be even lower. Third, residue values in the field do not take into account the lowering of residue values that frequently occurs as a result of degradation over time and through food processing and cooking.

EPA uses several techniques to refine residue value estimates. (Ref. 4 at 17-28). First, where appropriate, EPA will take into account all the residue values reported in the crop field trials, either through use of an average or individually. Second, EPA will consider data showing what portion of the crop is not treated with the pesticide. Third, data can be produced showing pesticide degradation and decline over time, and the effect of commercial and consumer food handling and processing practices. Finally, EPA can consult monitoring data gathered by the FDA, the USDA, or pesticide registrants, on pesticide levels in food at points in the food distribution chain distant from the farm, including retail food establishments.

Another critical component of the exposure assessment is how data on consumption patterns are combined with data on pesticide residue levels in food. Traditionally, EPA has calculated exposure by simply multiplying average consumption by average residue values for estimating chronic risks and high-end consumption by maximum residue values for estimating acute risks. Using average residues is a realistic approach for chronic risk assessment due to the fact that variations in residue levels and consumption amounts average out over time. Using average values is inappropriate for acute risk assessments, however, because in assessing acute exposure situations it matters how much of each treated food a given consumer eats and what the residue levels are in the particular foods consumed. Yet, using maximum residue values for acute risk assessment tends to greatly overstate exposure because it is unlikely that a person would consume at a single meal multiple food components bearing high-end residues. To take into account the variations in short-term consumption patterns and food residue values for acute risk assessments, EPA has more recently begun using probabilistic modeling techniques for estimating exposure when more simplistic models appear to show risks of concerns.

All of these refinements to the exposure assessment process, from use of food monitoring data through probabilistic modeling, can have dramatic effects on the level of exposure predicted, reducing worst case estimates by 1 or 2 orders of magnitude or more. (Ref. 8 at 16-17; 70 FR 46706, 46732 (August 10, 2005).

ii. *Exposure from water.* EPA may use either or both field monitoring data and mathematical water exposure models to generate pesticide exposure estimates in drinking water. Monitoring and modeling are both important tools for estimating pesticide concentrations in water and can provide different types of information. Monitoring data can provide estimates of pesticide concentrations in water that are representative of specific agricultural or residential pesticide practices and under environmental conditions associated with a sampling design. Although monitoring data can provide a

direct measure of the concentration of a pesticide in water, it does not always provide a reliable estimate of exposure because sampling may not occur in areas with the highest pesticide use, and/or the sampling may not occur when the pesticides are being used.

In estimating pesticide exposure levels in drinking water, EPA most frequently uses mathematical water exposure models. EPA's models are based on extensive monitoring data and detailed information on soil properties, crop characteristics, and weather patterns. (69 FR 30042, 30058-30065 (May 26, 2004)). These models calculate estimated environmental concentrations of pesticides using laboratory data that describe how fast the pesticide breaks down to other chemicals and how it moves in the environment. These concentrations can be estimated continuously over long periods of time, and for places that are of most interest for any particular pesticide. Modeling is a useful tool for characterizing vulnerable sites, and can be used to estimate peak concentrations from infrequent, large storms.

iii. *Residential exposures.* Generally, in assessing residential exposure to pesticides EPA relies on its Residential Standard Operating Procedures ("SOPs"). (Ref. 9). The SOPs establish models for estimating application and post-application exposures in a residential setting where pesticide-specific monitoring data are not available. SOPs have been developed for many common exposure scenarios including pesticide treatment of lawns, garden plants, trees, swimming pools, pets, and indoor surfaces including crack and crevice treatments. The SOPs are based on existing monitoring and survey data including information on activity patterns, particularly for children. Where available, EPA relies on pesticide-specific data in estimating residential exposures.

d. *Risk characterization.* The final step in the risk assessment is risk characterization. In this step, EPA combines information from the first three steps (hazard identification, level of concern/dose-response analysis, and human exposure assessment) to quantitatively estimate the risks posed by a pesticide. Separate characterizations of risk are conducted for different durations of exposure. Additionally, separate and, where appropriate, aggregate characterizations or risk are conducted for the different routes of exposure (dietary and non-dietary).

For threshold risks, EPA estimates risk in one of two ways. Where EPA has calculated a RfD/PAD, risk is estimated by expressing human exposure as a percentage of the RfD/PAD. Exposures lower than 100 percent of the RfD/PAD are generally not of concern. Alternatively, EPA may express risk by comparing the MOE between estimated human exposure and the Point of Departure with the acceptable or target MOE. As described above, the acceptable or target MOE is the product of all applicable safety factors. To calculate the actual MOE for a pesticide, estimated human exposure to the pesticide is divided into the Point of Departure. In contrast to the RfD/PAD approach, the higher the MOE, the safer the pesticide. Accordingly, if the target MOE for a pesticide is 100, MOEs equal to or exceeding 100 would generally not be of concern.

As a conceptual matter, the RfD/PAD and MOE approaches are fundamentally equivalent. For a given risk and given exposure of a pesticide, if exposure to a pesticide were found to be acceptable under an RfD/PAD analysis it would also pass under the MOE approach, and vice-versa. However, for any specific pesticide, risk assessments for different exposure durations or routes may yield different results. This is a function not of the choice of the RfD/PAD or MOE approach but of the fact that the levels of concern and the levels of exposure may differ depending on the duration and route of exposure.

For non-threshold risks (generally, cancer risks), EPA uses the slope of the dose-response curve for a pesticide in conjunction with an estimation of human exposure to that pesticide to estimate the probability of occurrence of additional adverse effects. For non-threshold cancer risks, EPA generally considers cancer risk to be negligible if the probability of increased cancer cases falls within the range of 1 in 1 million. Risks exceeding values within that range would raise a risk concern.

2. *EPA policy on the children's safety factor.* As the above brief summary of EPA's risk assessment practice indicates, the use of safety factors plays a critical role in the process. This is true for traditional 10X safety factors to account for potential differences between animals and humans when relying on studies in animals (inter-species safety factor) and potential differences among humans (intra-species safety factor) as well as the FQPA's additional 10X children's safety factor.

In applying the children's safety factor provision, EPA has interpreted it as imposing a presumption in favor of applying an additional 10X safety factor. (Ref. 5 at 4, 11). Thus, EPA generally refers to the additional 10X factor as a presumptive or default 10X factor. EPA has also made clear, however, that this presumption or default in favor of the additional 10X is only a presumption. The presumption can be overcome if reliable data demonstrate that a different factor is safe for children. (Id.). In determining whether a different factor is safe for children, EPA focuses on the three factors listed in section 408(b)(2)(C) - the completeness of the toxicity database, the completeness of the exposure database, and potential pre- and post-natal toxicity. In examining these factors, EPA strives to make sure that its choice of a safety factor, based on a weight-of-the-evidence evaluation, does not understate the risk to children. (Id. at 24-25, 35).

3. *EPA policy on cholinesterase inhibition as a regulatory endpoint.* Cholinesterase inhibition is a disruption of the normal process in the body by which the nervous system chemically communicates with muscles and glands. Communication between nerve cells and a target cell (i.e., another nerve cell, a muscle fiber, or a gland) is facilitated by the chemical, acetylcholine. When a nerve cell is stimulated it releases acetylcholine into the synapse (or space) between the nerve cell and the target cell. The released acetylcholine binds to receptors in the target cell, stimulating the target cell in turn. As EPA has explained, "the end result of the stimulation of cholinergic pathway(s) includes, for example, the contraction of smooth (e.g., in the gastrointestinal tract) or skeletal muscle, changes in heart rate or glandular secretion (e.g., sweat glands) or communication between nerve cells in the brain or in the autonomic ganglia of the peripheral nervous system." (Ref. 10 at 10).

Acetylcholinesterase is an enzyme that breaks down acetylcholine and terminates its stimulating action in the synapse between nerve cells and target cells. When acetylcholinesterase is inhibited, acetylcholine builds up prolonging the stimulation of the target cell. This excessive stimulation potentially results in a broad range of adverse effects on many bodily functions including muscle cramping or paralysis, excessive glandular secretions, or effects on learning, memory, or other behavioral parameters. Depending on the degree of inhibition these effects can be serious, even fatal.

EPA's cholinesterase inhibition policy statement explains EPA's approach to evaluating the risks posed by cholinesterase-inhibiting pesticides such as DDVP. (Ref. 10). The policy focuses on three types of effects associated with cholinesterase-

inhibiting pesticides that may be assessed in animal and human toxicological studies: (1) Physiological and behavioral/functional effects; (2) cholinesterase inhibition in the central and peripheral nervous system; and (3) cholinesterase inhibition in red blood cells and blood plasma. The policy discusses how such data should be integrated in deriving an acceptable dose (RfD/PAD) for a cholinesterase-inhibiting pesticide.

Clinical signs or symptoms of cholinesterase inhibition in humans, the policy concludes, provide the most direct evidence of the adverse consequences of exposure to cholinesterase-inhibiting pesticides. Nonetheless, as the policy notes, due to strict ethical limitations, studies in humans are "quite limited." (Id. at 19). Although animal studies can also provide direct evidence of cholinesterase inhibition effects, animal studies cannot easily measure cognitive effects of cholinesterase inhibition such as effects on perception, learning, and memory. For these reasons, the policy recommends that "functional data obtained from human and animal studies should not be relied on solely, to the exclusion of other kinds of pertinent information, when weighing the evidence for selection of the critical effect(s) that will be used as the basis of the RfD or RfC." (Id. at 20).

After clinical signs or symptoms, cholinesterase inhibition in the nervous system provides the next most important endpoint for evaluating cholinesterase-inhibiting pesticides. Although cholinesterase inhibition in the nervous system is not itself regarded as a direct adverse effect, it is "generally accepted as a key component of the mechanism of toxicity leading to adverse cholinergic effects." (Id. at 25). As such, the policy states that it should be treated as "direct evidence of potential adverse effects" and "data showing this response provide valuable information in assessing potential hazards posed by anticholinesterase pesticides." (Id.). Unfortunately, useful data measuring cholinesterase inhibition in the central and peripheral nervous systems has only been relatively rarely captured by standard toxicology testing, particularly as to peripheral nervous system effects. For central nervous system effects, however, more recent neurotoxicity studies "have sought to characterize the time course of inhibition in ... [the] brain, including brain regions, after acute and 90–day exposures." (Id. at 27).

Cholinesterase inhibition in the blood is one step further removed from the direct harmful consequences of cholinesterase-inhibiting pesticides. According to the policy, inhibition of blood cholinesterases "is not an adverse effect, but may indicate a potential for adverse effects on the nervous system." (Id. at 28). The policy states that "[a]s a matter of science policy, blood cholinesterase data are considered appropriate surrogate measures of potential effects on peripheral nervous system acetylcholinesterase activity in animals, for central nervous system ("CNS") acetylcholinesterase activity in animals when CNS data are lacking and for both peripheral and central nervous system acetylcholinesterase in humans." (Id. at 29). The policy notes that "there is often a direct relationship between a greater magnitude of exposure [to a cholinesterase-inhibiting pesticide] and an increase in incidence and severity of clinical signs and symptoms as well as blood cholinesterase inhibition." (Id. at 30). Thus, the policy regards blood cholinesterase data as "appropriate endpoints for derivation of reference doses or concentrations when considered in a weight-of-the-evidence analysis of the entire database ...." (Id. at 29). Between cholinesterase inhibition measured in red blood cell ("RBC") or blood plasma, the policy states a preference for reliance on RBC acetylcholinesterase measurements because plasma is composed of a mixture of acetylcholinesterase and butyrylcholinesterase, and inhibition of the latter is less clearly tied to inhibition of acetylcholinesterase in the nervous system. (Id. at 29, 32).

If a measure of cholinesterase inhibition (e.g., RBC cholinesterase) is being considered as a potential adverse effect or surrogate for an adverse effect, the policy advises that the level of inhibition must be critically evaluated "in the context of both statistical *and* biological significance." (Id. at 37) (emphasis in Original). The policy notes that "[n]o fixed percentage of change (e.g., 20% for cholinesterase enzyme inhibition) is predetermined to separate adverse from non-adverse effects." (Id.). Rather, the policy explains that "OPP's experience with the review of toxicity studies with cholinesterase-inhibiting substances shows that differences between pre- and post-exposure of 20% or more in enzyme levels is nearly always statistically significant and would generally be viewed as biologically significant." (Id. at 37-38). The policy recommends that "[t]he biological significance of statistically-significant changes of less than 20% would have to be judged on a case-by-case basis, noting, in particular the pattern of changes in the enzyme levels and the presence or absence of accompanying clinical signs and/or symptoms." (Id. at 38). The policy notes that similar or higher levels of cholinesterase inhibition are used "in monitoring workers for occupational exposures (even in the absence of signs, symptoms, or other behavioral effects)." (Id. at 31). For example, the policy points out that the California Department of Health Services requires that workers exposed to toxic chemicals such as organophosphate pesticides be removed from the workplace if "red blood cell cholinesterase levels show 30% or greater inhibition," and that the World Health Organization "has guidelines with the same RBC action levels (i.e., 30% or greater inhibition)." (Id.).

C. Endocrine Disruptor Screening Program

The 1996 FQPA and SWDA amendments directed EPA to develop and implement an endocrine screening program. To aid in the design of this program called for in the FQPA and SDWA amendments, EPA created the Endocrine Disruptor Screening and Testing Advisory Committee ("EDSTAC"), which was comprised of members representing the commercial chemical and pesticides industries, federal and state agencies, worker protection and labor organizations, environmental and public health groups, and research scientists. (63 FR 71542, 71544, Dec. 28, 1998). The EDSTAC presented a comprehensive report in August 1998 addressing both the scope and elements of the endocrine screening program. (Ref. 11). The EDSTAC's recommendations were largely adopted by EPA.

As recommended by EDSTAC, EPA expanded the scope of the program from focusing only on estrogenic effects to include other effects on the endocrine system (i.e., androgenic and thyroid effects). (63 FR at 71545). Further, EPA, again on the EDSTAC's recommendation, chose to include both human and ecological effects in the program. (Id.). Finally, based on EDSTAC's recommendation, EPA established the universe of chemicals to be screened to include not just pesticides but also a wide range of other chemical substances. (Id.). As to the program elements, EPA adopted EDSTAC's recommended two-tier approach with the first tier involving screening "to identify substances that have the potential to interact with the endocrine system" and the second tier involving testing "to determine whether the substance causes adverse effects,

identify the adverse effects caused by the substance, and establish a quantitative relationship between the dose and the adverse effect." (Id.). Tier 1 screening is limited to evaluating whether a substance is "capable of interacting with" the endocrine system, and is "not sufficient to determine whether a chemical substance may have an effect in humans that is similar to an effect produced by naturally occurring hormones." (Id. at 71550). Based on the results of Tier 1 screening, EPA will decide whether Tier 2 testing is needed. Importantly, "[t]he outcome of Tier 2 is designed to be conclusive in relation to the outcome of Tier 1 and any other prior information. Thus, a negative outcome in Tier 2 will supersede a positive outcome in Tier 1." (Id. at 71554-71555).

The EDSTAC provided detailed recommendations for Tier 1 screening and Tier 2 testing. The panel of the EDSTAC that devised these recommendations was comprised of distinguished scientists from academia, government, industry, and the environmental community. (Ref. 11 at Appendix B). As suggested by the EDSTAC, EPA has proposed a battery of short-term *in vitro* and *in vivo* assays for the Tier 1 screening exercise. (63 FR at 71550-71551). Validation of all but one of these assays is complete. As to Tier 2 testing, EPA, on the recommendation of the EDSTAC, has proposed using five longer-term reproduction studies that, with one exception, "are routinely performed for pesticides with widespread outdoor exposures that are expected to affect reproduction." (Id. at 71555). EPA is examining, pursuant to the suggestion of the EDSTAC, modifications to these studies to enhance their ability to detect endocrine effects.

EPA has published a draft list of the first group of chemicals that will be tested under the Agency's endocrine disruptor screening program. (72 FR 33486 (June 18, 2007)). The draft list was produced based solely on the exposure potential of the chemicals and EPA has emphasized that "[n]othing in the approach for generating the initial list provides a basis to infer that by simply being on this list these chemicals are suspected to interfere with the endocrine systems of humans or other species, and it would be inappropriate to do so." (Id.)

D. EPA's Human Research Rule

EPA decisions regarding the ethics of human studies are governed by the Protection for Subjects in Human Research final rule ("Human Research rule"), which significantly strengthened and expanded protections for subjects of human research. (71 FR 6138 (February 6, 2006)). The framework of the Human Research rule rests on the basic principle that EPA will not, in its actions, rely on data derived from unethical research. The rule divides studies involving intentional dosing of human subjects into two groups: "new" studies - those initiated after April 7, 2006 (the effective date of the rule) - and "old" studies - those initiated before April 7, 2006. The Human Research Rule forbids EPA from relying on data from any "new" study, unless EPA has adequate information to determine that the research was conducted in substantial compliance with the ethical requirements contained therein. (40 CFR. 26.1705). These ethical rules are derived primarily from the "Common Rule," (40 CFR part 26), a rule setting ethical parameters for studies conducted or supported by the federal government. In addition to requiring informed consent and protection of the safety of the subjects, among other things, the rule specifies that "[r]isks to subjects [must be] reasonable in relation to . . . the importance of the knowledge that may reasonably be expected to result [from the study]." (40 CFR 26.1111(a)(2)). In other words, a study would be judged unethical if it did not have scientific value outweighing any risks to the test subjects.

As to "old" studies, the Human Research Rule forbids EPA from relying on such data if there is clear and convincing evidence that the conduct of the research was fundamentally unethical or significantly deficient with respect to the ethical standards prevailing at the time the research was conducted. (40 CFR 26.1704). EPA has indicated that in evaluating "the ethical standards prevailing at the time the research was conducted" it will consider the Nuremburg Code, various editions of the Declaration of Helsinki, the Belmont Report, and the Common Rule, as among the standards that may be applicable to any particular study. (71 FR at 6161). Further, reflecting the concern that scientifically invalid data are "always unethical," (71 FR at 6160), the rule limits the human research that can be relied upon by EPA to "scientifically valid and relevant data." (40 CFR 26.1701).

Whether the data are "new" or "old," the Human Research rule forbids EPA from relying on data from any study involving intentional exposure of pregnant women, fetuses, or children subject to a very limited exception. (40 CFR 26.1703, 1706).

To aid EPA in making scientific and ethical determinations under the Human Research rule, the rule established an independent Human Studies Review Board ("HSRB") to review both proposals for new research ("new" studies) and reports of completed human research ("old" studies) on which EPA proposes to rely. (40 CFR 26.1603). The rule directs that HSRB shall be comprised of non-EPA employees "who have expertise in fields appropriate for the scientific and ethical review of human research, including research ethics, biostatistics, and human toxicology." (40 CFR 26.1603(a)). If EPA decides to rely on the results from "old" research conducted to identify or measure a toxic effect, EPA must submit the results of its assessment to the HSRB for evaluation of the ethical and scientific merit of the research. (40 CFR 26.1602(b)(2)).

EPA has established the HSRB as a federal advisory committee under the Federal Advisory Committee Act ("FACA") to take advantage of "the benefits of the transparency and opportunities for public participation" that accompany a FACA committee. (71 FR at 6156). The HSRB, as appointed by EPA, contains approximately 16 distinguished experts in the fields of bioethics, biostatistics, human health risk assessment and human toxicology, primarily from academia. (Ref. 12).

NRDC and other parties have challenged the legality of the Human Research rule. (NRDC v. U.S. EPA, No. 06-0820-ag (2d Cir.)). A decision on this challenge is presently pending before the United States Court of Appeals for the Second Circuit.

IV. Regulatory History of DDVP

A. In General

1. *DDVP use.* Dichlorvos (2, 2-dichlorovinyl dimethyl phosphate), also known as DDVP, is an insecticide used in controlling flies, mosquitoes, gnats, cockroaches, fleas, and other insect pests. (Ref. 3). DDVP is registered for use on agricultural sites; commercial, institutional, and industrial sites; and for domestic use in and around homes. Agricultural and other commercial uses include in greenhouses; mushroom houses; storage areas for bulk, packaged and bagged raw and processed agricultural commodities; food manufacturing/processing plants; animal premises; and non-food areas of food-handling establishments. It is also registered for treatment of cattle, poultry and swine. DDVP is not registered for direct use on any field grown commodities. Currently, there are 27 tolerances listed in 40 CFR 180.235 for DDVP on agricultural (food and feed) crops and animal commodities. DDVP is

applied with aerosols, fogging equipment, and spray equipment, and through use of impregnated materials such as resin strips which result in slow release of the pesticide. The current registrant for the technical active ingredient, DDVP, is Amvac Chemical Corporation ("Amvac").

2. *DDVP risks.* The following information on the assessment of the risks posed by DDVP is drawn from EPA's decision on the reassessment of DDVP tolerances and its response to NRDC's petition.

DDVP is a chlorinated organophosphate pesticide which inhibits plasma, RBC, and brain cholinesterase in a variety of species. (Ref. 3 at 122-123). Subchronic and chronic oral DDVP exposures to rats and dogs as well as chronic inhalation DDVP exposure to rats resulted in significant decreases in plasma, RBC and/or brain cholinesterase activity. However, DDVP does not cause delayed neurotoxicity in the hen. Repeated, oral subchronic DDVP exposures in male humans were associated with statistically and biologically significant decreases in RBC cholinesterase inhibition. There was no evidence of increased susceptibility to young animals following in utero DDVP exposure to rat and rabbit fetuses as well as pre/post natal DDVP exposure to rats in developmental, reproduction, and comparative cholinesterase studies. Evidence of sensitivity in the young was seen in one parameter, auditory startle amplitude, in a developmental neurotoxicity study; however, the effects in the rat pups here was at levels well above levels which result in RBC cholinesterase inhibition. Cancer studies with DDVP provide suggestive evidence of DDVP's potential human carcinogenicity; however, following the advice of numerous independent scientific panels, EPA has determined that DDVP poses a negligible cancer risk to humans due to the lack of relevance to humans of the tumors identified in the DDVP cancer studies. (72 FR at 68671-68673).

Inhibition of cholinesterase activity was the toxicity endpoint selected to assess hazards for all acute and chronic dietary exposures, as well as short-, intermediate-, and long-term (chronic) dermal, inhalation, and incidental oral residential exposures. Doses selected for the Point of Departure in determining the level of concern - i.e., RfD/PADs and acceptable MOEs - were based on both human and animal studies. (Ref. 3 at 130-135). Animal studies were used in choosing levels of concern for evaluating risk from acute and chronic dietary exposure; acute dermal exposure; and acute and chronic inhalation exposure. A human study was used evaluating risk from short-term incidental oral exposure; short-, intermediate-, and long-term dermal exposure; and short- and intermediate-term inhalation exposure.

Safety factor determinations used in selecting the level of concern differed based on whether EPA relied on one of several different animal studies or a human study. For levels of concerns derived from a Point of Departure from an animal study, EPA generally applied a 100X safety factor (10X for inter-species variability and 10X for intra-human variability). EPA removed the 10X children's safety factor for risk assessments based on an animal study. For levels of concerns derived from a Point of Departure from the human study, EPA applied a 10X safety factor for intra-human variability and a 3X children's safety factor. (Id.).

EPA based its decision to remove the children's safety factor when relying on animal data on its conclusions that (1) the toxicity database was complete; (2) most of the data indicated no sensitivity in the young and the only evidence of sensitivity occurred at levels well above the Points of Departure used for establishing the levels of concern; and (3) its estimate of human exposure to DDVP was not understated. EPA retained a portion of the children's safety factor when relying on the human study because that study did not determine a NOAEL. EPA concluded, however, that reliable data supported reduction of the 10X factor because the effect seen at the LOAEL in that study was so marginal that a lower dose would have been unlikely to detect any adverse effect. (72 FR 68694-68695).

EPA has estimated exposure to DDVP taking into account the potential for DDVP residues in food, drinking water, and in the home as the result of the use of DDVP pest strips. DDVP exposure may result not only from use of DDVP but use of two closely-related pesticides, naled and trichlorfon, which metabolize or degrade to DDVP in food, water, or the environment. In assessing the risks of DDVP, EPA has taken into account exposure to DDVP resulting from use of all three of these pesticides. (Ref. 3 at 147-149). Additionally, DDVP, naled, and trichlorfon are within a family of pesticides known as the organophosphates. EPA has classified the organophosphate pesticides and their common cholinesterase-inhibiting degradates as having a common mechanism of toxicity. Thus, in addition to assessing the risks posed by exposure to organophosphate pesticides individually, EPA has assessed the potential cumulative effects from concurrent exposure to organophosphate pesticides. (Ref. 13).

As discussed in Unit IV.B.1. below, taking all of the above information into account, EPA concluded that the tolerances for DDVP were safe.

B. FFDCA Tolerance Reassessment and FIFRA Pesticide Reregistration

1. *In general.* As required by the FQPA of 1996. EPA reassessed the safety of the DDVP tolerances under the new safety standard established in the FQPA. EPA released for comment a preliminary risk assessment for DDVP in October, 2000. (65 FR 60430 (October 11, 2000)). Subsequently, after consideration of public comment, EPA, on June 30, 2006, issued an Interim Reregistration Eligibility Document ("IRED") for DDVP. In that document, EPA determined that aggregate exposure to DDVP as a result of use of DDVP, naled, and trichlorfon, complied with the FQPA safety standard. (Ref. 3). Separately, on July 31, 2006, EPA determined that cumulative ffects from exposure to all organophosphate residues were safe. (Ref. 14). In combination, these findings satisfied EPA's obligation to review the DDVP tolerances under the new safety standard.

As a result of the FIFRA reregistration and FFDCA tolerance reassessment process there were numerous changes made to DDVP's registration that affect non-occupational exposure to DDVP. Specifically, on May 9, 2006, EPA received from Amvac, the only registrant of DDVP as a product for manufacturing end-use DDVP products, an irrevocable request to cancel certain uses and include additional pest strip label restrictions on the DDVP active ingredient product labels. Pursuant to section 6(f) of FIFRA, on June 30, 2006, the Agency published a notice in the **Federal Register** that it had received the request and sought comment on EPA's intention to grant the request and cancel the specified uses. (71 FR 37570 (June 30, 2006)). On October 20, 2006, EPA issued the final cancellation order. (71 FR 61968 (October 20, 2006)).

The added restrictions on the use of the pest strip products were approved on October 11, 2006, and provided, among other things, that large pest strips could no longer be used in homes except for garages, attics, crawl spaces, and sheds that are occupied for less than 4 hours per day. The only pest strips permitted for use in occupied areas inside the home were significantly smaller strips for use in closets, wardrobes, or cupboards. Additionally, in early March, 2007, Amvac requested the voluntary cancellation of all its pet

collar and bait registrations and deletion of those uses from its technical label. Pursuant to section 6(f) of FIFRA, Amvac's requests to cancel the pet collar and bait registrations as well as deleting such uses from the technical label were published in the **Federal Register** on March 23, 2007. (72 FR 13786 (March 23, 2007)). On June 27, 2007, EPA issued the final cancellation notice for the pet collar and bait registrations. (72 FR 35235 (June 27, 2007)).

Cancellation of uses and label restrictions imposed on Amvac's registration apply to all formulated DDVP end-use products because it is unlawful to use a pesticide in a manner inconsistent with its label. (7 U.S.C. 136(ee)). This bar on use inconsistent with the label applies to the formulation of end-use pesticide products from manufacturing use products. Accordingly, because Amvac holds the only registration for a DDVP manufacturing use product, the removal of uses and the addition of restrictions with respect to Amvac's manufacturing use product label has the effect of imposing those use cancellations and label restrictions on all DDVP end-use products.

2. *Review of human study.* Completion of the DDVP IRED was delayed, in part, by questions regarding whether it was appropriate for EPA to rely on several human toxicity studies conducted with DDVP which were submitted by Amvac. The study receiving principal attention was a study involving repeated dosing over several days conducted in 1997 by A.J. Gledhill. (Refs. 3 at 133; and 15). That study is identified by the Master Record Identification ("MRID") number of 44248801. Amvac also cited approximately a dozen other human studies, several of which were also conducted by Gledhill. (Ref. 16).

Following promulgation of the Human Research rule, EPA evaluated whether the human data submitted by Amvac complied with the rule, and, pursuant to the rule's requirements, presented these data and its recommendations to the Human Studies Review Board ("HSRB") for review. On March 9, 2006, the HSRB published a notice in the **Federal Register** announcing that a public meeting would be held to consider the DDVP studies as well as human studies for several other pesticides. (71 FR 12194 (March 9, 2006)). The meeting was scheduled for April 4-6, 2006. The notice alerted the public of the opportunity to file both written comments with the HSRB and to make oral comments at the April meeting. The members of the HSRB at the time of this meeting are listed in Appendix 1.

NRDC filed written comments with the HSRB concerning DDVP, (Ref. 17), and also presented oral testimony at the public meeting. (Ref. 18). NRDC's comments and oral remarks specifically focused on whether the Gledhill study had sufficient statistical power "to detect an effect when it may occur" and the fact that the Gledhill study only used healthy, male test subjects. (Ref. 7 at 13). Other subjects discussed at the meeting included the relative strengths and weaknesses of the Gledhill study such as its repeat dosing regime, the failure to test blood plasma cholinesterase, the failure to monitor subjects after testing, and the study's consent form. (Id.; Ref. 18 at 18, 20-23). On May 23, 2006, the HSRB published a notice in the **Federal Register** alerting the public that it had released a draft report (dated May 16, 2006) and would be holding a public teleconference meeting on June 6, 2006 to discuss its draft report. (71 FR 29624 (May 23, 2006)). The notice included instructions on how members of the public could participate in the teleconference and explained the procedure for providing oral and written comments. (Ref. 19). NRDC did not file comments on the draft report. (Ref. 20).

On June 26, 2006, the HSRB issued its finding that reliance on the Gledhill human study was appropriate given that the study had scientific value and there was no clear and convincing evidence that the study was fundamentally unethical. (Ref. 21). The HSRB concluded that the other DDVP human studies should not be used in the DDVP risk assessment. These findings were unchanged from its May 16, 2006 draft report.

EPA agreed with the findings of the HSRB and relied upon the HSRB's reasoning in using the Gledhill study in its DDVP risk assessment. (72 FR at 68675).

V. NRDC Petition Regarding DDVP

On June 2, 2006, the NRDC filed a petition with EPA which, among other things, requested that EPA: (1) Conclude the DDVP Special Review by August 3, 2006, with a finding that DDVP causes unreasonable adverse effects on the environment; (2) conclude the DDVP FIFRA reregistration process by August 3, 2006, with a finding that DDVP is not eligible for reregistration; (3) submit draft notices of intent to cancel all DDVP registrations to the FIFRA Scientific Advisory Panel and USDA by August 3, 2006, and issue those notices 60 days thereafter; (4) conclude the DDVP tolerance reassessment process by August 3, 2006, with a finding that the DDVP tolerances do not meet the FFDCA safety standard; and (5) issue a final rule by August 3, 2006, revoking all DDVP tolerances. (Ref. 2). Shortly after the petition was filed, on June 30, 2006, EPA released the IRED for DDVP which addressed DDVP's eligibility for reregistration under FIFRA and assessed, in part, whether DDVP's tolerances met the new safety standard enacted by the FQPA. NRDC submitted comments on the IRED and some of these comments bore on issues in its petition. (Ref. 3).

NRDC's petition contained dozens of claims as to why DDVP's registration under FIFRA should be canceled and its FFDCA tolerances revoked. These issues are not presented in detail here because many raised solely FIFRA concerns and NRDC has not pursued most of its tolerance-related claims in its objections and hearing requests.

EPA published notice of the petition for comment on October 11, 2006. (71 FR 59784 (October 11, 2006)). EPA received roughly 1,500 brief comments in support of the petition. These comments added no new information pertaining to whether the tolerances were in compliance with the FFDCA. Detailed comments in opposition to the petition were submitted by Amvac. (Ref. 22).

EPA responded to the petition in three separate documents: (1) It issued an order closing out the DDVP Special Review; (72 FR 72709 (December 21, 2007)); (2) it issued an order denying the request to cancel DDVP's FIFRA registration (72 FR 68581(December 5, 2007)); and (3) it issued an order pursuant to FFDCA section 408(d)(4)(iii) denying the request to revoke DDVP's FFDCA tolerances (78 FR 68662 (December 5, 2007). Today's final order only concerns the objections filed to the section 408(d)(4)(iii) order denying the request to revoke tolerances.

VI. EPA Response to the Petition to Revoke DDVP Tolerances

EPA issued a section 408(d)(4)(iii) order responding to the petition's request to revoke DDVP tolerances on December 5, 2007 (hereinafter referred to as EPA's "petition response" or "petition denial order"). (72 FR 68662 (December 5, 2005). That order denied the petition finding that none of the grounds asserted by NRDC demonstrated that the DDVP tolerances should be revoked. Nonetheless, EPA did conclude that NRDC raised several pertinent concerns with EPA's assessment of the risks posed by DDVP.

To respond to NRDC's concerns, EPA completely revamped both its dietary

and residential risk assessments. In its new risk assessments, EPA included updated information on residue levels of DDVP in food, the amount of usage of DDVP and related pesticides in agriculture, and food consumption patterns of infants and children. EPA also adopted modified and more conservative assumptions regarding exposure patterns to DDVP in residential settings and exposure to DDVP from naled's use to control mosquitoes. Because, however, EPA concluded that the revised risk assessments still showed that the DDVP tolerances are safe, EPA denied NRDC's petition.

EPA's specific responses to the claims in the petition that are relevant to NRDC's objections are summarized in the portion of this order responding to the objections and hearing requests.

VII. NRDC's Objections and Requests for Hearing

On February 1, 2008, NRDC filed, pursuant to FFDCA section 408(g)(2), objections to EPA's denial of its tolerance revocation petition and requested a hearing on those objections. As indicated above, NRDC's objections and requests for hearing raise two main claims: (1) that EPA has unlawfully failed to retain the full 10X safety factor for the protection of infants and children; and (2) that it was unlawful for EPA to rely on a toxicity study for DDVP that was conducted with humans.

NRDC cites three grounds for its assertion that EPA unlawfully lowered the 10X children's safety factor: (1) that EPA lacked adequate data on DDVP's potential effects on the endocrine system; (2) that EPA lacked adequate data on several matters related to assessing dietary exposure to DDVP residues in food; and (3) that EPA has inadequate data on exposure to DDVP from its use in residential pest strips. As to the DDVP human study, NRDC claimed that EPA's regulation concerning use of human studies is unlawful and that the study is scientifically flawed and ethically compromised. In analyzing NRDC's claims, EPA has broken NRDC's two main claims down into 19 separate sub-issues. Each sub-issue is described in detail and responded to separately in Unit VIII.

In support of its request for hearing, NRDC proffered the following documents as evidence that a hearing would be appropriate:

(1) the Interim Reregistration Eligibility Determination for DDVP; (2) the entire record for the IRED and the documents referenced and cited therein; (3) NRDC's comments on the IRED; (4) EPA's petition denial and the references cited in that denial; (5) NRDC's petition and all references cited in the petition; and (6) the arguments, citations, and attachments contained in these objections.

(Ref. 1 at 3) (citations and references to attachments omitted).

VIII. Response to Objections and Requests for Hearing

A. Overview

EPA denies each of NRDC's objections as well as its hearing requests. NRDC's hearing requests fail to meet the statutory and regulatory requirements for holding a hearing. NRDC has failed to proffer evidence on its hearing requests which would, if established, resolve one or more issues in its favor. Rather, NRDC relies on mere allegations and general denials and contentions. Further, many of NRDC's claims do not present genuine and substantial issues of fact and/or are immaterial to the relief requested. On the merits, NRDC's objections are denied for substantially the same reasons given in EPA's petition denial order. NRDC's objections largely restate the claims in its petition. Significantly, NRDC does not acknowledge or respond to the substantial revisions to the DDVP dietary and residential risk assessments made in response to the NRDC petition. Similarly, NRDC does not acknowledge or respond to EPA's detailed summary of why it adopted the conclusion by the independent HSRB that the Gledhill human study complied with EPA's Human Research rule.

The remainder of this Unit is organized in the following manner. Unit VIII.B. describes in greater detail the requirements pertaining to when it is appropriate to grant a hearing request. Unit VIII.C. examines the evidence proffered by NRDC in support of its hearing requests. Units VIII.D. and E. provide EPA's response to the NRDC's objections and hearing requests. Unit VIII.D. addresses NRDC's claims regarding the children's safety factor and subunit E addresses NRDC's arguments concerning reliance on the Gledhill human study. EPA's conclusions on the hearing requests and objections are summarized in Units VIII.F. and G., respectively.

EPA has adopted a 4-part format in Units VIII.D. and E. for explaining its ruling on each of the 19 sub-issues EPA identified in the objections. First, NRDC's claim and any arguments or evidence tendered to support that claim are described. Second, background information on the claim is provided including whether and how the claim was presented in NRDC's petition and, if it was presented, EPA's reasons for denying the claim in its earlier petition denial order. Third, EPA explains its reasons for denying a hearing on that claim. Finally, EPA explains its reasons for denying the claim on the merits.

B. The Standard for Granting an Evidentiary Hearing

EPA has established regulations governing objections to tolerance rulemakings and tolerance petition denials and requests for hearings on those objections. (40 CFR Part 178; 55 FR 50291 (December 5, 1990)). Those regulations prescribe both the form and content of hearing requests and the standard under which EPA is to evaluate requests for an evidentiary hearing.

As to the form and content of a hearing request, the regulations specify that a hearing request must include: (1) a statement of the factual issues on which a hearing is requested and the requestor's contentions on those issues; (2) a copy of any report, article, or other written document "upon which the objector relies to justify an evidentiary hearing;" and (3) a summary of any other evidence relied upon to justify a hearing. (40 CFR 178.27).

The standard for granting a hearing request is set forth in section 178.32. That section provides that a hearing will be granted if EPA determines that the "material submitted" shows all of the following:

(1) There is a genuine and substantial issue of fact for resolution at a hearing. An evidentiary hearing will not be granted on issues of policy or law.

(2) 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. An evidentiary hearing will not be granted on the basis of mere allegations, denials, or general descriptions of positions and contentions, nor if the Administrator concludes that the data and information submitted, even if accurate, would be insufficient to justify the factual determination urged.

(3) Resolution of the factual issue(s) in the manner sought by the person requesting the hearing would be adequate to justify the action requested. An evidentiary hearing will not be granted on factual issues that are not determinative with respect to the action requested. For example, a hearing will not be granted if the Administrator concludes that the action would be the same even if the factual issue were resolved in the manner sought.

(40 CFR 178.32(b)).

This provision essentially imposes four requirements upon a hearing requestor. First, the requestor must show it is raising a question of fact, not

one of law or policy. Hearings are for resolving factual issues not for debating law or policy questions. Second, the requestor must demonstrate that there is a genuine dispute as to the issue of fact. If the facts are undisputed or the record is clear that no genuine dispute exists, there is no need for a hearing. Third, the requestor must show that the disputed factual question is material - i.e., that it is outcome determinative with regard to the relief requested in the objections. Finally, the requestor must make a sufficient evidentiary proffer to demonstrate that there is a reasonable possibility that the issue could be resolved in favor of the requestor. Hearings are for the purpose of providing objectors with an opportunity to present evidence supporting their objections; as the regulation states, hearings will not be granted on the basis of "mere allegations, denials, or general descriptions of positions or contentions." (40 CFR 178.32(b)(2)).

EPA's hearing request requirements are based heavily on FDA regulations establishing similar requirements for hearing requests filed under other provisions of the FFDCA. (53 FR 41126, 41129 (October 19, 1988)). FDA pioneered the use of summary judgment-type procedures to limit hearings to disputed material factual issues and thereby conserve agency resources. FDA's use of such procedures was upheld by the Supreme Court in 1972, (Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973)), and, in 1975, FDA promulgated generic regulations establishing the standard for evaluating hearing requests. (40 FR 22950 (May 27, 1975)). It is these regulations upon which EPA relied in promulgating its hearing regulations in 1990.

Unlike EPA, FDA has had numerous occasions to apply its regulations on hearing requests. FDA's summary of the thrust of its regulations, which has been repeatedly published in the **Federal Register** in orders ruling on hearing requests over the last 24 years, is instructive on the proper interpretation of the regulatory requirements. That summary states:

> A party seeking a hearing is required to meet a 'threshold burden of tendering evidence suggesting the need for a hearing.' [] An allegation that a hearing is necessary to 'sharpen the issues' or 'fully develop the facts' does not meet this test. If a hearing request fails to identify any evidence that would be the subject of a hearing, there is no point in holding one.
>
> A hearing request must not only contain evidence, but that evidence should raise a material issue of fact concerning which a meaningful hearing might be held. [] FDA need not grant a hearing in each case where an objection submits additional information or posits a novel interpretation of existing information. [] Stated another way, a hearing is justified only if the objections are made in good faith and if they "draw in question in a material way the underpinnings of the regulation at issue." Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy.

(49 FR 6672, 6673 (February 22, 1984); 72 FR 39557, 39558 (July 19, 2007) (citations omitted)). EPA has been guided by FDA's application of its regulations in this proceeding.

Congress confirmed EPA's authority to use summary judgment-type procedures with hearing requests when it amended FFDCA section 408 in 1996. Although the statute had been silent on this issue previously, the FQPA added language specifying that when a hearing is requested, EPA "shall . . . hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections." (21 U.S.C. 346a(g)(2)(B)). This language grants EPA broad discretion to determine whether a hearing is "necessary to receive factual evidence" to objections.

C. Evidentiary Proffer by NRDC

As noted above, the purpose for holding hearings is "to receive factual evidence." (U.S.C. 346a(g)(2)(B); 53 FR 41126, 41129 ("Hearings are for the purpose of gathering evidence on disputed factual issues . . . .")). A requestor must identify evidence relied upon to justify a hearing and either submit copies of that evidence or summarize it. (40 CFR 178.27). After reviewing the proffer, EPA must find that there is a reasonable possibility that the proffered evidence, if established, would resolve one or more genuinely-disputed, material factual issues in a requestor's favor. (40 CFR 178.32(b)). Because a substantial portion of NRDC's evidentiary proffer is deficient on its face, EPA finds it most efficient to preliminarily review the proffer before turning to the individual issues raised by NRDC.

As previously mentioned, NRDC proffered the following items as evidence supporting its requests for hearing:

> (1) the Interim Reregistration Eligibility Determination for DDVP; (2) the entire record for the IRED and the documents referenced and cited therein; (3) NRDC's comments on the IRED; (4) EPA's petition denial and the references cited in that denial; (5) NRDC's petition and all references cited in the petition; and (6) the arguments, citations, and attachments contained in these objections.

(Ref. 1 at 3). These items can be divided into two groups: (1) items produced or assembled by EPA (the IRED; the IRED record; and EPA's petition denial); and (2) items produced by NRDC (NRDC's comments on the IRED; NRDC's petition; and NRDC's objections).

The items in the first group - the EPA documents - clearly do not constitute a proper proffer. Essentially, this is a non-specific identification of every document and piece of data EPA has considered and relied upon in the multi-year process of conducting the FIFRA reregistration and FFDCA tolerance reassessment for DDVP and in responding to NRDC's DDVP petition. This could easily encompass hundreds, if not thousands of documents, and tens of thousands of pages of analysis and data. EPA's petition response alone cited 82 documents and those documents generally were EPA analytical papers and not the underlying data. EPA concludes that NRDC's citation to the thousands of pages in the IRED, the IRED record, and the petition denial is so vague a proffer as to not constitute a proffer at all. It would be as if a lawyer, in responding to a court's request for case law authority for a principle he or she was defending, cited the court to West's Federal Reporter, 3rd Series. While somewhere in those hundreds of volumes a case may exist that supports the asserted principle, the lawyer cannot be said to have identified it by a vague wave at a substantial portion of the law library. Further, given that the purpose of a hearing is to gather or receive evidence, proffering evidence already considered and relied upon by EPA would not seem to be grounds for holding a hearing. Finally, as a matter of law, EPA does not understand how it can be argued that a proffer consisting of a general reference to a record of decision which EPA has found supported one result could constitute evidence that if established, would justify the opposite conclusion. At bottom, the proffer of the items in the first group fails to "identify" evidence which would, if established, resolve an issue in NRDC's favor.

NRDC's second group of documents consists of NRDC's comments on the IRED; NRDC's petition; and NRDC's objections. In analyzing this proffer, EPA has focused on NRDC's objections because the objections appear to contain, almost word-for-word, the arguments and claims put forward in its petition and IRED comments with regard to the children's safety factor and reliance on human studies. The objections reference 16 documents. For the reasons explained below, 10 of these documents can be rejected on their face

as not justifying a hearing. Four of the documents, however, potentially include factual evidence supporting a hearing and are analyzed more thoroughly in connection with the specific issue in the hearing request to which they are tied. The other two documents that are referenced are NRDC's DDVP petition and NRDC's comments on the DDVP IRED. As described above, these documents do not add anything beyond what is in the objections.

1. *Documents that clearly do not proffer evidence of a genuinely-disputed, material issue of fact.* (10 items)

• Five Newspaper Stories. NRDC cites to an Associated Press story from 2002 and four Los Angeles Times stories from 2007. These news stories contain basic background information about DDVP; general contentions from Amvac, NRDC, and EPA regarding the safety of DDVP; and no more than a cursory, passing reference to any of the issues raised in the petition. There can be no serious contention that these articles present evidence justifying a hearing.

• NRDC comments to HSRB. NRDC references the comments it submitted to the HSRB with regard to the HSRB's review of the human studies conducted with DDVP. The comments - three pages of bulleted talking points and one graph - are a summary of the slightly more detailed arguments contained in NRDC's objections. This document adds no justification for a hearing not otherwise included in NRDC's objections.

2. *Legal Briefs in NRDC v. EPA, No. 06-0820-ag (2d Cir.).* NRDC cites to its opening and reply briefs in NRDC v. EPA, the case adjudicating NRDC's challenge to EPA's Human Research rule. These briefs contain legal arguments regarding the lawfulness of the Human Research rule. They contain no factual evidence justifying NRDC's DDVP hearing requests.

• Three Law Review Articles. NRDC references: (1) a short article by a NRDC attorney summarizing his legal objections to EPA's Human Research rule; (2) an article concerning EPA's implementation of the FQPA; and (3) an article focusing on how tort law might be used to supplement the FQPA to protect children. None of these articles mention DDVP and no serious contention can be made that they provide factual evidence justifying a hearing.

3. *Documents which may present evidence of a genuinely-disputed, material issue of fact.* (4 items)

• Lockwood Articles. NRDC cites two articles by Dr. Alan Lockwood which discuss science and ethical issues with regard to several human intentional dosing studies involving pesticides. Several of the human studies addressed were DDVP studies, one of which is the Gledhill human study that is the focus of this proceeding. Whether the information presented in these articles supports NRDC's hearing requests is examined in Unit VIII.E.3.a.

• Sass Letters. NRDC cites two letters published in the journal Environmental Health Perspectives co-authored by Dr. Jennifer Sass of NRDC. These letters discuss science and ethical issues with regard to two human studies, including the DDVP human study in question in this proceeding. Whether the information presented in these letters supports NRDC's hearing requests is examined in Unit.VIII.E.3.a.

D. Response to Specific Issues Raised in Objections and Hearing Requests - Children's Safety Factor

1. *Failure to support children's safety factor decision with DDVP-specific data*— a. *Objection/hearing request sub-issue.* NRDC asserts that EPA, in choosing a 3X children's safety factor for DDVP, did not rely on reliable data showing that such a factor was safe for infants and children because EPA's choice of 3X "is not based on any data specific to DDVP." (Ref. 1 at 5). NRDC's argument is that EPA erred by not deriving a precise safety factor for DDVP but instead used a value that EPA considered to be half of the 10X safety factor. NRDC claims that "EPA could not have determined that 'such margin' [i.e., 3X] will be safe, when the replacement safety factor is simply a generic stand-in for EPA's conclusion that 'something less than 10X' is enough." (Id.). According to NRDC, EPA should have explained "what reliable data supports a 3X safety factor in particular, as opposed to 4X or some other number, for DDVP specifically." (Id.).

b. *Background.* Similar assertions were made in NRDC's petition and its IRED comments. For example, the petition claimed that "[t]he Agency did not explain why it chose 3X as opposed to 4X or any other factor," (Ref. 2 at 14), and the IRED comments asserted that there was a "complete lack of explanation" for EPA's safety factor decisions. (Ref. 23 at 5). Both documents also alleged there were inadequacies in the toxicity and exposure databases. (Refs. 2 at 15, and 38-41; and 23 at 8-9).

In response to these claims by NRDC, EPA, in the petition response, comprehensively restated its reasoning for its decisions on the children's safety factor for DDVP in the IRED. (72 FR at 68694-68695). EPA noted that it had a complete toxicity database for DDVP and it carefully reviewed the evidence regarding the sensitivity of the young to DDVP and explained why an additional safety factor was not needed to protect infants and children. Further, EPA detailed why it had concluded that its exposure assessments would not understate human exposure to DDVP.

For some DDVP risk assessments EPA chose to remove the children's safety factor entirely, and for others EPA reduced the safety factor to 3X. EPA explained that it retained a 3X children's safety for certain assessments because the toxicity study which was relied upon in conducting those risk assessments had not identified a "no adverse effect level" ("NOAEL") in its subjects but rather only a "lowest adverse effect level" ("LOAEL"). Despite the failure to identify a NOAEL in the study, EPA concluded that "a 3X factor" would be more than adequate to identify a NOAEL based upon the slight adverse effect (marginal RBC cholinesterase inhibition in a human study) observed at the LOAEL." (72 FR at 68695). EPA noted that an independent science review board had confirmed that lower doses were unlikely to produce a measurable effect. Finally, EPA explained why it chose 3X instead of 4X or some other value. (Id.). The petition response noted that "where the data does not warrant a full 10X, EPA generally does not attempt to mathematically derive a precise replacement safety factor because regulatory agencies' traditional use of 10X safety factors (upon which the FQPA safety factor was modeled) was based on rough estimates rather than detailed calculations. Instead, where a 10X factor would clearly overstate the uncertainty, EPA simply applies a factor valued at half of 10X." (Id.). EPA explained that it considers 3X to be half of 10X assuming a lognormal distribution of effects. (Id.).

c. *Denial of hearing request.* In analyzing whether a hearing would be appropriate on this sub-issue, it is helpful to break the sub-issue down into three separate, but related, questions: (1) Whether EPA, in selecting a children's safety factor lower than 10X, is required to justify with precision why it chose one factor over another; (2) whether EPA offered a justification for the children's safety factor it chose; and (3) whether EPA relied upon DDVP specific information in choosing a safety factor or instead relied upon "generic assertions." When broken down in this way, it is clear that none of these questions meets the standard for a hearing.

The first question is a pure question of law - does FFDCA section 408(c) require EPA to offer a reasoned explanation for its choice of a children's safety factor, including an explanation as to why a different factor is not needed. A question of fact, not of law, is required to justify a hearing. (40 CFR 178.32(b)(1)).The second and third questions fail to present a matter of genuinely-disputed facts because it is plain on the record that EPA did offer a reasoned justification for its decision and, in that justification, relied upon DDVP-specific facts. EPA's petition response to NRDC's 10X arguments laid out in careful detail information regarding the extent of the toxicity and exposure database on DDVP and the data bearing on DDVP's effects on young animals. (72 FR at 68694-68695 (discussing the completeness of the DDVP toxicity database, DDVP studies bearing on pre- and post-natal toxicity, and the basis for DDVP exposure estimates)). Further, NRDC proffers no evidence - because there is none to proffer - suggesting that EPA did not consider DDVP-specific information in making its children's safety factor decision. Therefore, this question does not meet the standard for a hearing both because there are no genuinely-disputed facts and NRDC has proffered no evidence which, if established, could resolve this issue in its favor. 57 FR 6667, 6672 (February 27, 1992) ("A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.")

d. *Denial of objection.* EPA agrees with NRDC that general principles of administrative law require it to provide a reasoned explanation for its decision on selection of a children's safety factor. (Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 103 (1983)). EPA disagrees with NRDC, however, to the extent it is suggesting that as part of this reasoned explanation for its selection of a children's safety factor, EPA must show why it did not choose some other mathematical value. Rather, the statute imposes upon EPA, if it decides to vary from the presumptive 10X children's safety factor, the burden to show that any "different" safety factor is safe. Once EPA has made that showing, its obligation to offer a reasoned explanation is complete. Because EPA offered a reasoned explanation as to why the children's safety factors it chose protect the safety of infants and children, (72 FR 68694-68695), EPA denies NRDC's objection on this point.

As to the substance of EPA's explanation of why it chose a 3X safety factor for certain DDVP risk assessments, NRDC claims that EPA erred because its choice of 3X is based on "a generic assertion not [] on any data specific to DDVP." (Ref. 1 at 5). NRDC is wrong. The generic assertion NRDC mentions is EPA's explanation of why 3X is half of 10X. EPA's choice of 3X, however, is not based on its conclusion that 3X is half of 10X but on the data in the DDVP human study at issue. As noted above, the petition response explained in detail that a full 10X safety factor was not needed to address the uncertainty raised by the failure of the DDVP human study to identify a NOAEL. The effects seen in that study at the LOAEL were only marginally adverse at best, and therefore, EPA concluded that applying the full 10X safety factor (i.e., dividing the LOAEL by another factor of 10X in addition to the 10X factor for intra-human variability) was more than was needed to address the lack of a NOAEL. The HSRB confirmed as much when it wrote: "because the decreased activity in RBC cholinesterase activity observed in this study was at or near the limit of what could be distinguished from baseline values, it was unlikely that a lower dose would produce a measurable effect in RBC cholinesterase activity." (Ref. 21 at 41).

EPA chose a safety factor of 3X for DDVP based on its conclusion that not only was 10X overprotective but that 3X would be protective given the results seen in the relevant DDVP study. (72 FR at 68695). As EPA concluded in the petition denial order: "a 3X safety factor would be more than adequate to identify a NOAEL based upon the slight adverse effect (marginal RBC cholinesterase inhibition in a human study) observed at the LOAEL." (Id.). Generally, EPA uses a 3X safety factor as the default value when reducing a 10X safety factor. (Refs. 5 at 9-10, 26; and 24 at 4-40 - 4-41;). A safety factor of 3X is deemed to be approximately half the value of a safety factor of an order of magnitude (10X). As EPA explained in the petition denial order:

> In choosing a safety factor in circumstances where the data does not warrant a full 10X, EPA generally does not attempt to mathematically derive a precise replacement safety factor because regulatory agencies' traditional use of 10X safety factors (upon which the FQPA safety factor was modeled) was based on rough estimates rather than detailed calculations. Instead, where a 10X factor would clearly overstate the uncertainty, EPA simply applies a factor valued at half of 10X. In determining half of a 10X factor, EPA assumes that the distribution of effects within the range of a safety factor is distributed lognormally (which is generally the case for biological effects), and reduction of a lognormal distribution by half is equal to half a log ($10^{.5}$) or approximately 3X. A lognormal distribution is a distribution which if plotted based on the logarithm of each of its values would yield a bell-shaped (normal) distribution but if plotted according to actual values would be skewed having a clumping of values along the vertical axis of the plot.

(72 FR at 68695) (citations omitted).

NRDC does not challenge EPA's reasoning regarding whether the choice of 3X is justified based on the results of a DDVP-specific study and thus, the merits of EPA's DDVP-specific reasoning is not here at issue. Rather, NRDC denies that EPA engaged in DDVP-specific reasoning in choosing 3X. Because NRDC's argument is contradicted on the face of the petition response, it is denied.

2. *Endocrine effects.* As described below, NRDC claims that EPA cannot remove the children's safety factor because it has not completed the endocrine screening program for DDVP under section 408(p) and because EPA has inadequate endocrine data for DDVP. Although NRDC did argue in its petition that EPA cannot make a safety finding without completing the endocrine screening program, it did not assert claims regarding endocrine data and the children's safety factor. EPA has previously ruled that a petitioner may not raise new issues in filing objections to EPA's denial of its Original petition. (72 FR 39318, 39324 (July 18, 2007) ("The FFDCA's tolerance revocation procedures are not some sort of 'game,' whereby a party may petition to revoke a tolerance on one ground, and then, after the petition is denied, file objections to the denial based on an entirely new ground not relied upon by EPA in denying the petition.")). Accordingly, NRDC's objections and hearing requests as to the children's safety factor and endocrine data are denied.

Even if these claims were properly presented in these objections, for the reasons set forth below they neither entitle NRDC to a hearing nor justify the relief sought.

a. *Endocrine disruptor screening program—*i. *Objection/hearing request sub-issue.* NRDC argues that EPA must retain the 10X children's safety factor because EPA has not fulfilled its obligations under FFDCA section 408(p) to screen pesticides, including DDVP, for endocrine disruption potential. (Ref. 1 at 5). Essentially, NRDC argues that EPA must retain the children's safety factor for any pesticide until testing under the endocrine screening program is completed for that pesticide.

ii. *Background.* In its petition, NRDC claimed that failure to conduct the

endocrine screening program for DDVP under section 408(p) made it impossible for EPA to conclude that the DDVP tolerances are safe. (Ref. 2 at 49). EPA responded to this argument by citing its denial of a petition to revoke various pesticide tolerances in which the claim was made that EPA could not remove the children's safety factor if endocrine screening under section 408(p) had not been conducted. (72 FR at 68676). There, EPA concluded that the statute did not impose a mandatory bar upon removal of the children's safety factor until completion of the endocrine screening program. (71 FR 43906, 43920 (August 2, 2006)). EPA also found in responding to the prior petition that it had sufficient data on endocrine screening for the pesticide in question to make a safety finding. (71 FR at 43920-43921). After analyzing the endocrine data for DDVP, EPA concluded that it had sufficient data to make a safety finding as to DDVP. (72 FR at 68676 - 68677).

iii. *Denial of hearing request.* The question of whether completion of the endocrine screening program under FFDCA section 408(p) is a mandatory prerequisite to removal of the children's safety factor is a legal issue. A question of fact, not of law, is required to justify a hearing. (40 CFR 178.32(b)(1)).

iv. *Denial of objection.* In response to a prior pesticide tolerance revocation petition, and objections filed as to EPA's denial of that petition, EPA has already rejected the legal claim presented in this objection. (71 FR at 43920; 72 FR 39318, 39327-39328 (July 18, 2007). After analyzing the statutory language, structure, and legislative history, EPA concluded that section 408(p) does not override the "clear and unmistakable language[] [in section 408(b)(2)(C)] grant[ing] EPA discretion to make a fact-based determination of whether a safety factor different than the 10X default value is safe for children." (71 FR at 43920). EPA summarized its reasoning as follows:

> under section 408(b)(2)(C) EPA clearly has the discretion to determine, in any given case, whether it has reliable data to choose a factor different than the 10X default value. Not only is there no statutory language supporting the [petitioners'] argument in favor of automatic retention of the 10X until completion of the endocrine screening program but the legislative history is in no way supportive of construing the enactment of the program as intended to have such a dramatic impact. Further, since the enactment of the FQPA, EPA's contemporaneous and consistent approach to the endocrine screening program has been to treat that information-gathering exercise as not imposing some type of statutorily-prescribed, automatic injunction barring removal of the children's safety factor until completion of information-gathering under the program.

(Id.). EPA also catalogued the extensive data requirements already in place for pesticides that produced information on a pesticide's potential endocrine effects. (71 FR at 43920-43921). EPA concluded that "in many instances the totality of the information gleaned from current data required for pesticides used on food will make it possible to develop a meaningful weight-of-the-evidence determination on the potential of the pesticide to adversely affect the endocrine system." (Id.).

NRDC has done nothing more than state in a conclusory fashion that completion of endocrine screening under section 408(p) is necessary to a decision to remove the children's safety factor. Accordingly, EPA denies this objection for the reasons stated in its previous two orders addressing this claim. (71 FR at 43920 - 43921; 72 FR at 39327-39328).

b. *DDVP endocrine data*—i. *Objection/hearing request sub-issue.* In its objections, NRDC argues that EPA has inadequate data on endocrine effects to remove the children's safety factor. As support for this argument NRDC asserts: (1) that the studies relied upon by EPA "were not designed to detect endocrine disruption . . . ;" and (2) that the two-generation rat reproduction study does not meet EPA's 1998 guideline for such studies and, given that the reproduction study did show endocrine effects, a "[p]roper histopathology in the two generation rat reproduction study could have revealed adverse effects at lower levels than" the levels at which cholinesterase inhibition was seen in DDVP studies. (Ref. 1 at 6).

ii. *Background.* As noted above, NRDC's petition argued that EPA could not make a safety finding for DDVP in the absence of data collected under the section 408(p) screening program. EPA responded to this claim by examining the data on DDVP bearing on its potential endocrine effects. EPA concluded that it could make a safety finding for DDVP in absence of further endocrine data given that: "(1) data bearing on potential endocrine effects from a two-generation reproduction study as well as other chronic data in which effects on reproductive organs were examined; (2) EPA well understands DDVP's most sensitive mechanism of toxicity (cholinesterase inhibition); and (3) the potential endocrine-related effects seen for DDVP appeared in the presence of significant cholinesterase inhibition and at levels nearly two orders of magnitude above the most sensitive cholinesterase effects. . . ." (72 FR at 68677).

iii. *Denial of hearing request.* A hearing on this sub-issue is not appropriate because NRDC's request is based on mere allegations, general contentions, and speculation. NRDC claims that the studies EPA relied upon were not "designed" to investigate endocrine effects; however, NRDC proffers no evidence to support such an allegation. Further, such a claim has little, if any, materiality, given that the important question is not whether the studies were "designed" to measure endocrine effects but whether they actually measure such effects. Notably, NRDC does not, and cannot upon this record, make the latter contention. (See 72 FR at 68676 (discussing the numerous endocrine-related endpoints assessed in the DDVP database)). Further, NRDC's claim that if the DDVP two-generation rat reproduction study had been conducted pursuant to the 1998 guidelines it might have shown endocrine effects at lower doses than the doses at which DDVP's cholinesterase effects were seen is nothing more than speculation. In applying its hearing regulations, FDA has routinely denied hearings on speculation about what redoing a study might show. For example, in a proceeding establishing a food additive regulation for acesulfame potassium, FDA denied a hearing to an objector who challenged FDA's rejection of a study for only containing partial histopathological data. (57 FR 6667 (February 27, 1992)). The objector had argued that full histopathological data might have altered FDA's conclusion. FDA found such an argument unconvincing: "Because complete histopathological examination of tissues from all animals in the first rat study was not done and cannot be done now, any prediction of the results of such an examination is simply speculation. Speculation regarding data that do not exist cannot serve as the basis for a hearing." (Id. at 6671). For all of the above reasons, the hearing request on this sub-issue is denied.

iv. *Denial of objection.* EPA denies NRDC's objection that EPA does not have adequate endocrine data on DDVP to remove the children's safety factor. First, NRDC is wrong to imply that existing, required toxicity studies do not provide valuable information on potential endocrine effects. EPA discussed this issue in detail in an earlier order involving similar claims concerning a different pesticide. There, EPA pointed out that:

> The primary proposed Tier 2 study [for the Endocrine Disruptor Screening Program]

relevant to endocrine effects on humans is the 2-generation reproductive toxicity study in rats. This is one of the core studies required for all food-use pesticides since 1984. In this reproduction study, potential hormonal effects can be detected through behavioral changes, ability to become pregnant, duration of gestation, signs of difficult or prolonged parturition, apparent sex ratio (as ascertained by anogenital distances) of the offspring, feminization or masculinization of offspring, number of pups, stillbirths, gross pathology and histopathology of the vagina, uterus, ovaries, testis, epididymis, seminal vesicles, prostate, and any other identified target organs. In fact, EPA, in 1998, in discussing this study's use in Tier 2, identified 39 endpoints examined in this study relevant to estrogenic, androgenic, or thyroid effects. At that time, EPA noted that it was evaluating whether to add another 10 endocrine-related endpoints to the study protocol to enhance the utility of the study to detect endocrine effects. Despite the ongoing evaluation of additional endpoints, EPA has concluded that the existing 2-generation mammalian assay is valid for the identification and characterization of reproductive and developmental effects, including those due to endocrine disruption, based on the long history of its use, the endorsement of the 1998 test guideline by the FIFRA Scientific Advisory Panel, and acceptance by member countries of the Organizations for Economic Cooperation and Development (OECD).

(71 FR 43906, 43921 (August 2, 2006) (citations omitted)). That order also catalogued the numerous endocrine-related endpoints in other chronic toxicities routinely-required for pesticides used on agricultural commodities. (Id.).

Specifically as to DDVP, in its response to NRDC's petition, EPA detailed four long-term DDVP toxicity studies, submitted under EPA data requirements that provided data on numerous effects that are relevant to potential endocrine disruption. EPA wrote:

> EPA has adequate data on DDVP's potential endocrine effects to evaluate DDVP's safety. In the 1989 NTP cancer studies with rats and mice, male and female reproductive organs (prostate, testes, epididymis, ovaries, uterus) were examined and no changes attributable to DDVP were found. The 52–week dog study with DDVP also was without effect in the reproductive organs (testes, prostate, epididymides, cervix, ovaries, uterus, vagina). EPA also has a 1992 two-generation rat reproduction study with DDVP (via drinking water) that is similar to the most recent guidelines (1998) for conduct of such a study with respect to endocrine-related endpoints. Although that study did not include certain evaluations that the 1998 guidelines recommended related to endocrine-related effects (age of vaginal opening and preputial separation), it did incorporate other aspects of the 1998 guidelines such as an examination of esterous cycling in females and sperm number, motility, and morphology in males. The study did identify an adverse effect on esterous cycling in females but only at the high dose (8.3 mg/kg/day). All doses in the study showed significant cholinesterase inhibition. Further, the NOAEL and LOAEL from the esterous cycling endpoint in the reproduction study are nearly two orders of magnitude higher than the NOAEL and LOAEL used as a Point of Departure in setting the chronic RfD/PAD for DDVP.

(72 FR at 68676 (citations omitted). Further, the petition response additionally discussed a DDVP study from the scientific literature examining endocrine-related effects. (Id.).

NRDC's speculation - that further testing of DDVP might reveal endocrine effects at levels below those at which cholinesterase inhibition has been measured - does not convince EPA that there is not a reliable basis for removing the children's safety factor as regards endocrine effects. As EPA indicated in its denial of the NRDC petition, it has several studies addressing numerous endpoints bearing on DDVP's potential endocrine effects, DDVP's cholinesterase inhibition effects are well-defined by existing data, and the only endocrine effect seen in the DDVP data occurred in the presence of significant cholinesterase inhibition and at a level two orders of magnitude (i.e., 100X) greater than the level at which the most sensitive cholinesterase effects were seen. As a pesticide, DDVP is subject to testing under the endocrine disruptor screening program; however, EPA expects that that data will confirm its conclusion regarding DDVP's potential endocrine effects. NRDC's objection on this point is denied.

3. *Dietary exposure—a. Objection/hearing request sub-issue.* NRDC claims that there are numerous uncertainties in EPA's estimate of dietary exposure to DDVP from food and that these uncertainties preclude EPA from departing from the 10X children's safety factor. (Ref. 1 at 6). Specifically, NRDC cites to a list of uncertainties noted by EPA in a preliminary risk assessment for DDVP released in 2000. Those uncertainties involve the number of infants surveyed for the food consumption database; foods consumed from farm stands; use of data on residue decline from cooking studies; reliance on the residue sampling from the FDA Total Diet Study; and lack of monitoring data, and extensive use of data translation, for fumigated commodities. With the exception of the infant consumption issue, NRDC makes no claim other than to allege that "[e]ach of these shortcomings poses a serious risk of understating the risks posed by DDVP contamination of food." (Id.). As to the infant consumption data, NRDC offers various challenges to the size and representativeness of the group of infants sampled in conjunction to the 2000 preliminary risk assessment. NRDC acknowledges that EPA, in its response to the NRDC petition, states that it used updated infant consumption data but NRDC objects that "EPA does not assert that these data represent a statistically adequate or representative sample." (Id.). Finally, NRDC implies that EPA thinks the data are not reliable by citing an EPA statement regarding the reliability of monitoring data.

b. *Background.* NRDC made almost identical claims in its petition to revoke DDVP tolerances. EPA responded with a detailed examination of each of the factors cited by NRDC as well as several additional factors. (72 FR at 68684-68686). Where EPA identified weaknesses in the exposure database it either incorporated new, updated data in its risk assessment (for example, replacing data from the FDA Total Diet Study with data from USDA's Pesticide Data Program) or explained how that weakness had been addressed by conservative assumptions. (72 FR at 68684). This led to an entirely revised dietary exposure and risk assessment for DDVP. As to this revised assessment, EPA concluded that "its assessment of exposure to DDVP from food will not under-estimate but rather over-estimate, and in all likelihood substantially over-estimate, DDVP exposure." (72 FR at 68686). EPA also noted that the largest "driver" or contributor to dietary exposure of DDVP was DDVP in drinking water and not DDVP in food. (Id.). Specifically, as to food consumption data for infants, EPA stated that it had incorporated the most recent consumption data for infants that is used in all EPA pesticide risk assessments currently in its revised risk assessment for DDVP. This most recent data was collected at the direction of Congress in the FQPA. (Public Law 104-170, sec. 301; 110 Stat. 1489, 1511).

c. *Denial of hearing request.* NRDC's objection and request for a hearing on this sub-issue suffers from several infirmities. First, NRDC has objected to an outdated document, EPA's preliminary risk assessment for DDVP. With the exception of the issue concerning food consumption data for infants, NRDC has made no effort to object to EPA's current assessment of the reliability of various factors cited by NRDC in EPA's petition response issued under FFDCA section 408(d)(4)(iii). When an objector does not challenge EPA conclusions in the section 408(d)(4)(iii) order but rather challenges some prior conclusion that was

superseded by the section 408(d)(4)(iii) order, the objector has not raised a live controversy as to an issue material to the section 408(d)(4)(iii) order. (See 53 FR 53176, 53191 (December 30, 1988) (where FDA responds to a comment in the final rule, repetition of the comment in objections does not present a live controversy unless the objector proffers some evidence calling FDA's conclusion into question)). In fact, in these circumstances, it is questionable whether EPA has jurisdiction to consider the objection and hearing request because objections may only be filed as to a section 408(d)(4)(iii) order or other statutorily-specified action. (21 U.S.C. 346a(g)(2)(A)).

Second, NRDC has made no proffer of evidence supporting its claim that each of the factors cited from EPA's preliminary risk assessment "poses a serious risk of understating the risks posed by DDVP contamination of food." (Ref. 1 at 6). NRDC's entire argument concerning the effect these factors (other than the infant food consumption data issue) would have on the DDVP exposure assessment is a single conclusory sentence. A hearing will not be granted on "mere allegations" or "general contentions." (40 CFR 178.32(b)(2)). Although NRDC discusses the infant food consumption data issue at greater length, this discussion provides no support for granting a hearing. NRDC's discussion is limited to: (1) a presentation of a short analysis of the adequacy of the superseded consumption data as opposed to the data upon which EPA relied in denying NRDC's objection; and (2) a claim that EPA has not made a finding that the more recent infant food consumption data "represent a statistically adequate or representative sample." (Ref. 1 at 6-7). However, the superseded data is irrelevant to the present proceeding and the allegation about an absent finding is framed as a procedural/legal challenge, not an identification of evidence supporting factual contentions. (See 53 FR 53176, 53199 (December 30, 1998) ("Rather than presenting evidence, [the objector] asserts that FDA did not adequately justify its conclusions. Such an assertion will not justify a hearing.").

Third, ignoring for a moment the other serious flaws identified above, a hearing is inappropriate on this issue because NRDC has not shown a disputed factual issue. Rather, NRDC is essentially arguing about the correct conclusion that should be drawn from the factual findings made by EPA in its preliminary risk assessment. (47 FR 55471, 55474 (December 10, 1982) ("[Objectors] assertion about this evidence is, at best, an argument that a different inference (i.e., that the pieces are not 'reasonably uniform' and 'cube shaped') should be drawn from established fact (the dimensions of the pieces) than the agency has drawn. No hearing is required in such circumstances.").

Finally, this entire issue suffers a materiality problem because dietary exposure to DDVP in food is so small relative to other DDVP exposures. As EPA noted in its petition denial, the "latest dietary assessment shows that, by a large margin, the biggest driver in the DDVP dietary risk assessment are DDVP residues in water not food." (72 FR at 68686). Moreover, in evaluating aggregate exposure to DDVP from all sources EPA found that dietary exposure from food and water was "insignificant" compared to exposures from pest strips. NRDC has made no showing that its concerns regarding dietary exposure to DDVP in food are material to the overall exposure assessment. (See 53 FR 53176, 53202 (December 30, 1998) (The objector claims that radiation causes nutrient loss but "to justify a hearing on this point, it is not enough for [the objector] to simply assert that some nutrient loss can occur. [The objector] must present evidence that suggests that nutrient losses in food irradiated at doses permitted by the regulation are sufficiently large and would so affect the diet that such food would be nutritionally unwholesome or unsafe.").

For all of the above reasons, NRDC's hearing request on the adequacy of the DDVP dietary exposure assessment are denied.

d. *Denial of objections.* EPA questions whether NRDC's repetition of EPA's statements from a preliminary risk assessment constitute an objection to a superseding risk assessment in a section 408(d) petition denial. In any event, EPA has already explained in great detail in its petition denial why the factors cited in its preliminary risk assessment do not raise a concern that EPA in its latest assessment has understated DDVP dietary exposure. To the contrary, EPA concluded that its dietary assessment will "over-estimate, and in all likelihood substantially over-estimate, DDVP exposure." (72 FR at 68686). Accordingly, NRDC's objections, to the extent they merely repeat the claims in the petition, are denied for the same reasons stated in the petition denial. (72 FR at 68684-68686).

EPA also denies NRDC's apparent objection that the updated infant food consumption data is unreliable and thus EPA may not depart from the 10X children's safety factor. The only two grounds NRDC cited for this objection were: (1) EPA's alleged failure to confirm that these data are "statistically adequate or [a] representative sample;" and (2) a reference EPA made to monitoring data. NRDC's arguments here are without merit.

EPA has traditionally relied upon large scale surveys of food consumption conducted by the USDA in assessing dietary exposure and risk from pesticides. USDA generally conducts these surveys roughly every 10 years. EPA currently relies primarily on the Continuing Survey of Food Intakes by Individuals ("CSFII") which was conducted in 1994-96. Prior surveys were performed by USDA in 1977-78 and 1989-91. The 1994-96 CSFII was supplemented in 1998 to expand the number of data points for infants and children. As EPA has explained: "These surveys were designed to monitor food use and food consumption patterns in the U.S. population. The data were collected as a multistage, stratified, probability sample that was representative of the U.S. population. [] The most recent survey (CSFII 1994-1996/1998) was designed to obtain a sample that would provide equal precision over all sex-age domains. The data are used by a number of federal and state agencies to improve understanding of factors that affect food intake and the nutritional status of the U.S. population. [EPA's Office of Pesticide Programs] considers the CSFII data adequate to model the daily variability in the U.S. diet." (Ref. 5 at 39).

The 1998 supplemental survey was collected in response to the mandate in the FQPA specifying that USDA, in consultation with EPA, was to "coordinate the development and implementation of survey procedures to ensure that adequate data on food consumption patterns of infants and children are collected." (Public Law 104-170, sec. 301; 110 Stat. 1489, 1511). Congress specified that "[t]o the extent practicable, [these] procedures [] shall include the collection of data on food consumption patterns of a statistically valid sample of infants and children." (Id.). Working together, EPA and USDA adopted a survey plan designed to be statistically reliable and representative. (Refs. 25 and 26). The 1998 survey involved sampling of 5,559 infants and children. When combined with the 4,253 infants and children from the 1994-96 survey, the total sample size for infants and children in the two surveys is near 10,000. EPA and USDA concluded that that "the sample sizes for each sex-age group [from the combined surveys] provide a sufficient level of precision to ensure statistical reliability of the estimates" except as to

certain low consumption items for individual age groups (e.g., infant consumption of lettuce). (Ref. 25 at 1). Comparison of the 1994-96 and 1998 surveys indicated few statistical differences in nutrient consumption for the different age groups with the exception of 3-5 year olds. Even so, "[t]he differences seen, although statistically significant, were relatively small and likely to be of little practical or biological significance." (Ref. 26 at 2-3).

Because EPA, in conjunction with USDA, has taken care to insure that its surveys of food consumption constitute a statistically valid and representative sample of infants and children, NRDC's unsupported objection suggesting that this data is somehow inadequate is rejected.

NRDC's reference to an EPA statement about monitoring data does not in any way undermine this conclusion. EPA began a section of the petition denial which discusses, among other things, monitoring data of residues in food, infant food consumption data, and fumigant monitoring data, with the broad statement that "[i]n general, EPA disagrees that the monitoring data are unreliable." (72 FR at 68684). While NRDC highlights the qualifying language "in general," it ignores the critical following sentence that provides: "To the contrary, EPA believes that the monitoring data provide for an appropriately conservative risk assessment." (Id.). The first sentence was qualified by the phrase "[i]n general," because in two instances the EPA's residue monitoring data were less than optimal; however, as noted in the second sentence, EPA concluded that the risk assessment was appropriately conservative because either the data in question were insignificant or other factors compensated for any uncertainty in the data. The first instance involved residue monitoring data for one minor commodity (berries not including strawberries) out of dozens of commodities where EPA relied on FDA enforcement monitoring data rather than its preferred source, data from USDA's Pesticide Data Program. EPA prefers using the USDA data because it is collected using a sampling plan designed to capture a representative sample of food in the United States, whereas sampling for FDA enforcement data is targeted at food where violations are more likely to occur. Such targeted enforcement data generally overstates, in comparison to a more representative sample, both the frequency of finding pesticide residues in commodities and the level of the residues detected. In the second instance, fumigant monitoring data was not available for all bagged and packaged commodities so EPA translated data across commodities. Although noting that this translation introduced some uncertainty, EPA concluded that "this uncertainty was more than offset by other factors," including a testing procedure that utilized maximum application rates and sampling within six hours of treatment and the assumption that all bagged and packaged commodities would be treated. Finally, the mention of "monitoring data" is a reference to studies that "monitor" residues in food not surveys of people's food consumption patterns. The latter topic was inadvertently included in a section of the order devoted to "[f]ood monitoring data." (72 FR at 68683). Thus, the sentence cited by NRDC does not even refer to food consumption survey data.

4. *Pest strip exposure.* NRDC claims that EPA's assessment of exposure to DDVP from residential pest strips "is based on unsupported assumptions and inadequate data." (Ref. 1 at 8). Accordingly, NRDC concludes the EPA lacks reliable data on DDVP exposure from pest strips and cannot reduce or remove the 10X children's safety factor. EPA has identified seven separate allegations made by NRDC and they are analyzed individually below.

a. *Representativeness of Collins and DeVries study*—i. *Objection/hearing request sub-issue.* NRDC argues that the Collins and DeVries study which EPA used to estimate DDVP exposure from pest strips had an inadequate sample size (15 houses). According to NRDC, 15 houses is not adequate to represent the diversity of housing in the United States given the variations in housing design and ventilation characteristics. (Ref. 1 at 7). Additionally, NRDC claims that, because the study was conducted in a single geographic area and for a period no longer than 91 days, it does not account for the varying weather conditions which can have differential effects on the movement and degradation of airborne residues.

ii. *Background.* NRDC made the identical claim in its petition. EPA's response in its petition denial order was two-fold. First, EPA pointed out that the Collins and DeVries study was not the only study considered by EPA in assessing DDVP exposure from pest strips. EPA reviewed several other studies involving over 100 homes in the United States and Europe. The results in the Collins and DeVries study were consistent with the results in the other studies and, thus, EPA concluded that it was reasonable to use the data from the Collins and DeVries study in assessing DDVP risk. (72 FR at 68692). Second, in response to this claim (as well as several of NRDC's other claims), EPA substantially revised the DDVP exposure and risk assessment. (72 FR at 68687-68691). Additional conservative assumptions were adopted and these conservative assumptions further offset any theoretical unrepresentativeness of the Collins and DeVries study. These assumptions were that exposed individuals spent 24 hours per day in a treated home, that a person spent all of the 24 hours per day in a room in the house with a pest strip, and that inclusion of a pest strip in a closet resulted in the same exposure as hanging the strip in the room itself. Further, EPA no longer averaged the exposure results from the houses in the study but evaluated each house individually.

iii. *Denial of hearing request.* NRDC's request for hearing on this issue is flawed for two reasons. First, as in its petition, NRDC proffers no evidence to support its claim that the Collins and DeVries study is inadequate due to the diversity of housing stock and geographic conditions in the United States. NRDC merely asserts that to be the case. However, hearings will not be granted on the basis of mere allegations or general contentions. (40 CFR 178.32(b)(2); see also 68 FR 46403, 46406-46407 (8/5/2003) (FDA denied a hearing involving a challenge to FDA's reliance on consumption pattern data because the objector "did not present any specific information to dispute P & G's consumption pattern data; instead, [objector] simply asserted that other consumption patterns were likely."); accord Community Nutrition Institute v. Novitch, 773 F.2d 1356, 1363 (D.C. Cir. 1985) ("Mere differences in the weight or credence given to particular scientific studies . . . are insufficient [to show a material issue of fact for a hearing].")).

Second, NRDC's hearing request is inadequate because NRDC does not object to the basis EPA asserted in its petition denial for concluding that the Collins and DeVries study does provide a sufficient basis for estimating residential exposure. Specifically, NRDC does not challenge EPA's conclusion that the Collins and DeVries study is consistent with several other pest strip studies and proffer evidence in support of that challenge. Neither does NRDC challenge and proffer evidence regarding EPA's conservative use of the Collins and DeVries study in assessing exposure. Rather, NRDC just repeats its assertions regarding the unrepresentativeness of the Collins and DeVries study from its petition. This

failure to challenge the basis of EPA's petition denial affects the materiality of the objection and hearing request. Even if NRDC could demonstrate in a hearing that the ventilation design of a house, for example, can affect the rate at which airborne contaminants are dissipated, that evidence would not contradict the fact that the Collins and DeVries study is consistent with DDVP pest strip studies in over 100 other homes in varying locations.

Prior FDA decisions under its regulations are instructive here. Objections and hearing requests were filed in response to a food additive regulation covering the irradiation of poultry. (62 FR 64102 (December 3, 1997). The objector argued that the addition of an anti-oxidant (ethoxyquin) to irradiated chicken prior to the chicken's use in animal feeding studies compromised the studies because the ethoxyquin would have decreased the level of lipid peroxides in the chicken to levels found in chicken that had not been irradiated. The FDA noted, however, that it had considered the question of ethoxyquin's effect on lipid peroxide levels in the final rule and determined that while ethoxyquin can retard the normal oxidation of chicken fat to peroxides, ethoxyquin cannot reverse oxidation that has already occurred. FDA denied the hearing request reasoning that because the objector did "not dispute FDA's explanation in the final rule as to why addition of ethoxyquin did not compromise the CIVO studies, and provided no information that would have altered the agency's conclusion on this issue . . . there is no factual issue that can be resolved by available and specifically identified reliable evidence." (62 FR at 64105; see also 53 FR 53176, 53191 (December 30, 1988) (FDA denied a hearing request noting that given FDA's prior conclusion that the studies relied upon by the objector were unreliable, the "burden shifted to [the objector] to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this matter.")). Similarly, here, NRDC has not challenged the basis EPA asserted for rejecting NRDC's challenge to EPA's reliance on the Collins and DeVries study and NRDC has not proffered any information calling into question EPA's conclusion.

iv. *Denial of objection.* Because NRDC offers no basis for its objection to EPA's denial of the challenge in its petition to EPA's reliance on the Collins and DeVries study—other than the claims made in its petition, itself—EPA denies the objections for the reasons in the petition denial order (i.e., the consistency of the Collins and DeVries study with other DDVP pest strip studies and the conservativeness of the DDVP pest strip exposure assessment).

b. *Sampling location in the Collins and DeVries study*—i. *Objection/hearing request sub-issue.* NRDC argues that the Collins and DeVries study is flawed because air concentration levels of DDVP were sampled in only one location in the house. According to NRDC, this sampling regime was inadequate because it "provides no information about the movement of residues from room-to-room and therefore exposure in other rooms in the homes." (Ref. 1 at 7).

ii. *Background.* NRDC repeats this claim verbatim from its petition. The petition denial order rejected this challenge to the Collins and DeVries study and the manner of EPA's use of the study in its exposure assessment noting that "the sample location in each instance was in a room with a pest strip, pest strips were used in other rooms of the house, and EPA assumed, for its calculation of the MOE, that the air concentration for all areas of a house is the same as at the sampled location." (72 FR at 68692).

iii. *Denial of hearing request.* This objection and hearing request does not involve a genuine and substantial issue of disputed fact. There is no dispute concerning how or where sampling was done in the Collins and DeVries study or how EPA used that data in estimating DDVP exposure from pest strips. NRDC's objection attacks EPA's conclusion that it is reasonable to assess residential DDVP exposure from pest strips using air concentrations of DDVP from rooms which contained a pest strip. A challenge to an EPA inference drawn from undisputed facts does not qualify as a disputed factual question. (47 FR 55471, 55474 (December 10, 1982) ("[Objectors] assertion about this evidence is, at best, an argument that a different inference (i.e., that the pieces are not 'reasonably uniform' and 'cube shaped') should be drawn from established fact (the dimensions of the pieces) than the agency has drawn. No hearing is required in such circumstances.")). Moreover, NRDC does not explain why knowledge of the amount of room-to-room DDVP movement is relevant given that EPA based its exposure assumption on the level of DDVP found in a room with a pest strip, much less proffer any evidence to suggest why this issue is material and should be resolved in its favor. For all of these reasons, NRDC's hearing request on this issue is denied.

iv. *Denial of objection.* This objection is denied for the same reason stated in the petition denial order: knowledge of the amount of room-to-room movement of DDVP is irrelevant if EPA bases its exposure assessment on a room that contains a pest strip. In both its petition and its objections, NRDC cites the following statement from EPA's preliminary risk assessment as supporting its conclusion regarding the inadequacy of use of a single air monitor in the Collins and DeVries study: "A more accurate exposure would be possible if air measurements were available from different rooms in the house." (Ref. 1 at 7). NRDC, however, misunderstands the thrust of this sentence. EPA was simply pointing out that monitoring in rooms without pest strips would have provided a more accurate and realistic - i.e., lower - estimate of exposure than using values from a room containing a pest strip. The sentences immediately following the language quoted by NRDC make this clear. EPA stated: "Limited data suggest that the level of Dichlorvos in the air declines with distance from the resin pest strip. There are data from the Dichlorvos Flea Collar Study that show Dichlorvos levels are lower some distance away from the pet flea collar." (Ref. 27 at 53).

c. *Averaging DDVP concentrations over 120 days*—i. *Objection/hearing request sub-issue.* NRDC objects to EPA's assessment of exposure to pest strips challenging EPA's alleged use of a 120–day average of DDVP concentration levels. NRDC argues that "[r]ather than using averages, the Agency should have presented the range of risks displayed over time, peak measurements, and the daily monitoring data so that trends over time could be determined." (Ref. 1 at 7).

ii. *Background.* NRDC repeats this claim verbatim from its petition. In its petition denial order, EPA agreed with NRDC and revised its residential exposure assessment to examine exposure and risk based on the first day of exposure after hanging the pest strip, the first 2 weeks of exposure, and exposure over a 91 day period. (72 FR at 68687).

iii. *Denial of hearing* A hearing can only be based on a genuine issue of disputed fact. Where a party's factual allegations are contradicted by the record, there is no genuine dispute. (57 FR 6667, 6672 (February 27, 1992) ("A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.").

iv. *Denial of objection.* NRDC's objection is directed at a prior,

superseded risk assessment, not the risk assessment relied upon in the petition denial order. Thus, this objection is not material to this proceeding and is denied. (See Unit VIII.D.3.c.).

d. *Replacement cycle for pest strips*—i. Objection/hearing request sub-issue. NRDC objects to EPA's assumption that pest strips are replaced no more frequently than 120 days even though the pest strip label does not prohibit more frequent replacement. (Ref.1 at 8). NRDC argues that EPA has no data to substantiate this assumption and claims that homeowners may decide "to replace strips sooner 'for good measure.'" (Id.). Recognizing that EPA decreased its assumption concerning the replacement cycle to 91 days in the revised risk assessment in the petition denial order, NRDC asserts that this value is equally arbitrary.

ii. *Background.* The challenge to the 120–day replacement assumption was included in NRDC's petition. EPA responded to NRDC's argument in the petition denial order by decreasing its assumption as on the replacement cycle of pest strips to 91 days. (72 FR at 68692).

iii. *Denial of hearing.* This sub-issue does not meet the standard for a hearing. NRDC disputes the reasonableness of EPA's choice of a replacement cycle for pest strips in the absence of a restriction on the pesticide label or data documenting consumer usage. NRDC proffers no evidence challenging EPA's use of a 91–day replacement cycle. Rather, NRDC asserts a legal argument that in the absence of specific data on consumer usage, EPA may not make an assumption about consumer practices. Hearings are not appropriate on legal questions. (40 CFR 178.32(b)(1)). Similarly, NRDC's speculation about how often homeowners may replace pest strips does not constitute an evidentiary proffer justifying a hearing. (See 57 FR 33244, 33248 (July 27, 1992) (NRDC claimed that the removal of premix batch analysis would lead to misformulation of selenium in feeds. A hearing was denied because NRDC "provided no factual information to support its claim . . . . [A] hearing will not be granted on the basis of mere allegations.")).

iv. *Denial of objection.* In its preliminary risk assessment and in the IRED, EPA assumed that pest strips would be replaced no more frequently than 120 days because the pest strip label specifies: "Drafts, weather, and other conditions may affect the performance, but treatment usually last for 4 months. Record the date of installation and replace with a new, fresh, full-strength strip at the end of 4 months or when effectiveness diminishes." (Ref. 28). Given that the manufacturer was essentially designating 120 days as the likely effective period and that consumers might leave the pest strips up for either longer or shorter periods, EPA assumed that 120 days was a reasonable estimate of the average replacement cycle for pest strips. EPA generally uses average values for chronic exposure scenarios because over time high and low values tend to average out. (Ref. 5 at 42). Nonetheless, in recognition of NRDC's contention that homeowners might replace strips more frequently, EPA amended its pest strip exposure to assume a 91–day replacement cycle (the length of the Collins and DeVries study) rather than extrapolate the data from the Collins and DeVries study over 120 days as was done previously. EPA believes 91 days is a reasonable estimate of the replacement cycle especially given the label language and the numerous conservative assumptions in the risk assessment such as, for example, the assumption of 24 hours per day exposure in a room containing a pest strip. Accordingly, NRDC's objection on this sub-issue is denied.

e. *Number of pest strips*—i. Objection/hearing request sub-issue. NRDC claims that EPA's assessment of DDVP exposure from pest strips is not based on adequate data because EPA does not have any data on how many strips people use in their homes. EPA assessed residential DDVP exposure based on the Collins and DeVries study which used 3-4 strips per house in each of the studied houses. NRDC argues that some homeowners may use more than 3-4 strips because there is no limitation on the label as to the number of strips per house.

ii. *Background.* NRDC repeats this claim verbatim from its petition. EPA rejected NRDC's concern in the petition denial order reasoning that its assessment was based on data on the air concentration of DDVP in a room containing a pest strip. (72 FR at 68692). EPA also noted that the only strips allowed in occupied areas of the home under the current registration are for closets, wardrobes, or cupboards and given that they treat a relatively small space, compared to the bigger strips used in the Collins and DeVries study, they are unlikely to result in significant DDVP air concentrations in rooms other than in the room containing the treated area. (Id.).

iii. *Denial of hearing.* NRDC has not alleged and proffered evidence on a genuine and substantial issue of disputed fact. NRDC speculates that use of pest strips in every, or almost every, room in a house may lead to higher residues in a room containing a pest strip than a room containing a pest strip in a house which has a pest strip in 3-4 rooms. Based on this speculation, NRDC claims that EPA's exposure assessment is inadequate because EPA has not documented how many strips people use in their houses. A hearing will not be granted on the basis of mere allegations or speculation about what other studies might show. (See 57 FR 33244, 33248 (July 27, 1992) (NRDC claimed that the removal of premix batch analysis would lead to misformulation of selenimum in feeds. A hearing was denied because NRDC "provided no factual information to support its claim . . . . [A] hearing will not be granted on the basis of mere allegations.")).

iv. *Denial of objection.* For several reasons, NRDC's speculation that a house containing strips in nearly every room might lead to greater DDVP exposures than estimated by EPA must be rejected. First, EPA based its DDVP pest strip exposure assessment on a study (Collins and DeVries) which measured DDVP concentrations in a room containing a pest strip. Second, the Collins and DeVries study did not involve a house with a single strip but used pest strips in 3-4 rooms of the studied houses. Third, the results of the Collins and DeVries study were consistent with the results of several other pest strip studies. Fourth, although corrected for the smaller size of current pest strips compared to the pest strips used in the Collins and DeVries study, EPA did not adjust its assessment for the fact that current strips may not be used for general space treatment but must be put in closets, wardrobes, or cupboards. Taking into account these factors, EPA's assessment of exposure from DDVP pest strips was reasonable and based upon adequate, reliable data to reduce or remove the children's safety factor.

f. *Exposure time per day*—i. Objection/hearing request sub-issue. NRDC objects that it was unreasonable for EPA to assume that the high end exposure period in the home is 16 hours and that a low end exposure period is 2 hours. NRDC argues that some groups of people may spend significantly greater amounts of time in their homes. NRDC asserts that EPA does not adequately justify these assumptions in its petition denial order.

ii. *Background.* NRDC repeats this claim verbatim from its petition. In response to NRDC's petition, EPA substantially revised its pest strip exposure assessment. As to exposure

periods, EPA completely dropped its prior approach and assessed exposure assuming a person spent 24 hours per day in their home in a room containing a pest strip. (72 FR at 68687).

iii. *Denial of hearing.* A hearing can only be based on a genuine issue of disputed fact. Where a party's factual allegations are contradicted by the record, there is no genuine dispute. (57 FR 6667, 6672 (February 27, 1992) ("A hearing must be based on reliable evidence, not on mere allegations or on information that is inaccurate and contradicted by the record.").

iv. *Denial of objection.* NRDC's objection is directed at a prior, superseded risk assessment, not the risk assessment relied upon in the petition denial order. Thus, this objection is not material to this proceeding and is denied. (See Unit VIII.D.3.c.).

g. *Movement of DDVP from unoccupied areas of the home to occupied areas—i. Objection/hearing request sub-issue.* NRDC claims that EPA does not have a sufficient basis for its conclusion that pest strips used in unoccupied places in a house (garages, attics, crawl spaces, sheds) will not migrate to occupied portions of the house. Thus, NRDC argues EPA does not have reliable data to reduce or remove the children's safety factor.

ii. *Background.* NRDC made the same argument in its petition. Additionally, in the petition, NRDC cited a study with another pesticide which NRDC claimed showed that pesticides could migrate into the house. EPA disagreed with NRDC's assertion, pointing out that migration was unlikely unless the unoccupied portion was connected to the air exchange system for the house. EPA also explained in detail why the study cited by NRDC was not relevant to DDVP. NRDC did not renew its arguments based on this study.

iii. *Denial of hearing.* NRDC has not alleged and proffered evidence on a genuine and substantial issue of disputed fact. NRDC speculates that use of pest strips in unoccupied areas of a house may lead to migration of DDVP residues to occupied portions of the house. Based on this speculation, NRDC claims that EPA's exposure assessment is inadequate because EPA has not documented that such migration does not occur. A hearing will not be granted on the basis of mere allegations or speculation about what other studies might show. (See 57 FR 33244, 33248 (July 27, 1992) (NRDC claimed that the removal of premix batch analysis would lead to misformulation of selenium in feeds. A hearing was denied because NRDC "provided no factual information to support its claim . . . . [A] hearing will not be granted on the basis of mere allegations.")).

iv. *Denial of objection.* NRDC's objection is denied. Given EPA's knowledge of the chemical properties of DDVP, it was reasonable to assume that DDVP would not migrate from unoccupied portions of the home to occupied portions absent some type of air exchange connection between the two areas. DDVP is a highly volatile chemical that quickly degrades once released to the environment. EPA reasonably concluded that the low concentration of airborne DDVP produced from a DDVP pest strip would not penetrate the walls of a home in meaningful amounts.

E. Response to Specific Issues Raised in Objections and Hearing Requests - Reliance on Human Study

1. *Background.* In making its FFDCA tolerance reassessment decision and FIFRA reregistration decision for DDVP, EPA relied upon one human toxicity study in deriving an acceptable level of exposure for several exposure scenarios. The study in question was conducted in 1997 by A.J. Gledhill. In this study, six male volunteers were administered 7 mg of DDVP in corn oil (equivalent to approximately 0.1 mg/kg/day) via capsule daily for 21 days. Three control subjects received corn oil as a placebo. Baseline values for RBC cholinesterase activity for each study participant were determined based upon repeated measurements prior to the administration of DDVP. After dosing started, RBC cholinesterase activity was monitored on days 2, 4, 7, 9, 11, 14, 16, and 18, and then on day 25 or 28 post-dosing. Although no toxicity attributable to administration of DDVP was reported by the test subjects, mean RBC cholinesterase activity was statistically significantly reduced in treated subjects on days 7, 11, 14, 16, and 18. These values were 8, 10, 14, 14, and 16 percent below the pre-dose mean. (Refs. 15 and 16).

EPA's decision to rely on the Gledhill study was made pursuant to its Human Research rule. As explained in Unit III.D, that rule establishes different ethical standards for the review of completed human studies depending on whether they were initiated before or after the effective date of the rule on April 7, 2006. For an intentional human exposure study such as the Gledhill study, that was initiated prior to April 7, 2006, EPA is barred, subject to a very limited exception, from relying on it if there is clear and convincing evidence that the conduct of the research was fundamentally unethical or significantly deficient with respect to the ethical standards prevailing at the time the research was conducted. (40 CFR 26.1704, 1706). Further, the rule limits the human research that can be relied upon by EPA to "scientifically valid and relevant data." (40 CFR 26.1701). Finally, because the Gledhill study was conducted with the purpose of identifying or measuring a toxic effect, EPA is required by the rule to submit its determination regarding these issues to an independent expert advisory body known as the Human Studies Review Board ("HSRB") for review. These procedures were followed with regard to the Gledhill study.

Previously, NRDC has challenged the lawfulness of the Human Research rule. Following promulgation of the Human Research Rule, NRDC filed a petition for judicial review of the rule in the United States Court of Appeals for the Second Circuit. (NRDC v. U.S. EPA, No. 06-0820-ag (2d Cir.)). That case has been briefed and argued and is awaiting decision.

NRDC also previously challenged the scientific merit and ethics of the Gledhill study in comments to EPA and to the HSRB. Specifically as to the HSRB, NRDC filed written comments prior to the HSRB's review of EPA's determination regarding the appropriateness of relying on the Gledhill study and also presented oral testimony at the public hearing the HSRB held with regard to that study. Subsequently, the HSRB, after taking into account the comments of NRDC and others, advised EPA that reliance on the Gledhill study was consistent with the Human Research rule. EPA relied heavily on the analysis of the HSRB in denying NRDC's petition to revoke DDVP tolerances. (72 FR at 68675).

In its petition to revoke DDVP tolerances, NRDC repeated its arguments made to the HSRB as to why the Gledhill study does not comply with the Human Research rule. As support, NRDC cited to a draft HSRB report on the Gledhill study, released shortly before NRDC filed its petition, which noted scientific and ethical deficiencies in the study. (Ref. 2 at 26). NRDC did not acknowledge, however, that despite identifying deficiencies in the Gledhill study, the HSRB, in its draft report, stated its agreement with EPA's determination that it would be acceptable to rely on the Gledhill study.

In its objections, NRDC once again makes the same arguments on the Gledhill study it made to the HSRB and in its petition to EPA (including the misleading reference to a portion of the draft report of the HSRB). Similar to the approach taken in the petition, NRDC does not even acknowledge the

recommendations made by the HSRB in its draft and final decisions despite EPA's explicit reliance on the HSRB's reasoning in EPA's petition denial order.

NRDC's objections also include a challenge to the legality of the Human Research rule paralleling the case pending in the Second Circuit.

2. *Challenge to the human research rule*—a. *Objection/hearing request sub-issue.* NRDC argues that "to the extent [its] facial challenge to the [Human Research] rule is not proper," it is renewing its arguments regarding the legality of the rule in its objections. (Ref. 1 at 9-10). The objections incorporate by reference NRDC's legal briefs filed in the Second Circuit and its comments filed on the Human Research rule as support for this objection. In its legal briefs, NRDC argues that EPA's rule is inconsistent with a congressional funding moratorium in an Appropriations Act. (Ref. 29). That Act prohibited EPA from "accept[ing], consider[ing] or rely[ing] on third-party intentional dosing human toxicity studies for pesticides . . . until [EPA] issues a final rulemaking on this subject." (Public Law 109-54, sec. 201, 119 Stat. 499, 531 (August 2, 2005)). According to NRDC, EPA did not comply with this legislation's requirement that the EPA human testing rule bar testing on pregnant women, infants and children and be consistent with the principles in a 2004 National Academy of Sciences Report and the Nuremburg Code on human experimentation. (Ref. 29 at 23). NRDC did not specifically lay out the arguments in its legal briefs in its objections other than to include a summary of some of the principles of the Nuremberg Code. (Ref. 1 at 11-12). Similar arguments are made in NRDC's comments on EPA's proposed Human Research rule. (Ref. 30).

b. *Background.* Arguments concerning the legality of the Human Research Rule were not contained in the petition.

c. *Denial of hearing request.* In this sub-issue, NRDC presents, by reference, various arguments that the Human Research rule is not consistent with congressional legislation bearing on the rule. These arguments raise questions regarding the proper interpretation of statutory language and hearings are not appropriate on such issues. (40 CFR 178.32(b)(1)).

d. *Denial of objection.* To the extent this matter is not resolved by the Second Circuit and NRDC has standing to challenge a rule whose "primary concern" is the "[p]rotection of the health and safety of human test subjects," (Ref. 1 at 15), EPA denies NRDC's objections to the legality of the Human Research rule. EPA believes the Human Research rule is fully consistent with the Appropriations Act and EPA has fully explained the basis for this conclusion in the rulemaking record (EPA–HQ–OPP–2003–0132) and its legal brief filed in the Second Circuit proceeding. (Ref. 31).

3. *Challenge to reliance on the Gledhill Study*—a. *Statistical power - too few subjects to detect an effect*—i. *Objection/hearing request sub-issue.* NRDC objects that the number of test subjects in the Gledhill study was low and thus there are statistical issues with extrapolating from the results of the Gledhill study to the general human population. (Ref. 1 at 13). In part, NRDC frames this argument as the Gledhill study lacks "statistical power" and NRDC references four published letters or articles in support of this claim. (Ref. 1 at 15). Further, NRDC claims that the statistical power issue is particularly important for studies such as the Gledhill study which measure cholinesterase inhibition because of the variability among individuals of cholinesterase inhibition over time. According to NRDC, the "range of variability both between and for the individual test subjects means that even greater than the customary number of test subjects would be required to permit adequate statistical power to detect effects caused by the test substance above background variations." (Ref. 1 at 13). As evidence of this cholinesterase inhibition variability in humans, NRDC cites to another human study by Gledhill (MRID # 4428802 rather than MRID # 44248801).

NRDC's objection here appears to be confusing two separate issues: (1) did the Gledhill study have sufficient statistical power to detect an effect caused by DDVP; and (2) does the Gledhill study contain sufficient data to reliably estimate a safe dose for humans. The first issue is addressed in this Unit and the second in Unit VIII.E.3.b.

ii. *Background.* NRDC's objection repeats assertions made in its petition to revoke DDVP tolerances and its comments on the DDVP IRED. (Ref. 2 at 26-27; Ref. 23 at 14-17). EPA rejected NRDC's claims about statistical power, explaining that "[a]lthough as a general matter more subjects would provide greater 'statistical power,' in this case the use of 6 to 9 subjects with the appropriate statistical methodology is acceptable to EPA because a positive response was seen." (72 FR at 68675). EPA also noted that the variability within the cholinesterase inhibition of the tested subjects "is not large, particularly since the percentage inhibition in all instances was at the marginal end of the range." (Id.).

iii. *Denial of hearing.* A hearing is not required on NRDC's statistical power claim because the concept of statistical power is simply not applicable to the conclusions EPA drew with regard to the Gledhill study and thus this issue is not material to NRDC's requested relief. Further, the evidence proffered by NRDC would not, if established, resolve this issue in NRDC's favor.

To understand EPA's ruling here, some basic definitional information on the concept of "statistical power" and how it applies in the context of toxicity studies may be helpful. Toxicity testing is designed to test the veracity of the hypothesis that there will be no differences in health outcomes between treated and untreated (control) subjects. Statisticians refer to this hypothesis as the "null hypothesis." The "alternative hypothesis" is that there will be a difference between treated and control subjects. In general terms, statistical power measures the probability that a toxicological study will find a treatment-related adverse health outcome when there is a treatment-related adverse effect to be found. (Ref. 32 at 125 and n.144). In the language of a statistician, statistical power measures the "probability of rejecting the null hypothesis when the alternative hypothesis is right." (Id.). A study with a statistical power value of near one (1) would have a very high chance of (properly) rejecting the null hypothesis if the alternative hypothesis is true, whereas a power value close to zero (0) would indicate that there is little chance that the study will identify any true adverse health outcomes occurring as a result of treatment.

Statistical power can also be used to calculate the probability that the study will falsely find that there is no difference in the health outcomes between treated and control subjects, that is, whether the study will falsely affirm the null hypothesis. The probability of such a false negative, is determined by subtracting the statistical power of a study from one (1). (Id.). Thus, the chance that a study will result in a false negative is directly related to the chance that the study will identify any effects present. For example, if a study has low statistical power, there will be a low probability that the study will find an effect if there is one and a high probability that the study will falsely affirm that there is no effect. Statistical power, therefore, is a important tool in designing studies to ensure that effects from treatment are not missed and may play a role in

evaluating completed studies that confirm the null hypothesis to determine the probability that the null hypothesis was not falsely affirmed (i.e., a false negative).

If analysis of a toxicological study shows that there are treatment-related effects (i.e., the null hypothesis of no treatment-related effect is rejected), then the question of the statistical power of the study becomes largely irrelevant. Put another way, if a study shows a positive outcome, the probability that the study might have produced a false negative becomes a moot point. Importantly, with the Gledhill study, the null hypothesis of no treatment-related effect was rejected: that is, the HSRB and EPA concluded that there was a significant difference in cholinesterase inhibition both between controls and DDVP-treated subjects and between the inhibition levels pre- and post-treatment of the DDVP-treated subjects.

With that background, the scientific papers cited by NRDC can be more easily followed. First, NRDC cites a one-page letter to the Environmental Health Perspectives journal which was co-authored by Jennifer Sass, a NRDC senior scientist, and a subsequent letter, again co-authored by Sass, that responded to various letters expressing a different viewpoint. (Ref. 1 at 15, and Refs. 33 and 34). The topic of both Sass letters is nicely captured by the title attached to the first letter: "Industry Testing of Toxic Pesticide on Human Subjects Concluded 'No Effect,' Despite the Evidence." (Ref. 33).

The first letter discusses the DDVP Gledhill study and a second human study involving a different pesticide. With regard to the DDVP Gledhill study, Sass criticizes Amvac's analysis of that study. Amvac had concluded that the Gledhill study demonstrated a NOAEL arguing that the cholinesterase inhibition effects seen at the single dose in that study were not biologically significant. Sass counters that "the only biological end point measured in the study was cholinesterase inhibition, and this was significantly inhibited." (Ref. 33 at A150). As to statistical power, Sass claims that studies involving only a few human subjects "often lack enough subjects to provide adequate statistical power to detect an effect if it is present." (Id.).

The second letter repeats this latter assertion and claims that the statistical power of human studies then available have such low statistical power that they "practically guarantee[d] a finding of no effect." (Ref. 34 at A340). Sass then returns to the Gledhill study and notes with approval EPA's conclusion that that study demonstrated a LOAEL: "the U.S. Environmental Protection Agency (EPA) rejected AMVAC's interpretation of the results, instead concluding that 'the reduction in RBC cholinesterase activity was considered by the Hazard ID [identification] Committee to be biologically significant, and the dose tested was considered to be a lowest observed effect level (LOEL).'" (Id.). EPA's reversal of the Amvac conclusion is cited by the letter as illustrative of bias by chemical manufacturers in the design and interpretation of studies.

For at least two reasons, these letters neither demonstrate the materiality of NRDC's statistical power claims nor constitute a sufficient evidentiary proffer. First, although they do contain allegations about low statistical power of human studies with low numbers of subjects, they only address the question of whether such studies can detect an effect even if an effect is present (i.e., are they likely to falsely affirm the null hypothesis that there are no treatment-related adverse effects). In the DDVP Gledhill study, however, EPA and the HSRB concluded that the study did identify an adverse effect. Accordingly, the letters have little relevance to EPA's ultimate finding with regard to the Gledhill study. Second, these letters do not challenge EPA's analysis of the Gledhill study - rather, they ratify it. Thus, the letters do not proffer evidence, which would, if established, resolve a material issue in NRDC's favor. (See 57 FR 33244, 33246 (July 7, 1992) (Studies cited by NRDC do not provide a basis for the hearing because they "support the [FDA] conclusion in question.")).

NRDC also cites two articles by Alan Lockwood. One is an article in the American Journal of Public Health discussing ethical and scientific considerations with regard to six human toxicology studies, including the Gledhill study at issue in this proceeding. (Refs. 1 at 15; and 35). The second is a one-page summary of the earlier article that was published in The Environmental Forum. (Ref. 36). The first article contains the following paragraph discussing statistical power:

> A power analysis to define the proper size of study group(s) is an essential part of the design. If too many participants are enrolled, the excess will be subjected to unnecessary risk. If too few are enrolled, the investigator risks erroneous acceptance of the null hypothesis. Underpowered studies are inconclusive, and all participants in an underpowered study will have been exposed to risk unnecessarily. All of these studies were underpowered.

(Ref. 35 at 1912). There is little to no explanation provided in the article for the "underpowered" conclusion other than the notation that the six studies involved young healthy adults. There is little, if any, discussion of the Gledhill DDVP study at issue in this proceeding. The summary article adds nothing new to the longer article.

Like the Sass letters, therefore, the Lockwood articles do not constitute a proffer of evidence that if established would resolve a material issue in favor of NRDC. Not only do they not proffer any evidence, they focus on an issue not involved here - do human studies, such as the Gledhill study, have sufficient statistical power to avoid "erroneous acceptance of the null hypothesis." Both EPA and the HSRB rejected the null hypothesis as to the Gledhill study (i.e., an adverse effect on the treated subjects was identified). Additionally, these articles do not advance specific evidence, or even arguments, concerning the Gledhill study itself. (See 53 FR 53176, 53179-53180 (December 30, 1998) (a general assertion in a letter to Science magazine is not basis for a hearing); 68 FR 46403, 46405-46406 (August 5, 2003) (a hearing was denied because the cited studies only contained equivocal statements supporting the objector's position)).

NRDC also cites the variable level of cholinesterase inhibition within individuals as supporting its statistical power argument. NRDC references a different DDVP human study by Gledhill (MRID # 44248802) to show variability in cholinesterase inhibition. This argument and these data also do not justify a hearing.

Initially, it must be noted that EPA cannot consider this other Gledhill study because both EPA and the HSRB concluded it was without scientific merit and therefore does not qualify for EPA consideration under the Human Research rule. (Ref. 21 at 42-43). Whether or not the aspect of the study cited by NRDC is implicated by this conclusion has not been evaluated; nonetheless, EPA does not disagree with NRDC's assertion that individual humans have variable levels of cholinesterase inhibition and thus this is not a disputed issue of fact. Neither does EPA dispute that variability of cholinesterase inhibition should be taken into account in considering statistical power and in analyzing the results of a human study.

However, as discussed above, statistical power is no longer a relevant concept once EPA has concluded that a toxicity study shows that the pesticide has an adverse effect on treated subjects. Statistical power is a tool used to evaluate the possibility of accepting false negatives. Moreover, the variability

of cholinesterase inhibition in subjects is also a factor relating to a concern with false negatives. Normal variation in the responses of individual test subjects may mask treatment-related effects leading to a false conclusion that there were no treatment-related effects. Finally, NRDC's claims on variability amount to no more than a mere allegation that the existence of variable rates of cholinesterase inhibition indicate a flaw in the Gledhill study and EPA's reliance on it. Without an evidentiary proffer, however, a hearing is not appropriate.

iv. *Denial of objection.* NRDC has misconstrued the concept of statistical power. It has little relevance in circumstances where a positive effect is found in a toxicological study. NRDC's objection that EPA should not have relied upon the Gledhill study because it lacked statistical power is denied.

b. *Too few test subjects to establish a NOAEL*—i. *Objection/hearing request.* NRDC objects to reliance on the Gledhill study claiming that because it only involved six treated test subjects it cannot "support the establishment of a reliable NOAEL or dose response curve . . . ." (Ref. 1 at 13).

ii. *Background.* NRDC's claim was contained in both its petition and its comments on the IRED. (Refs. 1 at 26; and 23 at 15). In its petition denial order, EPA responded to these claims by concurring with the HSRB's conclusion that the Gledhill study was "sufficiently robust for developing a Point of Departure for estimating dermal, incidental oral, and inhalation risk from exposure to DDVP in a single chemical assessment." (72 FR at 68675 (quoting HSRB Report)). The HSRB found the study to be "robust" based on the following attributes: "the repeated dose approach which allowed examination of the sustained nature of RBC cholinesterase inhibition; robust analysis of RBC cholinesterase inhibition both in terms of identifying pre-treatment levels and consistency of response within and between subjects; and the observation of a low, but statistically significant RBC cholinesterase inhibition response." (Id.; Ref. 21 at 39-41).

iii. *Denial of hearing.* NRDC has not met the requirements for a hearing on this sub-issue. First, NRDC has proffered no evidence that the six treated subjects in the Gledhill subject were too few for EPA to use data from that study as a Point of Departure. Rather, NRDC does no more than state "[w]e are aware of no statistical test" which would support EPA's use of the Gledhill data. (Ref. 1 at 13). As EPA's regulations make clear, a mere "denial" of an EPA position is not sufficient to satisfy the standard for granting a hearing. (40 CFR 178.32(b)(2)). Second, NRDC does not confront the reasoning of the HSRB, which was adopted by EPA, for why the data from the Gledhill study are sufficiently robust to justify their use as a Point of Departure. This failure to challenge the basis of EPA's petition denial affects the materiality of the objection and hearing request. Even if NRDC could demonstrate in a hearing that generally more test subjects are needed to derive a Point of Departure for a RfD/PAD, that evidence would not address the specific factors in the Gledhill study that EPA and the HSRB found convincing on this question. (See Unit VIII.D.4.a.iii).

iv. *Denial of objections.* EPA does not agree with NRDC's undocumented assertion that the Gledhill study does not provide an appropriate Point of Departure for assessing DDVP risk. EPA, and the HSRB, found that there were several features of the study and the statistical analysis of the study that made it "sufficiently robust for developing a Point of Departure . . . ." (72 FR at 68675). Important factors cited by the HSRB, and adopted by EPA, included: (1) the study design which involved repeated dosing and repeated measurement of cholinesterase effects in individuals; (2) extensive pre-dosing measurement of the test subjects' cholinesterase inhibition levels which showed consistency both within and between individual test subjects; and (3) the clear study results which showed a statistically significant effect on cholinesterase inhibition was found (both between controls and treated subjects and between the tested subjects' pre- and post-dosing levels) that was at or near the lowest level that could be distinguished from baseline values. (72 FR at 68675). Further, as EPA noted in its petition denial order, a similar number of test subjects (four per sex) are recommended for a toxicology study in non-rodents (usually the dog) routinely required for pesticide risk assessment. (72 FR at 68675).

In response to EPA's and the HSRB's conclusions as to the Gledhill study, NRDC does little more than repeat its allegation that the Gledhill study was underpowered. NRDC does respond to EPA's reference to the chronic dog study, alleging without providing any basis that that study is underpowered, and claiming that "EPA rarely relies upon that study." (Ref. 1 at 13). NRDC is incorrect. The chronic dog study was added to EPA's testing requirement regulations in 1984 and was included in the revised regulations re-promulgated just last year, although the length of the study was shortened from 1 year to 13 weeks. (72 FR 60934, 60940-60941 (October 26, 2007); 49 FR 42881 (October 24, 1984)). As a standard study required in evaluating pesticides used on food, the chronic dog study would have been considered and relied upon in virtually every one of the roughly 10,000 FFDCA tolerance reassessments conducted in the 10 years following enactment of the FQPA. (Ref. 37). If, by "rarely relied upon," NRDC means the results from chronic dog are rarely used as a Point of Departure, NRDC is still incorrect. For example, a cursory review of rules establishing new tolerances in 2005 showed at least eight instances in which the Point of Departure for assessment of a pesticide's risk was based on the chronic dog study. (70 FR 77363, 77366 (December 30, 2005) (hexythiazox); 70 FR 74688, 74690 (December 16, 2005) (bifenazate); 70 FR 55740, 55743 (September 23, 2005) (fenpropathrin); 70 FR 55752, 55757 (September 23, 2005) (amicarbazone); 70 FR 55761, 55764 (September 23, 2005) (pyridaben); 70 FR 54640, 54644 (September 16, 2005) (fluoxastrobin); 70 FR 53944, 53946 (September 13, 2005); 70 FR 51615, 51617 (August 31, 2005) (halosulfuron-methyl). A retrospective analysis performed by EPA in 2005 also showed that 116 out of 304 chronic RfDs for pesticides was based on the chronic dog study. (Ref. 38). Finally, another example somewhat closer to home would be DDVP, where the NOAEL from the chronic dog study is used as the Point of Departure in assessing chronic dietary risk. (Ref. 3 at 132).

Further, EPA's recommendation for four test subjects per sex per dose in the sub-chronic and chronic non-rodent (dog) study is widely followed. The FDA has a similar recommendation for conducting non-rodent studies of sub-chronic and chronic duration as does the Organisation for Economic Co-operation and Development ("OECD"), Canada which has accepted the OECD guideline on the sub-chronic and chronic non-rodent (dog) study, and the European Commission's Joint Research Centre of the European Union. (Refs. 39, 40, 41, 42, and 43).

c. *Adult males only*—i. *Objection/hearing request sub-issue.* NRDC objects to the Gledhill study because it included as test subjects only adult males. (Ref. 1 at 14). NRDC claims that adult males are "biologically unrepresentative" of the human population.

ii. *Background.* NRDC's objection is drawn verbatim from its comments on the DDVP IRED. EPA responded to this argument by pointing out that "no sex differences were observed in the

comparative cholinesterase studies." (72 FR at 68675). EPA also found no age-related differences in cholinesterase inhibition. (72 FR at 68694).

iii. *Denial of hearing.* A hearing is denied on this sub-issue because there is no disputed factual matter for resolution at a hearing. There is no dispute concerning the subjects in the Gledhill study - they were adult males. Thus, the only question is whether a human study using only adult males meets the regulatory requirement of "scientifically valid and relevant data." (40 CFR 26.1701). Because NRDC has proffered no evidence regarding the representativeness of adult males to the general population, this question requires the application of a legal standard to undisputed facts. Hearings are not appropriate on questions of law or policy. (40 CFR 178.32(b)(1)). FDA has repeatedly confirmed that the application of a legal standard to undisputed facts is a question of law for which a hearing is not required. (See, e.g., 68 FR 46403, 46406 n.18, 46408, 46409 (August 5, 2003) (whether facts in the record show there is a reasonable certainty of no harm is a question of law; whether a particular effect is a "harm" is a question of law)).

NRDC's hearing request is also flawed because NRDC does not object to the basis EPA asserted in its petition denial for concluding that the Gledhill study provided scientifically valid data despite its use of only adult male subjects. As noted above, EPA thought representativeness concerns were addressed by the fact that animal studies with DDVP showed no differences in sensitivities between males and females and adults and the young. NRDC, however, has not challenged and proffered evidence to rebut this conclusion nor has NRDC challenged or proffered evidence to rebut EPA's analysis of the underlying data. Rather, NRDC just repeats its assertions regarding the unrepresentativeness of adult males generally. This failure to challenge the basis of EPA's petition denial affects the materiality of the objection and hearing request. Even if NRDC offers evidence to show sex- and age-related sensitivities in the population to some toxicants, such evidence would not rebut the DDVP-specific data on sensitivity. (53 FR 53176, 53191 (December 30, 1988) (FDA denied a hearing request noting that given FDA's prior conclusion that the studies relied upon by the objector were unreliable, the "burden shifted to [the objector] to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this matter.")).

iv. *Denial of objection.* EPA concludes that it was reasonable to use the Gledhill study despite that fact that it only examined adult males given that the animal toxicology data on DDVP's cholinesterase effects consistently showed no differences between males and females and adults and the young. Multiple studies involving adult animals yielded consistent cholinesterase inhibition results in males and females. (Ref. 3 at 124-126). Similarly, Benchmark Dose Method analysis of the developmental neurotoxicity data "did not demonstrate any substantial numerical differences in [Benchmark Dose Method Level] values for either RBC or brain cholinesterase between young and adult animals." (72 FR at 68694).

d. *Plasma*—i. *Objection/hearing request.* NRDC objects that the Gledhill study is unreliable because it measured only RBC cholinesterase inhibition and not plasma cholinesterase inhibition. NRDC claims that measuring plasma cholinesterase might have reduced the variability measured in RBC cholinesterase.

ii. *Background.* In its petition, NRDC argued that plasma cholinesterase should have been measured because it might be a more sensitive indicator of DDVP's cholinesterase effects. EPA responded to the petition by noting that RBC cholinesterase is the Agency's preferred cholinesterase inhibition endpoint as compared to plasma cholinesterase. (72 FR at 68676). EPA explained that "[s]ince the red blood cell contains only acetylcholinesterase, the potential for exerting effects on neural or neuroeffector acetylcholinesterase may be better reflected by changes in red blood cell acetylcholinesterase than by changes in plasma cholinesterases which contain both butyrylcholinesterase and acetylcholinesterase in varying ratios depending upon the species." (Id.). EPA concluded that information on a less preferred endpoint "adds little meaningful information." (Id.).

iii. *Denial of hearing.* NRDC proffers no evidence in support of its allegation that collection of plasma cholinesterase inhibition data would be useful in limiting the variability seen in the RBC cholinesterase inhibition data. Hearings will not be granted on mere allegations. (40 CFR 178.32(b)(2)). Further, given EPA's conclusion that the variability in RBC cholinesterase inhibition in the test subjects was accounted for by pre- and post-treatment measurement, this issue is not material to resolution of NRDC's claim. Finally, to the extent NRDC is advocating reliance on plasma cholinesterase inhibition data over RBC cholinesterase inhibition data that is a policy issue and hearings will not be held as to policy issues. (40 CFR 178.32(b)(1)).

iv. *Denial of objection.* EPA's well-established policy when evaluating blood cholinesterase inhibition is to use RBC cholinesterase data in preference to plasma cholinesterase. (Ref. 10 at 32). EPA's reasoning here is straightforward. Blood cholinesterase data is used as an indicator of possible effects on acetylcholinesterase in the peripheral nervous system. RBC cholinesterase is composed entirely of acetylcholinesterase, whereas plasma cholinesterase is a mixture of acetylcholinesterase and butyrylcholinesterase, a compound somewhat similar to acetylcholinesterase in structure that nonetheless is "different in important ways which often result in it having binding affinities to anticholinesterase agents as well as other characteristics that are quite different from those of acetylcholinesterase." (Id. at 32). The ratio of acetylcholinesterase to butyrylcholinesterase in plasma differs by species; in humans, plasma "is overwhelmingly butyrylcholinesterase with a ratio of butyrylcholinesterase to acetyl cholinesterase of 1,000:1." (Id.)

It is preferable to have both RBC and plasma cholinesterase data from a study because effects in the RBC may be non-existent, equivocal, or fail to establish a clear-dose response pattern. In those circumstances, plasma cholinesterase inhibition data may serve as a Point of Departure or may aid in the interpretation of the RBC data, particularly when extrapolating animal data to humans. In the Gledhill study, however, the robust RBC cholinesterase sampling approach in humans (multiple pre- and post-dosing samples and sampling after repeat dosing) as well as the clear pattern on RBC cholinesterase inhibition means the absence of plasma cholinesterase inhibition data is of little to no consequence.

In its objections NRDC claims that plasma cholinesterase inhibition data "might have reduced somewhat" the variability in the RBC cholinesterase data. EPA disagrees both because plasma cholinesterase in humans is overwhelmingly composed of butyrylcholinesterase not acetylcholinesterase, and because the robust sampling plan in the Gledhill study well-characterized the RBC cholinesterase variability. For all of these reasons, NRDC's objection on this issue are denied.

e. *Controls over environment*—i. *Objection/hearing request sub-issue.* NRDC argues that because there were

not controls over the Gledhill test subjects' exposure to environmental factors which might affect cholinesterase inhibition (e.g., ingestion of pharmaceuticals), the results of Gledhill study might be caused environmental factors and are thus invalid.

ii. *Background.* This claim is contained in NRDC's petition and was not specifically addressed by EPA in the petition denial order other than through its acceptance of the HSRB's analysis.

iii. *Denial of hearing request.* The control measures used in the Gledhill study are set forth in the study report and are not in dispute. The only question is whether these control measures make the Gledhill study scientifically invalid and thus not in compliance with EPA regulations. Legal questions such as this are not appropriate for a hearing. (40 CFR 178.32(b)(1); see, e.g., 68 FR 46403, 46406 n.18, 46408, 46409 (August 5, 2003) (whether facts in the record show there is a reasonable certainty of no harm is a question of law and thus is not a hearing issue; whether a particular effect is a "harm" is a question of law not of fact and a hearing will not be held on issues of law)). Additionally, NRDC proffers no evidence regarding the effect of the study's control measures other than speculation about how environmental factors might have affected the study. A hearing will not be granted on the basis of mere allegations or speculation. (40 CFR 178.32(b)(2); (57 FR 6667, 6671 (February 27, 1992)). Finally, NRDC's argument here is immaterial to its claim. As EPA explains below in denying this objection, the lack of control measures would only be an issue if NRDC is arguing that EPA has wrongfully concluded that the Gledhill study has not shown a measurable effect in the treated subjects.

iv. *Denial of objection.* NRDC's objection here might warrant some consideration if the study results had shown no pattern and EPA had concluded that the study established a NOAEL for DDVP. In those circumstances, it could be argued that any effects from DDVP exposure may have been masked by other factors. However, the study results here showed a clear and consistent pattern of marginal effects on RBC cholinesterase inhibition in connection with DDVP dosing. Given these results and the fact that the test subjects were pre-screened for environmental factors that might affect study results (e.g., regular use of pharmaceuticals; excessive alcohol consumption; exposure to organophosphurus compounds), NRDC's speculation that environmental factors might have affected the study results is without merit.

f. *Consent*—i. *Objection/hearing request sub-issue.* NRDC asserts that informed consent was not obtained from the Gledhill test subjects because the consent form for the experiment identified DDVP as a "drug." (Ref. 1 at 14). NRDC claims that EPA has ignored this issue. NRDC cites an EPA memorandum dated March 16, 2006, examining the ethics of the Gledhill study and asserts that it "fails to mention [the informed consent] issue when it concludes that the study was not fundamentally unethical." (Id. at 15). NRDC argues that describing DDVP as a drug "constitute[s] 'fundamentally unethical' actions by any reasonable understanding of that term." (Id.).

ii. *Background.* This objection comes verbatim from NRDC's comments on the DDVP IRED. EPA responded to this issue in its denial of NRDC's petition by adopting the HSRB's conclusion that informed consent was obtained. EPA explained that "[t]he HSRB reasoned that references to DDVP as a drug did not vitiate informed consent because 'the consent materials clearly advised subjects that this was a study involving consuming an insecticide.'" (72 FR at 68675).

iii. *Denial of hearing.* It is not clear from NRDC's objections whether NRDC is challenging EPA's conclusion on the ethics of consent issue based on (1) an alleged failure of EPA to address this question; or (2) the legal proposition that identification of a pesticide as a drug "constitute[s] 'fundamentally unethical' actions by any reasonable understanding of that term." In either case, a hearing is not appropriate on NRDC's objection.

First, NRDC's allegation that EPA did not address the consent issue does not present a genuinely-disputed issue of fact. It is plain on the face of EPA's petition denial order, that EPA adopted the reasoning of the HSRB on why references on the consent form to DDVP as a drug do not constitute clear and convincing evidence that the Gledhill study is fundamentally unethical. (72 FR at 68675). After summarizing the decision of the HSRB on the consent issue (see quoted language in Unit VIII.E.3.f.ii. above), EPA stated: "EPA adopts the HSRB's reasoning and finds it persuasive in rejecting NRDC's arguments concerning why the Gledhill study should not be relied upon." (Id.). NRDC's argument that EPA offered no explanation is based on a memorandum that predates and is superseded by EPA's denial of NRDC's petition. The March 16, 2006 memorandum was finalized more than 20 months before issuance of the DDVP petition denial order and the order contains EPA's rationale on the consent issue. As noted earlier in Unit VIII.D.3.c., when an objector to a section 408(d)(4)(iii) order challenges an EPA conclusion that has been superseded by the section 408(d)(4)(iii) order, the objector has not raised a live controversy as to a material issue. (See 53 FR 53176, 53191 (December 30, 1988) (where FDA responds to a comment in the final rule, repetition of the comment in objections does not present a live controversy unless the objector proffers some evidence calling FDA's conclusion into question)). Moreover, objections, and hearing requests on objections, may only be filed as to a section 408(d)(4)(iii) order or other statutorily-specified action. (21 U.S.C. 346a(g)(2)(A)).

Second, the informed consent question as to the Gledhill study is a legal/policy issue not a factual one. There are no disputed facts regarding the consent form. The consent form used in the Gledhill study is set forth in the study report and NRDC has not proffered any other evidence bearing on consent. Accordingly, the only question is the legal/policy one of whether use of the Gledhill study consent form is "clear and convincing evidence" that the Gledhill study was "fundamentally unethical" and thus not in compliance with EPA regulations. (40 CFR 26.1704). In fact, NRDC has framed the consent issue as a legal question, arguing that the undisputed reference to DDVP as a drug in the consent form for the Gledhill study "constitute[s] [a] 'fundamentally unethical' action[] by any reasonable understanding of that [regulatory] term." (Ref. 1 at 15). Further, to support this legal argument, NRDC turns to other legal authorities arguing that "[t]he requirement for obtaining informed consent is at the core of the [40 CFR] Part 26 regulations and FIFRA section 12(a)(2)(P)," and "[v]iolation of these regulations, laws and international standards in the design and conduct of human studies is fundamentally unethical." (Id.). Hearings are not appropriate on questions of law or policy. (40 CFR 178.32(b)(1)).

Finally, a hearing is not appropriate on this sub-issue because NRDC's objection does not respond to EPA's conclusion, based on the HSRB's reasoning, as to why there was not a problem with consent in the Gledhill study. As such, NRDC's objection on this point is nothing more than a general denial of EPA's conclusion and a hearing cannot be justified on this basis. (40 CFR 178.32(b)(2)).

iv. *Denial of objection.* NRDC has offered no response to EPA's petition

denial order which incorporated the HSRB's reasoning as to why the references to DDVP as a drug did not constitute clear and convincing evidence that the Gledhill study was fundamentally unethical. Specifically, NRDC does not address the HSRB's conclusion, adopted by EPA, that the test subjects' consent was informed because "the consent materials clearly advised subjects that this was a study involving consuming an insecticide." (Ref. 21 at 46). Thus, EPA denies the objection.

g. *Protection of health of the test subjects*—i. *Objection/hearing request sub-issue.* NRDC differs with EPA's conclusion that there was not clear and convincing evidence that the Gledhill study was rendered fundamentally unethical by the failure of the test conductors to retest the subjects until their cholinesterase inhibition levels returned to baseline levels. (Ref. 1 at 14-15). According to NRDC, EPA acknowledged, in a March 16, 2006, memorandum, that the failure to retest was inconsistent with the standards in the Declaration of Helskinki by showing a lack of concern for the safety of the test subjects. (Id.). NRDC claims that EPA has offered no explanation for why it concluded that the Gledhill study was not fundamentally unethical despite this inconsistency with the Declaration of Helsinki. (Id. at 15).

ii. *Background.* This objection is adopted verbatim from the comments that NRDC filed on the IRED. (Ref. 23 at 16-17). In responding to this claim, EPA adopted the reasoning of the HSRB that "[d]eficiencies in monitoring of subjects were found not to provide clear and convincing evidence that the study was ethically deficient by subjecting the test subjects to the threat of serious harm because prior studies by this researcher involving higher doses had only invoked minimal responses." (72 FR at 68675).

iii. *Denial of hearing.* As with the consent issue, it is not clear from NRDC's objections whether NRDC is challenging EPA's conclusion on the ethics of not retesting based on (1) an alleged failure of EPA to offer an explanation for its conclusion; or (2) the legal proposition that a study that is inconsistent with the Declaration of Helsinki is necessarily "fundamentally unethical" under the Human Research rule. In either case, a hearing is not appropriate on NRDC's objections.

If NRDC is challenging EPA's alleged lack of an explanation, then NRDC has failed to identify a genuinely-disputed issue of fact. As with the consent issue, EPA, in its petition denial order, summarized and then adopted the reasoning of the HSRB on why the failure to retest does not constitute clear and convincing evidence that the Gledhill study is fundamentally unethical. (72 FR at 68675) (see quoted language in Unit VIII.E.3.g.ii. above). NRDC's argument that EPA offered no explanation is based on a memorandum that predates and is superseded by EPA's denial of NRDC's petition. For the reasons set forth in Unit VIII.D.3.c and Unit VIII.E.3.f.iii., an objection and hearing request as to a section 408(d)(4)(iii) order based on a memorandum superseded by the section 408(d)(4)(iii) order does not constitute a live controversy on an issue material to the section 408(d)(4)(iii) order and, arguably, not even a valid objection under section 408(g)(2)(A). (21 U.S.C. 346a(g)(2)(A); see 53 FR 53176, 53191 (December 30, 1988) (where FDA responds to a comment in the final rule, repetition of the comment in objections does not present a live controversy unless the objector proffers some evidence calling FDA's conclusion into question)).

If NRDC is challenging the substance of EPA's conclusion on the ethics of the Gledhill study, this objection also does not warrant a hearing because NRDC is making no more than a legal or policy argument. There is no dispute with regard to what post-testing was performed as to the Gledhill subjects. NRDC admits as much. (Ref. 1 at 15 ("There is nothing in the [EPA] memo that suggests that there is any uncertainty or controversy about what the various study documents said or what was done in the study in relation to this ethical 'inconsistency' with the Helsinki Declaration. . . . Notwithstanding the clear facts of the case [regarding retesting] . . . ."). The only question is whether the failure to test subjects until cholinesterase inhibition levels returned to baseline is "clear and convincing evidence" that the Gledhill study was "fundamentally unethical." (40 CFR 26.1704). Like the consent issue, NRDC, itself, has framed the issue as involving a legal question as to which there is only one answer. According to NRDC, "these failings [as to retesting subjects and consent] both constitute 'fundamentally unethical' actions by any reasonable understanding of that term." (Ref. 1 at 15). Further, NRDC argues categorically that "[v]iolation of . . . international standards in the design and conduct of human studies is fundamentally unethical." (Id.). This is a legal/policy determination regarding application of an EPA regulatory standard and the standards of the Declaration of Helsinki to undisputed facts. Certainly, NRDC has proffered no genuine factual issue to be resolved at a hearing. Hearings are not appropriate on questions of law or policy. (40 CFR 178.32(b)(1)).

Finally, a hearing is not appropriate on this sub-issue because NRDC's objection does not respond to EPA's conclusion, based on the HSRB's reasoning, as to why the failures in monitoring of subjects following the conclusion of dosing did not amount to clear and convincing evidence that the study was fundamentally unethical. As such, NRDC's objection on this point is nothing more than a general denial of EPA's conclusion and a hearing cannot be justified on this basis. (40 CFR 178.32(b)(2)).

iv. *Denial of objection.* NRDC has offered no response to EPA's petition denial order which incorporated the HSRB's reasoning as to why the failure to retest subjects did not constitute clear and convincing evidence that the Gledhill study was fundamentally unethical. Specifically, NRDC does not address the HSRB's conclusion, adopted by EPA, that the lack of retesting was not fundamentally unethical because "prior studies by this researcher involving higher doses had only invoked minimal responses." (72 FR at 68675). Thus, NRDC's objection on this point is denied.

F. Summary of Reasons for Denial of NRDC's Hearing Requests

EPA denies NRDC's request for a hearing on whether reliable data support EPA's reduction of the children's safety factor and on whether EPA properly relied on the Gledhill human study. EPA's close examination of each of the 19 sub-issues involved in these two hearing requests demonstrates that none of the issues satisfies the standard for granting a hearing in 40 CFR 178.32. Most fail for multiple reasons.

Several sub-issues do not present an issue of genuinely-disputed fact. Instead, NRDC raises issues presenting purely legal or policy questions or questions involving the application of legal standards to undisputed facts. For example, with regard to its children's safety factor objection, NRDC makes the legal argument that failure to complete the mandatory endocrine screening program compels EPA to retain the children's safety factor for DDVP and all other pesticides. (See Unit VIII.D.2.a.). In other cases, NRDC's description of a factual dispute is clearly contradicted by the record. An example here is NRDC's assertion that EPA failed to consider acute residential exposure even though EPA, in response to

NRDC's petition, amended its risk assessment to include examination of exposure for 1–day and 14–day periods. (See Unit VIII.D.4.c.)

Many of NRDC's sub-issues lack materiality. In some instances that is due to NRDC's misunderstanding of a scientific concept - as when NRDC raises questions about the statistical power of the Gledhill study or seeks to invalidate the Gledhill study based on a alleged inadequacy to control for environmental factors. Both of these concepts have little relevance given the positive results found in that study. (See Units VIII.E.3.a. and VIII.E.3.e.). In other instances, the sub-issues presented by NRDC lack materiality either because (1) NRDC objects to aspects of EPA's risk assessments that were changed in response to the petition; (2) NRDC fails to address the reasons given by EPA for denying NRDC's petition; or (3) NRDC objects to prior conclusions of EPA that were superseded by the petition denial order. (See Units VIII.D.3., VIII.E.3.b., and VIII.E.3.g.)

Most importantly, as to all of the sub-issues, NRDC fails to identify and proffer evidence which, if established, would resolve one or more questions in NRDC's favor. As EPA's analysis shows, NRDC essentially proffered no evidence in support of its hearing requests and objections and instead relies upon legal and policy arguments and unsupported or speculative factual assertions. NRDC's attempted evidentiary proffers are either: (1) so broad as to be meaningless (e.g., the complete EPA docket for DDVP); (2) too general to define a factual issue as to DDVP (e.g., newspaper and law review articles); (3) supportive of scientifically irrelevant claims (e.g., Sass and Lockwood articles); or (4) mere allegations or general denials (e.g., NRDC's claim that dietary risk assessment "poses a serious risk of understating risks posed by DDVP;" NRDC's speculation about how many DDVP pest strips a homeowner may use). (See Units VIII.C., VIII.D.3., and VIII.D.4.e.).

NRDC's failure to offer evidence in support of its contentions is a consistent pattern in this proceeding. NRDC offered no greater support for its arguments in its petition, in its comments on the IRED, or, for that matter, in its written or oral comments to the HSRB. In these circumstances, EPA questions whether granting a hearing would have been appropriate even if NRDC had, at this last stage of the administrative process, suddenly produced factual evidence in support of its claims. Presumably, Congress created a multi-stage administrative process for resolution of tolerance petitions to give EPA the opportunity in the first stage of the proceeding to resolve factual issues, where possible, through a notice-and-comment process, prior to requiring EPA to hold a full evidentiary hearing - which can involve a substantial investment of resources by all parties taking part. While EPA has not held any pesticide tolerance hearings under the FFDCA, its experience with pesticide hearings under FIFRA in the 1970s indicates the process can be quite lengthy. (See were e.g., Environmental Defense Fund v. EPA, 548 F.2d 998, 1002 (D.C. Cir. 1976) (4 months were needed for testimony in an expedited FIFRA suspension proceeding); Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292, 1297 (D.C. Cir. 1975) (13 months of testimony in a FIFRA cancellation proceeding); Environmental Defense Fund v. Ruckelshaus, 489 F.2d 1247, 1251 n. 24 (D.C. Cir. 1973) ("During seven months of hearings [in the DDT cancellation proceeding], 125 witnesses appeared to testify and 365 exhibits were placed in evidence. The transcript of the hearings was over 9,000 pages long."); Ref. 44 at 246 (referring to FIFRA cancellation proceedings in the 1970s as the "'100–years' pesticide wars"). Given that in the ensuing 30 years the pesticide risk assessment process has become exponentially more complex, FFDCA pesticide hearings have the potential for being even more resource intensive. Accordingly, if a party were to withhold evidence from the first stage of a tolerance petition proceeding and only produce it as part of a request for a hearing on an objection, EPA might very likely determine that such an untimely submission of supporting evidence constituted an amendment to the Original petition requiring a return to the first stage of the administrative process (if, consideration of information that was previously available is appropriate at all).

Finally, EPA notes that it is denying NRDC's hearing requests under 40 CFR 178.32 and does not here rely on the even broader discretionary authority to deny hearing requests in FFDCA section 408(g)(2)(B). As recounted previously, 40 CFR 178.32 predates the explicit addition to the statute by the FQPA of the grant of authority to EPA to deny hearings. That language provides that EPA shall "hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections." (21 U.S.C. 346a(g)(2)(B)). EPA does not interpret this language as requiring it to hold a hearing in any instance where factual evidence relevant to a material issue of fact is proffered (essentially the standard set forth in 40 CFR 178.32); rather, EPA construes the statutory language as requiring it to hold a hearing only where it determines a hearing is *necessary* to receive such proffered evidence. In other words, a party wishing to obtain a hearing must not only satisfy the requirements of 40 CFR 178.32, it must also show that an evidentiary hearing is necessary to presentation of proffered evidence to the Agency. Because, however, NRDC has not satisfied the standard set forth in 40 CFR 178.32, EPA does not need to address whether a hearing is necessary to receive NRDC's "evidentiary" proffer.

G. Summary of Reasons for Denial of NRDC's Objections

EPA denies NRDC's objections to EPA's petition denial that EPA lacked sufficient data to reduce the children's safety factor for DDVP, and EPA unlawfully relied on the Gledhill intentional human dosing study in assessing the risk of DDVP exposure.

1. *Children's safety factor objection.* In support of its children's safety factor objection, NRDC claims that EPA has inadequate data on endocrine effects, dietary exposure to DDVP residues in food, and exposure from residential pest strips. On endocrine effects. NRDC argues that EPA lacks adequate data, as a legal matter, because it has not completed the section 408(p) endocrine screening program, and, as a factual matter, because DDVP has not been tested under the most recent two-generation rat reproduction study. EPA has previously rejected NRDC's legal argument as not consistent with the statutory language, structure, or history, and NRDC has offered no arguments as to why EPA's previous conclusion was incorrect. On the factual question of whether EPA has adequate endocrine data on DDVP, EPA concluded in the petition denial that, given the existing data bearing on DDVP's potential to cause endocrine effects and large difference in sensitivity between DDVP's cholinesterase inhibition effects and potential endocrine effects, EPA had sufficient reliable data on DDVP's potential endocrine effects to vary from the default children's safety factor. In its objections, NRDC offers nothing other than speculation about what another two-generation rat reproduction study might show. NRDC's speculation does not convince EPA that its analysis was incorrect.

As to dietary exposure to DDVP residues in food, NRDC argues that EPA's dietary exposure assessment has

many shortcomings that may lead to underestimation of dietary exposure to DDVP. In support of this claim, NRDC relies on statements EPA made in 2000 in a preliminary risk assessment of DDVP. NRDC places particular emphasis on its claim that EPA's database on food consumption by infants is inadequate. These allegations by NRDC lack merit because NRDC has ignored the many revisions to the DDVP risk assessment since the 2000 preliminary risk assessment. First, EPA completely revised the dietary exposure and risk assessment in response to NRDC's petition. One of the specific reasons for revising the risk assessment was so that EPA's latest information on infant food consumption could be incorporated. Second, also in response to NRDC's petition, EPA comprehensively analyzed its dietary exposure assessment to evaluate whether that assessment potentially underestimated dietary exposure to DDVP. EPA concluded that "its assessment of exposure to DDVP from food will not under-estimate but rather over-estimate, and in all likelihood substantially over-estimate, DDVP exposure." (72 FR at 68686). NRDC neither acknowledges nor challenges the revised dietary exposure assessment or EPA's detailed analysis of whether that assessment under- or over-estimates DDVP exposure. Finally, EPA questions the materiality of NRDC's argument with regard to DDVP exposure from food given that DDVP exposure from this source is trivial compared with other sources. For all of these reasons, EPA rejects NRDC's arguments on the alleged inadequacy of EPA's assessment of human dietary exposure to DDVP in food.

With regard to DDVP exposure from residential pest strips, NRDC claims that the data relied upon by EPA (the Collins and DeVries study) was inadequate and EPA's risk assessment based on that study was based on inadequately-supported assumptions. These arguments, however, are without merit because not only does NRDC offer nothing other than general, undocumented contentions in support but once again NRDC has ignored clear evidence and analysis in the record that contradict its allegations. First, NRDC ignores the other DDVP pest strip exposure studies relied upon by EPA to support the findings in the Collins and DeVries study. EPA concluded that these studies confirmed that the findings in Collins and DeVries were representative of DDVP concentration levels from pest strips that could be expected in houses in other locations. Second, NRDC ignores EPA's complete revision to the DDVP residential exposure assessment that was conducted in response to its petition. That revision modified numerous assumptions in the assessment to ensure that the data from the Collins and DeVries study were analyzed in a conservative fashion. NRDC does not acknowledge the new assessment much less offer a rebuttal to EPA's revised analysis. Most surprisingly, NRDC repeats challenges to several assumptions (only examining DDVP exposure as averaged over a 120–day period; considering 16 hours per day a maximum exposure in a home) that were explicitly modified (adding consideration of 1–day and 14–day exposure periods; assuming 24 hours exposure per day) in the revised risk assessment in response to NRDC's petition. Accordingly, EPA disagrees with NRDC's allegations concerning the inadequacy of the data and assumptions underlying its residential pest strip risk assessment.

2. *Human study objection.* NRDC challenged EPA's reliance on the Gledhill human study arguing that EPA's Human Research rule is unlawful and the study was both scientifically flawed and unethically conducted.

NRDC relies on its legal briefs filed in a separate challenge to the Human Research rule and its comments on that rule in support of its legal attack on the rule. Similarly, to the extent NRDC has standing to challenge a rule whose "primary concern" is the "[p]rotection of the health and safety of human test subjects," (Ref. 1 at 15), EPA relies on its legal brief in the 2nd Circuit proceeding and the administrative record for the rule, in denying NRDC's challenge to Human Research Rule.

As to the Gledhill study, itself, NRDC makes various claims regarding its scientific validity and ethicality. NRDC has previously presented these claims in writing and orally to EPA's HSRB. The HSRB is an independent scientific panel, consisting of experts in bioethics, biostatistics, human health risk assessment, and human toxicology, created specifically for the purpose of advising EPA on whether human studies have scientific value and conform to ethical standards. Although NRDC's concerns as to the Gledhill study were presented to the HSRB, the HSRB concluded that the Gledhill study complied with the Human Research rule and could be considered by EPA in assessing the risk of DDVP. EPA relied heavily on the advice by the HSRB in denying NRDC's petition. Remarkably, NRDC, in its objections, proceeds as if the HSRB review never occurred. NRDC neither acknowledges the existence of the HSRB report nor attempts to refute its reasoning. In Unit VIII.E. above, EPA repeats the findings of the HSRB and EPA's reasons for accepting the HSRB's conclusions with regard to the specific contentions of NRDC. Based on both the findings of the HSRB and EPA in its petition denial, as described above, as well as NRDC's failure to meaningfully dispute those findings, EPA rejects NRDC's challenge to EPA's reliance on the Gledhill study.

H. Conclusion

For all of the reasons set forth above, EPA denies NRDC's objections and its requests for a hearing on those objections.

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41. OECD, "OECD Guideline For The Testing Of Chemicals: Chronic Toxicity Studies — 452" (May 1981).

42. OECD Test Guideline No. 452, "Chronic Toxicity Studies" dated May 12, 1981; (CPR 52(a)(iii), 52(b)(ii), 52(c)(ii), 59(a)(iii), 59(b)(ii), 59(c)(ii) and 63) (Can).

43. Council Directive No. 2001/59/EC, O.J. L 225 (2001) (Annex V of Dir 67/548/EEC on the Classification, Packaging and Labeling of Dangerous Substances (http://ecb.jrc.it/testing-methods/annex5)).

44. William Rodgers, Environmental Law: Pesticides and Toxic Substances (1988).

X. Regulatory Assessment Requirements

As indicated previously, this action announces the Agency's final order regarding objections filed under section 408 of FFDCA. As such, this action is an adjudication and not a rule. The regulatory assessment requirements imposed on rulemaking do not, therefore, apply to this action.

XI. Submission to Congress and the Comptroller General

The Congressional Review Act, (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Appendix 1—United States Environmental Protection Agency Human Studies Review Board

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List of Subjects in 40 CFR Part 180

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

Dated: July 11, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E8–16617 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0302; FRL–8369–5]

Fludioxonil; Pesticide Tolerance for Emergency Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for residues of fludioxonil in or on carambola (starfruit). This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on carambola. This regulation establishes a maximum permissible level for residues of fludioxonil in starfruit. The time-limited tolerance expires and is revoked on December 31, 2010.

DATES: This regulation is effective July 23, 2008. Objections and requests for hearings must be received on or before September 22, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION.**

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0302. To access the electronic docket, go to *http://www.regulations.gov*, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Andrea Conrath, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9356; e-mail address: conrath.andrea@*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 Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (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. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0302 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 September 22, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2008–0302, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(e) and 408(l)(6) of FFDCA, 21 U.S.C. 346a(e) and 346a(1)(6), is establishing a time-limited tolerance for residues of the fungicide fludioxonil, (4-(2,2-difluoro-1,3-benzodioxol-4-yl)-1*H*-pyrrole-3-carbonitrile), in or on carambola at 10 parts per million (ppm). This time-limited tolerance expires and is revoked on December 31, 2010. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the CFR.

Section 408(l)(6) of FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related time-limited tolerances to set binding precedents for the application of section 408 of FFDCA and the new safety standard to other tolerances and exemptions. Section 408(e) of FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, i.e., without having received any petition from an outside party.

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. . . ."

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that "emergency conditions exist which require such exemption." EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

III. Emergency Exemption for Fludioxonil on Carambola and FFDCA Tolerances

The disease, Dothiorella fruit rot is a recent phenomenon in Florida and was documented as a major problem for citrus growers during the 2006–07 season. The current practice of dipping carambola in chlorine solution to remove other fungal pathogens has been ineffective in controlling Dothiorella fruit rot, and there are no other appropriate practices or materials available. The industry is also particularly vulnerable since it is still recovering from the 2005 hurricane season and the 2006–07 spring drought which delayed flowering and fruiting. A postharvest dip of fludioxonil has demonstrated effective management of Dothiorella fruit rot. Losses suffered were expected to be significant if fludioxonil were not available for post-harvest treatment as requested. After having reviewed the submission, EPA determined that emergency conditions exist for this State, and that the criteria for an emergency exemption are met. EPA has authorized under FIFRA section 18 the use of fludioxonil on carambola for control of Dothiorella fruit rot in Florida.

As part of its evaluation of the emergency exemption application, EPA assessed the potential risks presented by residues of fludioxonil in or on carambola. In doing so, EPA considered the safety standard in section 408(b)(2) of FFDCA, and EPA decided that the necessary tolerance under section 408(l)(6) of FFDCA would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this tolerance without notice and opportunity for public comment as provided in section

408(l)(6) of FFDCA. Although this time-limited tolerance expires and is revoked on December 31, 2010, under section 408(l)(5) of FFDCA, residues of the pesticide not in excess of the amount specified in the tolerance remaining in or on carambola after that date will not be unlawful, provided the pesticide was applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this time-limited tolerance at the time of that application. EPA will take action to revoke this time-limited tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because this time-limited tolerance is being approved under emergency conditions, EPA has not made any decisions about whether fludioxonil meets FIFRA's registration requirements for use on carambola or whether a permanent tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that this time-limited tolerance decision serves as a basis for registration of fludioxonil by a State for special local needs under FIFRA section 24(c). Nor does this tolerance serve as the basis for persons in any State other than Florida to use this pesticide on this crop under FIFRA section 18 absent the issuance of an emergency exemption applicable within that State. For additional information regarding the emergency exemption for fludioxonil, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. Aggregate Risk Assessment and Determination of Safety

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...."

Consistent with the factors specified in FFDCA section 408(b)(2)(D), 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 expected as a result of this emergency exemption request and the time-limited tolerance for residues of fludioxonil on carambola at 10 ppm. EPA's assessment of exposures and risks associated with establishing the time-limited tolerance follows.

A. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account 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. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-term, intermediate-term, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for fludioxonil used for human risk assessment can be found at *http://www.regulations.gov* in document Fludioxonil. "Human Health Risk Assessment for a Section 18 Emergency Tolerance on Starfruit" at page 35 in docket ID number EPA–HQ–OPP–2008–0302.

B. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to fludioxonil, EPA considered exposure under the time-limited tolerance established by this action as well as all existing fludioxonil tolerances in 40 CFR 180.516. EPA assessed dietary exposures from fludioxonil in food as follows:

i. *Acute exposure.* In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, an acute dietary assessment assuming tolerance-level residues for all commodities with existing and proposed tolerances and default 100% crop treated (CT) information was conducted for the population subgroup females 13 to 49 years old. The estimated peak drinking water concentration of 132 parts per billion (ppb) was directly incorporated into the acute risk assessment. There were no appropriate toxicological effects attributable to a single exposure (dose) for the general population or any other population subgroups; therefore these population subgroups were not included in this assessment. For food and drinking water, the exposure to females 13 to 49 yrs old (the most sensitive population subgroup) was 0.14 milligrams/kilogram/day (mg/kg/day), which utilized 14% of the aPAD at the 95th percentile of exposure distribution.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed tolerance-level residues for most commodities and 100% CT. Anticipated residue values for apple, grapefruit, lemon, lime, orange, and pear were generated from field trials. Anticipated residues were also determined from processing studies for apple, grapefruit, lemon, lime and orange juices. The mean drinking water estimate of 49 ppb was directly incorporated into the chronic assessment. For the U.S. population the exposure for food and water utilized 47% of the cPAD. The chronic dietary

risk estimate for the highest reported exposed population subgroup, children 1 to 2 years old, is 86% of the cPAD.

iii. *Cancer.* Fludioxonil is classified as a "Group D" chemical - not classifiable as to human carcinogenicity. Therefore a cancer dietary assessment was not performed.

iv. *Anticipated residue information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for fludioxonil in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of fludioxonil. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the First Index Reservoir Screening Tool (FIRST), and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of fludioxonil for acute exposure is estimated to be 132 ppb (peak concentration), and for chronic (non-cancer) exposures, 49 ppm (mean concentration), both levels for surface water concentrations. Ground water sources were not included in this assessment, as the EDWCs for this water source are minimal in comparison to surface water (0.11 ppb for both acute and chronic concentrations).

Modeled estimates of drinking water concentrations were entered directly into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 132 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration value of 49 ppb was used to assess the contribution to drinking 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).

Fludioxonil is currently registered for residential turf use, restricted to commercial applicators only. Since there are no short-term or intermediate-term dermal toxicity endpoints, only a toddler post-application assessment for incidental ingestion exposures to treated lawns was included (for all children/infant subgroups). The combined short-term oral exposure risk estimate, which includes hand-to-mouth, object-to-mouth and soil ingestion pathways, was determined to be 0.013 mg/kg body weight (bw)/day, while the intermediate-term was determined to be 0.0074 mg/kg bw/day. The MOEs for combined non-dietary oral exposures were 770 for short-term exposures and 450 for intermediate-term exposures. These do not exceed the EPA's LOC for residential exposures (MOEs < 100).

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 has not found fludioxonil to share a common mechanism of toxicity with any other substances, and fludioxonil does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that fludioxonil does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative.*

C. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) 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 database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional SF when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There was no quantitative or qualitative evidence of increased susceptibility following *in utero* exposure of rats and rabbits or following pre-natal/post-natal exposure of rats. In rats, there was an increase in the number of fetuses and litters with dilated renal pelvis and dilated ureter. This finding was considered to be related to maternal toxicity rather than an indication of increased susceptibility. Therefore, it is concluded that there is no evidence of increased susceptibility in rats. In rats, developmental effects occurred in the presence of maternal effects. In rabbits, no developmental toxicity was seen up to the highest dose tested which demonstrated maternal toxicity. In the 2–generation rat reproduction study, offspring toxicity was seen at the dose that produced parental toxicity. The maternal toxicity was manifested as increased clinical signs, decreased body weight, body weight gain and food consumption. Fetal toxicity was manifested as decreased weight gain in pups. Since maternal and fetal toxicity were comparable, it was concluded that there is no increased susceptibility in the 2–generation reproduction study.

3. *Conclusion.* EPA has determined that reliable data show that the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for fludioxonil is complete.

ii. There is no indication that fludioxonil is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that fludioxonil results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2–generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. Anticipated residue values for apple, grapefruit, lemon, lime, orange, and pear were generated from field trials. Anticipated residues were also determined from processing studies for

apple, grapefruit, lemon, lime and orange juices. Data supporting the citrus crop group tolerance were used to estimate residues for carambola. These data are reliable and will not underestimate the exposure and risk. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to fludioxonil in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by fludioxonil.

D. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk.* Since the acute aggregate risk assessment includes exposure from food and water only, and the acute dietary analysis that was performed included both, no further calculations are necessary. An acute dietary assessment was conducted for the population subgroup females 13 to 49 years old. There were no appropriate toxicological effects attributable to a single exposure (dose) for the general population or other population subgroups; therefore only the subgroup of females 13 to 49 years old was included in this assessment. Using the exposure assumptions discussed in this unit for acute exposure, the acute aggregate exposure from food and water to fludioxonil will occupy 14% of the aPAD for Females 13 to 49 years old.

2. *Chronic risk.* Based on the explanation in the unit regarding residential use patterns, chronic residential exposure to residues of fludioxonil is not expected. Consequently, the chronic aggregate risk assessment includes exposure from food and water only. Because the chronic dietary analysis that was performed included both food and water, no further calculations are necessary for an aggregate chronic risk assessment. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to fludioxonil from food and water will utilize 86% of the cPAD for children 1 to 2 years old the population group receiving the greatest exposure. For the U.S. population the exposure for food and water utilized 47% of the cPAD.

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

Fludioxonil is currently registered for uses that could result in short- and intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short- and intermediate-term residential exposures to fludioxonil.

Using the exposure assumptions described in this unit for short- and intermediate-term exposures, EPA has concluded that combined short- and intermediate-term food, water, and residential exposures aggregated result in aggregate MOEs for the most highly exposed subgroup, Infants <1 year old, of 320 for short-term exposures and 130 for intermediate-term exposures. These do not exceed the level of concern for residential exposures (MOEs < 100).

4. *Aggregate cancer risk for U.S. population.* Fludioxonil is classified as a "Group D" chemical - not classifiable as to human carcinogenicity. Therefore a cancer aggregate assessment was not performed.

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, or to infants and children, from aggregate exposure to fludioxonil residues.

V. Other Considerations

A. Analytical Enforcement Methodology

The methods used in previous field trial studies were similar to a method validated by the Analytical Chemistry Branch (ACB). Since adequate method validation and concurrent recoveries were attained in the field trial studies, EPA concludes that the ACB validated method is appropriate for enforcement.

Adequate enforcement methodology (high performance liquid chromatography method AG–597B) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

There are no CODEX maximum residue levels for fludioxonil residues on carambola.

VI. Conclusion

Therefore, a time-limited tolerance is established for residues of fludioxonil, (4-(2,2-difluoro-1,3-benzodioxol-4-yl)-1*H*-pyrrole-3-carbonitrile), in or on starfruit at 10 ppm. This tolerance expires and is revoked on December 31, 2010.

VII. Statutory and Executive Order Reviews

This final rule establishes tolerances under sections 408(e) and 408(l)(6) of FFDCA. 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 final rule has been exempted from review under Executive Order 12866, this final 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) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). 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.*, 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).

Since tolerances and exemptions that are established in accordance with a FIFRA section 18 exemption under sections 408(e) and 408(l)(6) of FFDCA, such as the tolerances 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.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments,

on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not 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).

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).

VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report 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: July 9, 2008.

Donald R. Stubbs,

Acting 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 180.516 is amended by revising the table in paragraph (b) to read as follows:

§ 180.516 Fludioxonil; tolerances for residues.

* * * * *

(b) * * *

Commodity	Parts per million	Expiration/revocation date
Starfruit	10	12/31/10

* * * * *

[FR Doc. E8–16876 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 263

RIN 0970–AC15

Cost Allocation Methodology Applicable to the Temporary Assistance for Needy Families Program

AGENCY: Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule applies to the Temporary Assistance for Needy Families (TANF) program and requires States, the District of Columbia and the Territories (hereinafter referred to as the "States") to use the "benefiting program" cost allocation methodology in U.S. Office of Management and Budget (OMB) Circular A–87 (2 CFR part 225). It is the judgment and determination of HHS/ACF that the "benefiting program" cost allocation methodology is the appropriate methodology for the proper use of Federal TANF funds. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 gave federally-recognized Tribes the opportunity to operate their own Tribal TANF programs. Federally-recognized Indian tribes operating approved Tribal TANF programs have always followed the "benefiting program" cost allocation methodology in accordance with OMB Circular A–87 (2 CFR part 225) and the applicable regulatory provisions at 45 CFR 286.45(c) and (d). This final rule contains no substantive changes to the proposed rule published on September 27, 2006.

EFFECTIVE DATE: This rule is effective July 23, 2008.

FOR FURTHER INFORMATION CONTACT: Robert Shelbourne, Director, State TANF Policy Division at (202) 401–5150, *rshelbourne@acf.hhs.gov*.

SUPPLEMENTARY INFORMATION: On September 27, 2006, ACF published a Notice of Proposed Rulemaking (NPRM) to add section 263.14 to 45 CFR part 263, requiring a State or Territory to use a benefiting program cost allocation methodology consistent with the general requirements of OMB Circular A–87 to allocate TANF costs. We provided a 60-day comment period that ended on November 27, 2006. We offered the public the opportunity to submit comments by surface mail, e-mail, or electronically via our Web site.

Comment Overview

After accounting for duplication, we received one comment on the NPRM. We have summarized the public comment and our response to it in Section II of the preamble to this final rule.

Table of Contents

I. Statutory Authority

We are issuing this regulation under the authority granted to the Secretary of Health and Human Services (HHS) by 42 U.S.C. 1302(a). Section 1302(a) authorizes the Secretary to make and publish such rules as may be necessary for the efficient administration of functions with which he is charged under the Social Security Act.

42 U.S.C. 617 limits the authority of the Federal government to regulate State conduct or enforce the TANF provisions of the Social Security Act, except as expressly provided. We interpret this

provision to allow us to regulate the use of a permissible cost allocation methodology because States and the Territories need to know what they may and may not do to avoid potential misuse of funds penalties under 42 U.S.C. 609(a)(1).

Pursuant to 42 U.S.C. 609(a)(1), we may impose a financial penalty whenever a State misuses Federal TANF funds. The TANF regulations at 45 CFR 263.11 address the proper and improper uses of Federal TANF funds. Section 263.11(b) sets forth the circumstances that constitute misuse of Federal funds. Use of Federal TANF funds in violation of any of the provisions in OMB Circular A–87 (2 CFR part 225) is one such circumstance. Accordingly, we are specifying that the "benefiting program" cost allocation methodology is the appropriate methodology for the proper use of Federal TANF funds.

II. Background

The Office of Management and Budget (OMB) has issued government-wide standards for allocating the costs of government programs. Specifically, OMB Circular A–87 (2 CFR part 225), "Cost Principles for State, Local and Indian Tribal Governments," provides that "A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received." Thus, costs that benefit multiple programs may not be allocated to a single program. An illustrative way to determine whether multiple programs benefit from a cost objective is to ask, for example: In the absence of the TANF program, would another program still have to undertake the function? If the answer is yes, there is a benefit to each program and the costs should be allocated using the "benefiting programs" cost allocation method.

The "benefiting program" cost allocation method applies to all Federal programs, unless there is a statutory or OMB-approved exception. Prior to enactment of the TANF program, HHS allowed States, the District of Columbia, and the Territories to charge the common administrative costs of determining eligibility and case maintenance activities for the Food Stamp and Medicaid programs to the AFDC program—a so-called "primary program" allocation method. This exception to the "benefiting program" cost allocation requirement of OMB Circular A–87 (2 CFR part 225) was consistent with Conference Committee language indicating AFDC might pay for these common costs because families who were eligible for AFDC (the primary program) were also automatically eligible for Medicaid and met the categorical, but not necessarily the income, requirements of Food Stamps.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Pub. L. 104–193) was enacted on August 22, 1996. Title I of PRWORA repealed the AFDC program and replaced it with the TANF program. Unlike AFDC, TANF eligibility no longer automatically makes a family eligible for Medicaid, and eligibility for certain TANF services and benefits do not lead to categorical eligibility for Food Stamps.

As a result, HHS issued guidance prohibiting States from continuing to use the "primary program" allocation methodology. On September 30, 1998, the Office of Grants and Acquisition Management (OGAM) in HHS issued OGAM Action Transmittal (AT) 98–2 which required States to allocate costs to each "benefiting program" in accordance with the provisions in OMB Circular A–87 (2 CFR part 225). According to the instructions and rationale in OGAM AT 98–2, "Cost shifting (to a primary program) is not permitted by most program statutes, except where there is a specific legislative provision allowing such cost shifting. While the former AFDC program allowed such an exception, the TANF legislation that replaced AFDC does not permit it being designated as the sole benefiting or primary program." All States submitted revised cost allocation plans to comply with this policy and since then have continued to allocate Medicaid, Food Stamp and TANF costs in accordance with a "benefiting" methodology.

Six States filed suit in District Court to prevent HHS from enforcing OGAM AT 98–2 (*Arizona* v. *Thompson, 281 F.3d 248* (*DC Cir. 2002*). The States alleged that they incur common administrative costs that benefit the TANF, Medicaid, and Food Stamp programs and contended that the "grandfather provision" under 42 U.S.C. 604(a)(2) permits them to use TANF grants as they did under the AFDC program. Section 604(a)(2) allows States to use Federal TANF funds in any manner that the State was authorized to use Federal funds received under the State's former AFDC program, the Job Opportunities and Basic Skills Training (JOBS) program or the Emergency Assistance program in effect as of either September 30, 1995 or August 21, 1996, whichever date the State has elected.

The United States District Court for the District of Columbia upheld the Department's position. However, the States appealed to the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals). The Court of Appeals decided, on March 5, 2002, that the TANF legislation does not require HHS to conclude that States are prohibited from using the "primary program" cost allocation methodology (281 F.3d at 256). The Appeals Court noted that: "The background against which Congress enacted the Welfare Reform Act included both Circular A–87's general principle of benefiting program allocation and its well-recognized exception for the AFDC program." Id. However, the Court left open the possibility that HHS could, in the exercise of its rulemaking discretion, prospectively prescribe that States use the "benefiting program" method to allocate common costs among programs. Id. The case was ultimately remanded to HHS for further consideration. After considerable deliberation, we have determined that the benefiting program cost allocation methodology is the appropriate cost allocation rule to apply to the TANF program.

Comment: A national association requested that we reconsider our proposal, because it restricts State flexibility and State options. It maintains that the ties between the TANF program and the Food Stamp program are strong and numerous in most States. It points to the 2002 Farm Bill as an example of legislation which enables States to align the definition of income and/or resources under the Food Stamp program to that used in the TANF or Medicaid program. As another example, it points to the close connection between the Food Stamp program and the TANF program set forth in the interim final TANF rule published in the **Federal Register** on June 29, 2006. A provision in the rule urges States to implement a Simplified Food Stamp Program, for purposes of considering the required hours of work participation in a work experience or community service program. It argues that the widespread adoption of such conformity options has led States to combine staff, automated systems, and other administrative functions when operating these programs.

Response: The 2002 Farm Bill provisions and the Simplified Food Stamp Program give States the option to align certain Food Stamp and TANF program eligibility rules. But, this flexibility did not alter or affect in any way the required cost principles applicable to both programs. The Food Stamp program, administered by the U.S. Department of Agriculture's Food and Nutrition Service, is subject to the

same Common Rule cost principles as the TANF program. In using Federal Food Stamp program funds or Federal TANF program funds, States have been and continue to be required to follow the uniform cost principles for determining allowable costs in OMB Circular A–87 (2 CFR part 255).

OMB Circular A–87 (2 CFR part 225) states that program costs must be necessary, reasonable, and allocable. A cost must also be allowable under OMB Circular A–87 cost principles and the program's laws, terms and conditions of the Federal award, or governing regulations. An allowable cost is allocable to a particular program in accordance with the relative benefits received by that program. Thus, allowable shared costs must be allocated in accordance with the "benefiting program" cost allocation methodology and no changes have been made in this final rule.

III. Discussion of Regulatory Provisions

We have added the following new section to part 263, subpart B of the TANF regulations.

Section 263.14 What methodology shall States use to allocate Federal TANF costs?

This section provides that States shall use only the "benefiting program" cost allocation methodology. Requiring a "benefiting program" cost allocation methodology is consistent with the TANF final rules which make the TANF program subject to 45 CFR part 92 and includes the cost principles of OMB Circular A–87 (2 CFR part 225).

One of the fundamental Federal appropriation principles at 31 U.S.C. 1301(a) states that appropriations can only be used for the purposes for which they were appropriated, unless otherwise provided by law. OMB Circular A–87 (2 CFR part 225) reflects this principle by requiring "benefiting program" cost allocation. The overall purpose of OMB Circular A–87 (2 CFR part 225) is to achieve more efficient and uniform administration of Federal awards and to provide the foundation for greater uniformity in the costing procedures of non-Federal governments. Without an explicit legislative provision permitting "primary program" cost allocation, we believe it would be inconsistent with and contrary to these appropriation principles to allow TANF funds to be used to pay for costs allocable to other programs.

Since the decision of the Appeals Court, no State has submitted a revised "primary program" cost allocation plan for allocating the common costs of determining eligibility or case maintenance for TANF, Food Stamps and Medicaid to HHS for approval. These were the primary common costs previously claimed and allowed under a "primary program" cost allocation methodology under the former AFDC program.

Under the President's Management Agenda of improved accountability, each program needs to know its full costs using consistent and comparable data to assess program trends and measure performance. Appropriate program and funding decisions, both now and in the future, must be based on the knowledge and accounting of total program costs, including those costs incurred under a consistent benefiting program methodology. Under this rule, we will not permit an exception to the benefiting program cost allocation methodology generally required under OMB Circular A–87 (as permitted for the AFDC program prior to the enactment of the TANF program). Thus, HHS will disapprove any TANF cost allocation amendments proposing a "primary program" cost allocation methodology.

Therefore, the Secretary is exercising his discretion to require a "benefiting program" cost allocation methodology under TANF in accordance with OMB Circular A–87 (2 CFR part 225). This final rule requires States to make no changes to their TANF cost allocation plans, but instead will affirm and lock in place, current cost allocation practice.

Readers should note that we revised the title of this section to be more concise. "States" has already been defined in 45 CFR 260.30 to mean the 50 States, the District of Columbia, and the Territories.

This final rule does not affect federally-recognized Indian tribes operating approved Tribal TANF programs. Prior to enactment of PRWORA of 1996, needy families in a federally-recognized Indian tribe received assistance under the State's former Aid to Families with Dependent Children (AFDC) program. PRWORA gave federally-recognized Tribes the opportunity to operate their own Tribal TANF programs. These Tribes have always followed the "benefiting program" cost allocation methodology in accordance with OMB Circular A–87 and the applicable Tribal TANF regulatory provisions at 45 CFR 286.45(c) and (d).

IV. Paperwork Reduction Act of 1995

This rule contains no new information collection activities that are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, codified at 44 U.S.C. 3507.

V. Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. The primary impact is on State governments. State governments are not considered small entities under the Regulatory Flexibility Act.

VI. Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This rule is considered a "significant regulatory action" under the Executive Order, and therefore has been reviewed by the Office of Management and Budget.

Since all States should be using a "benefiting program" cost allocation methodology under TANF, we believe the impact of this final rule is minimal. We do not believe this rule will have a significant negative impact or reduce potential Federal reimbursement, as States receive a fixed Federal block grant amount.

VII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

The Department has determined that this rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year.

VIII. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. Chapter 8.

IX. Assessment of Federal Regulation and Policies on Families

Section 654 of The Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment

addressing seven criteria specified in the law. These regulations will not have an impact on family well-being as defined in the legislation.

X. Executive Order 13132

Executive Order 13132 "Federalism" requires that Federal agencies consult with State and local government officials in the development of regulatory policies with Federalism implications. In the NPRM, we did solicit comments from State and local government officials, consistent with this Executive Order. We did not receive any comments from State and local government officials.

List of Subjects in 45 CFR part 263

Grant programs—Federal aid programs, Penalties, Public assistance programs—Welfare programs.

Approved: May 16, 2008.

Daniel C. Schneider,

Acting Assistant Secretary for Children and Families.

Michael O. Leavitt,

Secretary of Health and Human Services.

■ For the reasons set forth in the preamble, the Administration for Children and Families amends 45 CFR chapter II to read as follows:

PART 263—EXPENDITURES OF STATE AND FEDERAL TANF FUNDS

■ 1. The authority citation for 45 CFR part 263 continues to read as follows:

Authority: 42 U.S.C. 604, 607, 609, and 862a.

■ 2. Add § 263.14 to subpart B to read as follows:

§ 263.14 What methodology shall States use to allocate TANF costs?

States shall use a benefiting program cost allocation methodology consistent with the general requirements of OMB Circular A–87 (2 CFR part 225) to allocate TANF costs.

[FR Doc. E8–16854 Filed 7–22–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XJ16

Fisheries of the Exclusive Economic Zone Off Alaska; Pelagic Shelf Rockfish in the West Yakutat District of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pelagic shelf rockfish by catcher processors participating in the limited access or opt-out fisheries that are subject to sideboard limits established under the Central GOA Rockfish Program in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2008 sideboard limits of pelagic shelf rockfish established for catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 17, 2008, through 1200 hrs, A.l.t., July 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 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 2008 pelagic shelf rockfish sideboard limit established for catcher processors participating in the limited access or opt-out fisheries that are subject to sideboard limits under the Central GOA Rockfish Program in the West Yakutat District of the GOA is 180 mt. The sideboard limit is established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008) and as posted as the 2008 Rockfish Program Catcher Processor Sideboards at *http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm.*

In accordance with § 679.82(d)(7)(i)(A), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2008 pelagic shelf rockfish sideboard limit established for catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 180 mt, and is setting aside the remaining 0 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.82(d)(7)(ii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for the pelagic shelf rockfish sideboard limit established for catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA.

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 pelagic shelf rockfish sideboard limit for catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 16, 2008.

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 § 679.82 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 17, 2008.

Emily H. Menashes

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 08–1455 Filed 7–17–08; 3:24 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XJ17

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the West Yakutat District of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch by catcher processors participating in the limited access or opt-out fisheries that are subject to sideboard limits established under the Central Gulf of Alaska (GOA) Rockfish Program in the West Yakutat District of the GOA. This action is necessary to prevent exceeding the 2008 sideboard limit of Pacific ocean perch established for catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 17, 2008, through 1200 hrs, A.l.t., July 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 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 2008 Pacific ocean perch sideboard limit established for catcher processors participating in the limited access or opt-out fisheries that are subject to sideboard limits under the Central GOA Rockfish Program in the West Yakutat District of the GOA is 722 mt. The sideboard limit is established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008), and as posted as the 2008 Rockfish Program Catcher Processor Sideboards at *http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm.*

In accordance with § 679.82(d)(7)(i)(A), the Regional Administrator has determined that the 2008 Pacific ocean perch sideboard limit established for catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 722 mt, and is setting aside the remaining 0 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.82(d)(7)(ii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for the Pacific ocean perch sideboard limit established for catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA.

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 Pacific ocean perch sideboard limit by catcher processors participating in the limited access or opt-out fisheries in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 15, 2008.

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 § 679.82 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 17, 2008.

Emily H. Menashes

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 08–1456 Filed 7–17–08; 3:24 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XJ19

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Western Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2008 total allowable catch (TAC) of Pacific ocean perch in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 18, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 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 2008 TAC of Pacific ocean perch in the Western Regulatory Area of the GOA is 3,686 metric tons (mt) as established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region,

NMFS (Regional Administrator), has determined that the 2008 TAC of Pacific ocean perch in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 3,586 mt, and is setting aside the remaining 100 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 ocean perch in the Western Regulatory Area of the GOA.

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 ocean perch in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 17, 2008.

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: July 18, 2008.

Emily H. Menashes

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 08–1459 Filed 7–18–08; 1:25 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 142
Wednesday, July 23, 2008

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–2008–0808; Directorate Identifier 2008–NE–18–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CT58 Series Turboshaft Engines

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain GE CT58 series turboshaft engines. This proposed AD would require recalculating the lives of certain part numbered compressor spools using a new repetitive heavy lift (RHL) multiplying factor. This proposed AD results from reports of cracks originating from the inner faces of the locking screw holes in the compressor spool. We are proposing this AD to prevent cracks due to RHL missions. Cracks could result in an uncontained rotor burst and damage to, or loss of, the helicopter and serious injuries to any person onboard.

DATES: We must receive any comments on this proposed AD by September 22, 2008.

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

- *Federal eRulemaking Portal*: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail*: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery*: Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday. except Federal holidays.
- *Fax*: (202) 493–2251.

You can get the service information identified in this proposed AD from GE Aircraft Engines Customer Support Center, M/D 285, 1 Neumann Way, Evendale, OH 45215; telephone (513) 552–3272; fax (513) 552–3329; e-mail *GEAE.csc@ae.ge.com*.

FOR FURTHER INFORMATION CONTACT: Christopher J. Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov*; telephone (781) 238–7133; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2008–0808; Directorate Identifier 2008–NE–18–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments 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://www.regulations.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 the Web site, anyone can find and read the comments in any of our dockets, including, if provided, 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).

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Discussion

We have received reports of nine compressor spools, with cracks originating from the inner faces of the locking screw holes in compressor spools used in RHL missions. We have not received any reports of in-flight events occurring because of the cracking. GE, the engine manufacturer, has developed a new RHL multiplying factor for use when calculating compressor spool lives on engines used for RHL missions. The new, larger multipliers will prevent the cracks from propagating to failure by causing the spools to meet their service life limits sooner, resulting in earlier removal from the engine. This condition, if not corrected, could result in an uncontained rotor burst and damage to, or loss of, the helicopter and serious injuries to any person onboard.

Relevant Service Information

We have reviewed and approved the technical contents of GE Alert Service Bulletin (ASB) CT58 S/B 72–A0162, Revision 12, dated April 17, 2008, that describes procedures for calculating the compressor spool cycles using RHL mission multipliers.

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. We are proposing this AD which would require recalculating the cycles on certain compressor spools using new RHL mission multipliers within 30 days after the effective date of the proposed AD.

Costs of Compliance

We estimate that this proposed AD would affect 89 engines installed on helicopters of U.S. registry. We also estimate that it would take about 0.5 work-hour per engine to perform the proposed actions, and that the average labor rate is $80 per work-hour. Prorated life lost for the compressor spools

would cost about $16,972 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $1,514,068.

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. 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.

The Proposed Amendment

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:

General Electric Company (GE): Docket No. FAA–2008–0808; Directorate Identifier 2008–NE–18–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by September 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to GE CT58 series turboshaft engines with a compressor spool, part number (P/N) 5920T82G07, 6010T57G07, or 6010T57G08, installed. These engines are installed on, but not limited to, Sikorsky S–61A, S–61L, S–61N, S–61R, S–62, and Columbia 107–II helicopters.

Unsafe Condition

(d) This AD results from reports of cracks originating from the inner faces of the locking screw holes in the compressor spool. We are issuing this AD to prevent cracks due to repetitive heavy lift (RHL) missions. Cracks could result in an uncontained rotor burst and damage to, or loss of, the helicopter and serious injuries to any person onboard.

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.

Recalculating Compressor Spool Cycles

(f) Within 30 days after the effective date of this AD, recalculate the life of compressor spools, P/N 5920T82G07, 6010T57G07, or 6010T57G08, using an RHL mission multiplying factor of both 3.7 cycles per hour and 6.0 cycles per hour. GE Alert Service Bulletin CT58 S/B 72–A0162, Revision 12, dated April 17, 2008, contains information on calculating life cycles for the compressor spools.

Removing Compressor Spools Based on the New Recalculated Cycles

(g) Before January 1, 2010, remove the compressor spools, P/N 5920T82G07, 6010T57G07, or 6010T57G08, at the earlier of when:

(1) The compressor spool reaches its part life limit as calculated using an RHL multiplying factor of 3.7, or

(2) You can see the spool at shop visit after it has reached its part life limit using an RHL multiplying factor of 6.0.

(h) On January 1, 2010 and thereafter, remove the engine before the compressor spool exceeds its part life limit as calculated using an RHL multiplying factor of 6.0.

(i) As of January 1, 2010, don't use an RHL multiplying factor of 3.7 to calculate the life of the compressor spool.

Installation Prohibition

(j) After the effective date of this AD, don't install any engine that has a compressor spool installed that meets or exceeds the life limits as calculated in paragraph (g)(1) through (g)(2) or (h) of this AD.

Alternative Methods of Compliance

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

Related Information

(l) GE Alert Service Bulletin CT58 S/B 72–A0162, Revision 12, dated April 17, 2008, pertains to the subject of this AD.

(m) Contact Christopher J. Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov*; telephone (781) 238–7133; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on July 17, 2008.

Marc Bouthillier,

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

[FR Doc. E8–16883 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0419; Directorate Identifier 2007–NE–52–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company CF34–1A, –3A, –3A1, –3A2, –3B, and –3B1 Turbofan Engines

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for General Electric Company (GE) CF34–1A, –3A, –3A1, –3A2, –3B, and –3B1 turbofan engines with high-pressure (HP) rotor 4-step air balance piston stationary seals (4-step seals), part numbers 4923T54G01, 6019T90G03, 6037T99G01, 6037T99G02, and 6037T99G03, installed. This proposed AD would require removing the 4-step seals and incorporating an 8-step seal at

the next piece-part exposure. This proposed AD results from the investigation of an airplane accident. Both engines experienced high-altitude flameouts. Rotation of the HP rotors was not maintained during descent and the engines could not be restarted. We are proposing this AD to prevent the inability to restart both engines after flameout due to excessive friction of the 4-step seal, which could result in subsequent forced landing of the airplane.

DATES: We must receive any comments on this proposed AD by September 22, 2008.

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

- *Federal eRulemaking Portal*: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

You can get the service information identified in this proposed AD from General Electric Company via Lockheed Martin Technology Services, 10525 Chester Road, Suite C, Cincinnati, Ohio 45215, telephone (513) 672–8400, fax (513) 672–8422.

FOR FURTHER INFORMATION CONTACT: Kenneth Steeves, Aerospace Engineer, Engine Certification Office, Engine and Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803; *e-mail*: *kenneth.steeves@faa.gov*; *telephone:* (781) 238–7765; *fax:* (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2007–0419; Directorate Identifier 2007–NE–52–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments 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://www.regulations.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 the Web site, anyone can find and read the comments in any of our dockets. This includes, if provided, 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).

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Discussion

In October 2004, a Bombardier CL600–2B19 Regional Jet airplane experienced high-altitude flameouts of both engines while on a ferry flight. After flameout, when the airplane was descending, sufficient airspeed was not maintained to ensure rotation of the HP rotors and they stopped rotating. During repeated unsuccessful engine restart attempts on both engines, the HP rotors did not obtain sufficient rotational speeds for the engines to restart. The airplane eventually crashed while attempting to glide to an airport, and the crew was fatally injured. When these engines experience a high-altitude flameout, the engines are immediately subjected to rapid cooling due to the extremely cold air flowing around and through them. The static seal parts cool more rapidly than the rotors, and shrink until they contact the rotating seal surfaces. If the speed of the airplane is not sufficient to maintain windmill rotation of the HP rotors, the rotors will stop rotating and could lock if sufficient friction develops between the rotating and static air balance piston seal surfaces. This condition, if not corrected, could result in the inability to restart the engines and the subsequent forced landing of the airplane. Investigation by GE determined that under certain conditions, the existing 4-step seals used in CF34–1A, –3A, –3A1, –3A2, –3B, and –3B1 turbofan engines can come into contact with the rotating seal surfaces and create friction. In a worse case, this friction could cause locking of the HP rotors, called "rotor lock". GE is introducing 8-step seals for all CF34–1A, –3A, –3A1, –3A2, –3B, and –3B1 turbofan engines. The 8-step seals will reduce potential drag in the rotor system and enhance the windmilling capabilities of HP rotors. This will ultimately reduce the possibility of the HP rotor locking after a high-altitude flameout when HP rotor rotation is not maintained during descent.

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. We are proposing this AD, which would require removing the 4-step seal at next piece-part exposure and incorporating an 8-step seal, either by modifying the existing 4-step seal to an 8-step seal or by replacing it with an 8-step seal.

Costs of Compliance

We estimate that this proposed AD would affect 2,722 CF34–1A, –3A, –3A1, –3A2, –3B, and –3B1 turbofan engines installed on airplanes of U.S. registry. We also estimate that this proposed AD will not impose any additional labor or material costs as most of the seals will require replacement when they are removed from the engine during scheduled engine overhaul. For those few seals that can be reworked, we estimate that it would take about 5 work-hours per engine to perform the proposed seal modification, and that the average labor rate is $80 per work-hour. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $108,800.

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. 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.

The Proposed Amendment

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:

General Electric Company: Docket No. FAA–2007–0419; Directorate Identifier 2007–NE–52–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by September 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to General Electric Company (GE) CF34–1A, –3A, –3A1, –3A2, –3B, and –3B1 turbofan engines, with high-pressure (HP) rotor 4-step air balance piston stationary seals (4-step seals), part numbers (P/Ns) 4923T54G01, 6019T90G03, 6037T99G01, 6037T99G02, and 6037T99G03, installed. These engines are installed on, but not limited to, Bombardier, Inc. airplane models CL–600–2A12, –2B16, and –2B19.

Unsafe Condition

(d) This AD results from the investigation of an airplane accident. Both engines experienced high-altitude flameouts. Rotation of the HP rotors was not maintained during descent and the engines could not be restarted. We are issuing this AD to prevent the inability to restart both engines after flameout due to excessive friction of the 4-step seal, which could result in subsequent forced landing of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed at the next piece-part exposure after the effective date of this AD, unless the actions have already been done.

(f) Remove the 4-step seals, P/Ns 4923T54G01, 6019T90G03, 6037T99G01, 6037T99G02, and 6037T99G03.

(g) Incorporate an 8-step seal, either by modifying the existing 4-step seal to an 8-step seal, or by replacing it with an 8-step seal.

(h) Information on modifying the seal and part number configuration charts, can be found in GE Service Bulletin (SB) No. CF34–AL S/B 72–0238, dated July 27, 2007 (CL–600–2B19), and SB No. CF34–BJ S/B 72–0217, dated July 27, 2007 (CL–600–2A12 and CL–600–2B16).

Definition

(i) For the purposes of this AD, piece-part exposure means when the 4-step seal is removed from the combustion module in accordance with the disassembly instructions in the engine manufacturer's, or other FAA-approved engine manual.

Alternative Methods of Compliance

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

Related Information

(k) Contact Kenneth Steeves, Aerospace Engineer, Engine Certification Office, Engine and Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803; *e-mail: keneth.steeves@faa.gov;* telephone: (781) 238–7765, fax: (781) 238–7199; for more information about this AD.

Issued in Burlington, Massachusetts, on July 16, 2008.

Marc Bouthillier,

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

[FR Doc. E8–16884 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2008–0479; FRL–8696–2]

Determination of Attainment of the One-Hour Ozone Standard for the Southern New Jersey Portion of the Philadelphia Metropolitan Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to determine that the one-hour ozone nonattainment area in Southern New Jersey, that is, the New Jersey portion of the Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD area, attained the one-hour ozone standard, is not subject to the imposition of penalty fees under section 185 of the Clean Air Act and does not need to implement contingency measures. Areas that EPA classified as severe ozone nonattainment areas for the one-hour National Ambient Air Quality Standard and did not attain the Standard by the applicable attainment date of November 15, 2005 may be subject to these penalty fees. However, since the air quality in the Philadelphia-Wilmington-Trenton area attained the ozone standard as of November 15, 2005, EPA is proposing not to implement these fees. This proposed determination of attainment is not a redesignation of attainment for this area, only a fulfillment of a Clean Air Act obligation to determine if an area attains the ozone standard by its applicable attainment date.

DATES: Comments must be received on or before August 22, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R02–OAR–2008–0479, by one of the following methods:

- *www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: Werner.Raymond@epa.gov.*
- *Fax:* 212–637–3901.
- *Mail:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866.
- *Hand Delivery:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional

Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R02–OAR–2008–0479. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, 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 *www.regulations.gov* or in hard copy during normal business hours at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866.

FOR FURTHER INFORMATION CONTACT: Robert F. Kelly, Air Programs Branch, Environmental Protection Agency, Region 2, 290 Broadway, 25th Floor, New York, New York 10007–1866, 212–637–4249.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What Are Today's Actions?

EPA is proposing two actions for the Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD one-hour ozone nonattainment area (the "Philadelphia metropolitan" nonattainment area). First, EPA is proposing to determine that this area attained the one-hour ozone National Ambient Air Quality Standard (NAAQS) by its attainment date, November 15, 2005. Because EPA is proposing to find that this area has attained the one-hour ozone NAAQS by its applicable attainment date, EPA also proposes to find that this area is not subject to the imposition of the section 185 penalty fees and does not need to implement contingency measures. In a separate proposed rule at 73 FR 22896, EPA's Region 3 office proposed to find that the Philadelphia metropolitan nonattainment area attained the one-hour ozone NAAQS by its applicable attainment date and is not subject to the imposition of section 185 penalty fees. Since EPA region 2 retains authority for addressing comments and making findings for the New Jersey portion of the area, we are issuing this separate notice.

Under Section 181(b)(2) of the CAA, EPA must determine whether ozone nonattainment areas attained the ozone NAAQS by their attainment date. EPA uses an area's design value, calculated from three years of complete, quality assured air monitoring data as of the attainment date. For the Philadelphia area, attainment date is 2005; therefore EPA is using the 2005 design value, which includes air quality monitoring data for the 2003 through 2005 ozone seasons. The design value used for the one-hour ozone NAAQS is the fourth highest daily one-hour ozone concentration over the three-year period. Since this value is not greater than 0.12 parts per million (ppm) at any monitor in the nonattainment area, this area is attaining the one-hour ozone NAAQS[1].

II. What Is the Background for These Actions?

II.a. When Were These Areas Designated and Where Are They Located?

When the CAA Amendments were enacted in 1990, each area of the country that was designated nonattainment for the one-hour ozone NAAQS, including the Philadelphia metropolitan area, was classified by operation of law as marginal, moderate, serious, severe, or extreme depending on the severity of the area's air quality problem. (See CAA sections 107(d)(1)(c) and 181(a).) The Philadelphia one-hour ozone nonattainment area was classified as "severe-15" with a statutory attainment date of November 15, 2005. See 56 FR 56694, November 6, 1991. Section 185(a) of the CAA states that for a severe or extreme ozone nonattainment area a State must collect fees on certain stationary sources of air pollution if the area "has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date." The Philadelphia area consists of the following counties: Cecil County, Maryland; Kent and New Castle Counties in Delaware; Burlington, Camden, Cumberland, Gloucester, Mercer, and Salem Counties in New Jersey; and, Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties in Pennsylvania.

II.b. What Effect Did the 1997 Eight-Hour Ozone Standard Have on Requirements for the One-Hour Ozone Nonattainment Areas, Including Section 185?

In an April 30, 2004 final rule (69 FR 23858), EPA designated and classified most areas of the country under the eight-hour ozone NAAQS promulgated in 40 CFR 50.10. On April 30, 2004, EPA also issued a final rule (69 FR

[1] EPA remains obligated under section 181(b)(2) to determine whether an area attained the one-hour ozone NAAQS by its attainment date. However, after the revocation of the one-hour ozone NAAQS, EPA is no longer obligated to reclassify an area to a higher classification for the one-hour NAAQS based upon a determination that the area failed to attain the one-hour NAAQS by the area's attainment date for the one-hour NAAQS. (40 CFR 51.905(e)(2)(i)(B).) Thus even if we make a finding that an area has failed to attain the one-hour ozone NAAQS by its attainment date, the area would not be reclassified to a higher classification.

23951) entitled "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1" (Phase 1 Rule). Among other matters, this rule revoked the one-hour ozone NAAQS in the Philadelphia area (as well as most other areas of the country), effective June 15, 2005. (See, 40 CFR 50.9(b); 69 FR at 23996; and 70 FR 44470, August 3, 2005.) This Phase 1 Rule also set forth how anti-backsliding principles will ensure continued progress toward attainment of the eight-hour ozone NAAQS by identifying which one-hour requirements remain applicable in an area after revocation of the one-hour ozone NAAQS.

Among the requirements not retained were the section 185 requirements for one-hour severe or extreme nonattainment areas that fail to attain the one-hour ozone NAAQS by the applicable one-hour attainment date and the requirement to implement contingency measures for failure to attain the one-hour ozone NAAQS by the applicable attainment date. (See, 69 FR 23951, April 30, 2004, and 70 FR 30592, May 26, 2005.)

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit (the Court) vacated EPA's Phase 1 Implementation Rule for the eight-hour Ozone Standard (69 FR 23951, April 30, 2004). *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882 (DC Cir. 2006). Subsequently, in *South Coast Air Quality Management Dist.* v. *EPA*, 489 F.3d 1295 (DC Cir. 2007), in response to several petitions for rehearing, the Court clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. With respect to the challenges to the anti-backsliding provisions of the rule, the Court vacated three provisions that would have allowed States to remove from the SIP or to not adopt three one-hour obligations once the one-hour ozone NAAQS was revoked: (1) Nonattainment area new source review (NSR) requirements based on an area's one-hour nonattainment classification; (2) section 185 requirement for one-hour severe or extreme nonattainment areas that fail to attain the one-hour ozone NAAQS by the one-hour attainment date; and (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, on the contingency of an area not making reasonable further progress toward attainment of the one-hour NAAQS or for failure to attain that NAAQS. The Court clarified that one-hour conformity determinations are not required for anti-backsliding purposes.

The provisions in 40 CFR 51.905(a)–(c) remain in effect and areas must continue to meet those anti-backsliding requirements. However, the three provisions noted previously, which are specified in 51.905(e), were vacated by the Court. As a result, States must continue to meet the obligations for one-hour NSR; one-hour contingency measures; and, for severe and extreme areas, the obligations related to the section 185 requirement. Currently, EPA is developing two proposed rules to address the Court's vacatur and remand with respect to these three requirements. EPA will address in this proposed rule how the one-hour obligations that currently continue to apply under EPA's anti-backsliding rule (as interpreted by the Court) apply where EPA has made a determination that the area attained the one-hour ozone NAAQS by its attainment date.

II.c. How Does EPA Compute Whether an Area Complies With the One-Hour Ozone Standard?

Although the one-hour ozone NAAQS as promulgated in 40 CFR 50.9 includes no discussion of specific data handling conventions, EPA's publicly articulated position and the approach long since universally adopted by the air quality management community is that the interpretation of the one-hour ozone standard requires rounding ambient air quality data consistent with the stated level of the standard, which is 0.12 ppm. 40 CFR 50.9(a) states that: "The level of the national one-hour primary and secondary ambient air quality standards for ozone * * * is 0.12 parts per million. * * * The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations of 0.12 parts per million * * * is equal to or less than 1, as determined by appendix H to this part."

EPA has clearly communicated the data handling conventions for the one-hour ozone NAAQS in guidance documents. As early as 1979, EPA issued guidance that the level of our NAAQS dictates the number of significant figures to be used in determining whether the standard was exceeded. The stated level of the standard is taken as defining the number of significant figures to be used in comparisons with the standard. For example, a standard level of 0.12 ppm means that measurements are to be rounded to two decimal places (0.005 rounds up), and, therefore, 0.125 ppm is the smallest concentration value in excess of the level of the standard. (*See*, "Guideline for the Interpretation of Ozone Air Quality Standards," EPA–450/4–79–003, OAQPS No. 1.2–108, January 1979.) EPA has consistently applied the rounding convention in this 1979 guideline. For example, *see*, 68 FR 19106 at 19111, April 17, 2003; 68 FR 62041 at 62043, October 31, 2003; and, 69 FR 21717 at 21719, April 22, 2004.

II.d. Does the Clean Air Act Require EPA To Determine Attainment of the One-Hour Ozone Standard?

Section 181(b)(2)(A) requires the Administrator to determine after the attainment date whether ozone nonattainment areas have attained the NAAQS. This provision states: "Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by the date." Although section 181(b)(2)(A) states that the determination of attainment status be based on the area's "design value," EPA interprets this provision generally to refer to EPA's methodology for determining attainment status. That is, EPA determines attainment status under the one-hour ozone NAAQS on the basis of the annual average number of expected exceedances of the NAAQS over the three-year period up to, and including, the attainment date. (See, 60 FR 3349, January 17, 1995 and see, also, "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498 at 13506, April 16, 1992 (the "General Preamble").

EPA will determine whether an area's air quality is meeting the NAAQS for purposes of sections 181(b)(2) based upon data that has been collected and quality-assured in accordance with 40 CFR part 58, and recorded in EPA's Air Quality System (AQS) database, (formerly known as the Aerometric Information Retrieval System (AIRS)). The one-hour ozone NAAQS is 0.12 ppm, not to be exceeded on average more than 1 day per year averaged over any 3-year period. (See 40 CFR 50.9 and appendix H to 40 CFR part 50.) To account for missing data, the procedures found in appendix H to 40 CFR part 50 are used to adjust the actual number of monitored exceedances of the standard to yield the annual number of expected exceedances ("expected exceedance days") at an air quality monitoring site. Under EPA's policies, we determine if an area has attained the one-hour ozone NAAQS by calculating, at each monitor, the average expected number of days over the standard per year (i.e., "average number of expected exceedance days")

during the applicable 3-year period. See, generally the General Preamble, 57 FR at 13506, April 16, 1992 and Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, EPA, to Regional Air Office Directors; "Procedures for Processing Bump Ups and Extensions for Marginal Ozone Nonattainment Areas," February 3, 1994. While the latter is explicitly applicable only to marginal areas, the general procedures for evaluating attainment in terms of the average number of expected exceedance days during the applicable 3-year period in this memorandum apply regardless of the initial classification of an area because all findings of attainment are made pursuant to the same CAA requirements in section 181(b)(2).

As noted previously, the applicable attainment date under the one-hour ozone NAAQS for the Philadelphia metropolitan area was November 15, 2005. Under these requirements for severe ozone nonattainment areas with a statutory attainment date of November 15, 2005, EPA bases its proposed determination of attainment of the one-hour ozone NAAQS by the applicable attainment date on the average number of expected exceedance days per year for the period 2003 though 2005 to determine whether the area met its applicable attainment date under section 181 of the CAA. EPA has reviewed this data to determine the area's air quality status in accordance with 40 CFR 50.9, and EPA policy guidance as discussed in the preceding paragraphs and in the previous discussion on rounding conventions elsewhere in this document.

II.e. Did the Philadelphia Metropolitan Nonattainment Area Attain the One-Hour Ozone Standard by 2005?

As noted previously, the applicable attainment date for the Philadelphia metropolitan nonattainment area was November 15, 2005. EPA is evaluating attainment based on the data from 2003 through 2005. During the entire 2003 to 2005 period, state and local air pollution control agencies operated eighteen ozone monitoring stations in the Philadelphia area. One other monitor discontinued operations in 2003.[2]

Table 1 summarizes the ozone data collected at the eighteen ozone monitoring stations during the 2003 to 2005 period and included in AQS for the Philadelphia area. These data have been quality assured and are recorded in AQS. The Philadelphia area States use the AQS as the permanent database to maintain its data and quality assure the data transfers and content for accuracy. EPA has used the established rounding conventions set forth in our guidance documents and regulations.

TABLE 1.—AVERAGE NUMBER OF OZONE EXPECTED EXCEEDANCE DAYS PER YEAR BY MONITORS IN THE PHILADELPHIA AREA 2003 TO 2005

Monitor information			Number of expected exceedance days			Average number of expected exceedance days per year 2003–05
State	Monitor	AQS ID	2003	2004	2005	
DE	Killens Pond Rd, Kent Co	100010002	1.0	0.0	0.0	0.3
DE	Lums Pond State Park, New Castle Co	100031007	1.0	0.0	2.0	1.0
DE	Brandywine Creek State Park, New Castle Co	100031010	0.0	0.0	0.0	0.0
DE	Bellevue State Park, New Castle Co	100031013	0.0	0.0	0.0	0.0
MD	Fairhill, Cecil Co	240150003	0.0	0.0	2.0	0.7
NJ	Copewood E. Davis Sts, Camden	340070003	0.0	0.0	0.0	0.0
NJ	Ancora State Hospital, Camden Co	340071001	2.0	0.0	0.0	0.7
NJ	Lincoln Ave. & Highway 55, Vineland, Cumberland Co	340110007	1.0	0.0	1.0	0.7
NJ	Shady Lane Rest Home, Clarksboro, Gloucester Co	340150002	2.0	0.0	0.0	0.7
NJ	Rider College, Mercer Co	340210005	0.0	0.0	0.0	0.0
PA	Rockview Lane, Bristol, Bucks Co	420170012	0.0	0.0	1.0	0.3
PA	New Garden Airport—Toughkenamon, Chester Co	420290100	0.0	0.0	1.0	0.3
PA	Front St & Norris St, Chester, Delaware Co	420450002	0.0	0.0	1.1	0.4
PA	State Armory, Norristown, Montgomery Co	420910013	0.0	0.0	0.0	0.0
PA	1501 E Lycoming Ave AMS Lab, Philadelphia	421010004	0.0	0.0	0.0	0.0
PA	Roxy Water Pump Sta, Philadelphia	421010014	0.0	0.0	0.0	0.0
PA	Grant-Ashton Roads, NE Airport, Philadelphia	421010024	0.0	0.0	2.0	0.7
PA	Amtrak, 5917 Elmwood Avenue, Philadelphia	421010136	0.0	0.0	0.0	0.0

Source: EPA Air Quality System (AQS) Database.

As shown in Table 1, the average number of expected exceedance days per year is less than or equal to 1.0 at all of the sites. Therefore, EPA proposes to find that the Philadelphia area attained the one-hour ozone NAAQS by November 15, 2005, which was the applicable attainment date under the one-hour ozone NAAQS for this nonattainment area.

II.f. Do Areas That Attain the One-Hour Ozone Standard Need To Implement the Section 185 Fee Program?

If a severe or extreme one-hour ozone nonattainment area attains by its one-hour ozone attainment date, it is not required to implement the section 185 penalty fees program. Section 185(a) of the CAA states that a severe or extreme ozone nonattainment area must implement a program to impose fees on certain stationary sources of air pollution if the area "has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date." Consequently, if such an area has attained the standard as of its applicable attainment date, even if it subsequently lapses into nonattainment, the area would not be required to

[2] This was the monitor located at West Chester University in West Chester, Chester County, Pennsylvania (AQS ID# 420290050). The monitor had averaged 0.3 exceedances per year over this 3-year period from 2001 to 2003. Therefore, EPA concludes that this monitor was attaining the one-hour ozone NAAQS at the time monitoring ceased at this site.

implement the section 185 penalty fees program.

In addition, because the area has attained the one-hour ozone NAAQS by the applicable attainment date, the area is not subject to the requirement to implement contingency measures for failure to attain the one-hour ozone NAAQS by its attainment date. Since the area has met its attainment deadline, even if the area subsequently lapses into nonattainment, it would not be required to implement the contingency measures for failure to attain the one-hour ozone NAAQS by its attainment date.

IV. What Is EPA Proposing?

Based upon EPA's review of the air quality data for the 3-year period 2003 to 2005, EPA is proposing to determine that the New Jersey portion of the Philadelphia severe one-hour ozone nonattainment area attained the one-hour ozone NAAQS by the applicable attainment date of November 15, 2005. EPA also proposes to find that this area is not subject to the imposition of the section 185 penalty fees and will not need to implement contingency measures, which were required to be implemented only if the area did not attain the one-hour standard by the attainment date.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action proposes to make a determination based on air quality data, and would, if finalized, result in the suspension of certain Federal requirements. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to make a determination based on air quality data, and would, if finalized, result in the suspension of certain Federal requirements, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to make a determination based on air quality data and would, if finalized, result in the suspension of certain Federal requirements, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it proposes to determine that air quality in the affected area is meeting Federal standards.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply because it would be inconsistent with applicable law for EPA, when determining the attainment status of an area, to use voluntary consensus standards in place of promulgated air quality standards and monitoring procedures that otherwise satisfy the provisions of the Clean Air Act.

This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) Under Executive Order 12898, EPA finds that this rule involves a proposed determination of attainment based on air quality data and will not have disproportionately high and adverse human health or environmental effects on any communities in the area, including minority and low-income communities.

List of Subjects in 40 CFR Part 52

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

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

Dated: July 8, 2008.

Alan J. Steinberg,

Regional Administrator, Region 2.

[FR Doc. E8–16836 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2007–0624; FRL–8694–9]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation of the Clearfield/Indiana 8-Hour Ozone Nonattainment Area to Attainment and Approval of the Maintenance Plan and 2002 Base-Year Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a redesignation request and State Implementation Plan (SIP) revisions submitted by the Commonwealth of Pennsylvania. The Pennsylvania Department of Environmental Protection (PADEP) is requesting that the Clearfield and Indiana Counties ozone nonattainment area (Clearfield/Indiana Area) be redesignated as attainment for the 8-hour ozone national ambient air quality standard (NAAQS). EPA is proposing to approve the ozone redesignation request for the Clearfield/Indiana Area. In conjunction with its redesignation request, PADEP submitted a SIP revision consisting of a maintenance plan for the Clearfield/Indiana Area that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after redesignation. EPA is proposing to make a determination that the Clearfield/Indiana Area has attained the 8-hour ozone NAAQS, based upon three years of complete quality-assured ambient air quality ozone monitoring data for 2004–2006. EPA's proposed approval of the 8-hour ozone redesignation request is based on its determination that the Clearfield/Indiana Area has met the criteria for redesignation to attainment specified in the Clean Air Act (CAA). In addition, PADEP submitted a 2002 base-year inventory for the Clearfield/Indiana Area which EPA is proposing to approve as a SIP revision. EPA is also providing information on the status of its adequacy determination for the motor vehicle emission budgets (MVEBs) that are identified in the Clearfield/Indiana Area maintenance plan for purposes of transportation conformity, which EPA is also

proposing to approve. EPA is proposing approval of the redesignation request, the maintenance plan, the 2002 base-year inventory, and the MVEBs SIP revisions in accordance with the requirements of the CAA.

DATES: Written comments must be received on or before August 22, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2007–0624 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2007–0624, Cristina Fernandez, Branch Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2007–0624. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, 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 *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by e-mail at *becoat.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA.

Table of Contents

I. What Are the Actions EPA Is Proposing To Take?

On June 14, 2007, PADEP formally submitted a request to redesignate the Clearfield/Indiana Area from nonattainment to attainment of the 8-hour NAAQS for ozone. Concurrently, PADEP submitted a maintenance plan for the Clearfield/Indiana Area as a SIP revision to ensure continued attainment for at least 10 years after redesignation. PADEP also submitted a 2002 base-year inventory as a SIP revision. On May 23, 2008, PADEP formally submitted a revision to the June 14, 2007 submittal encompassing two changes. First, PADEP submitted a new methodology that projects future emissions of nitrogen oxides (NO_X) from electric generating units (EGUs) to replace the former methodology submitted on June 14, 2007. Second, PADEP separated the MVEBs for the Clearfield/Indiana Area into separate MVEBs for Clearfield County and Indiana County, to replace the MVEBs established in the June 14, 2007 submittal.

The Clearfield/Indiana Area was designated a subpart 1 or a basic 8-hour ozone nonattainment area in a final rule published on April 30, 2004 (69 FR 23858), based upon its exceedance of the 8-hour health-based standard for ozone during the years 2001–2003. EPA is proposing to determine that the Clearfield/Indiana Area has attained the 8-hour ozone NAAQS and that it has met the requirements for redesignation pursuant to section 107(d)(3)(E) of the Clean Air Act. EPA is, therefore, proposing to approve the redesignation request to change the designation of the Clearfield/Indiana Area from nonattainment to attainment for the 8-hour ozone NAAQS. EPA is also proposing to approve the Clearfield/Indiana Area maintenance plan as a SIP revision. The maintenance plan is designed to ensure continued attainment in the Clearfield/Indiana Area for the next ten years. EPA is also proposing to approve the 2002 base-year inventory for the Clearfield/Indiana Area as a SIP revision. Additionally, EPA is announcing its action on the adequacy process for the MVEBs identified in the Clearfield/Indiana Area maintenance plan, and proposing to approve the MVEBs identified for volatile organic compounds (VOC) and NO_X for transportation conformity purposes.

II. What Is the Background for These Proposed Actions?

A. General

Ground-level ozone is not emitted directly by sources. Rather, emissions of NO_X and VOC react in the presence of sunlight to form ground-level ozone. The air pollutants NO_X and VOC are referred to as precursors of ozone. The CAA establishes a process for air quality management through the attainment and maintenance of the NAAQS.

On July 18, 1997, EPA promulgated a revised 8-hour ozone standard of 0.08 parts per million (ppm). This standard is more stringent than the previous 1-hour ozone standard. EPA designated, as nonattainment, any area violating the 8-hour ozone NAAQS based on the air quality data for the three years of 2001–2003. These were the most recent three years of data at the time EPA designated

8-hour areas. The Clearfield/Indiana Area was designated as basic 8-hour ozone nonattainment status in a **Federal Register** notice published on April 30, 2004 (69 FR 23858), based on its exceedance of the 8-hour health-based standard for ozone during the years 2001–2003.

On April 30, 2004, EPA issued a final rule (69 FR 23951, 23996) to revoke the 1-hour ozone NAAQS in the Clearfield/Indiana Area (as well as most other areas of the country) effective June 15, 2005. *See*, 40 CFR 50.9(b); 69 FR at 23966 (April 30, 2004); 70 FR 44470 (August 3, 2005).

However, on December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. (69 FR 23951, April 30, 2004). *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in *South Coast Air Quality Management Dist.* v. *EPA*, Docket No. 04–1201, in response to several petitions for rehearing, the D.C. Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. Therefore, the Phase 1 Rule provisions related to classifications for areas currently classified under subpart 2 of Title I, Part D of the CAA as 8-hour nonattainment areas, the 8-hour attainment dates and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS remain effective.

The June 8 decision left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged. The June 8 decision reaffirmed the December 22, 2006 decision that EPA had improperly failed to retain measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) section 185 penalty fees for 1-hour severe or extreme nonattainment areas; and (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS. In addition, the June 8 decision clarified that the Court's reference to conformity requirements for anti-backsliding purposes was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations, which is already required under EPA's conformity regulations. The Court thus clarified that 1-hour conformity determinations are not required for anti-backsliding purposes.

The Court upheld EPA's authority to revoke the 1-hour standard provided there were adequate anti-backsliding provisions. EPA discusses its rationale why the decision in *South Coast* is not an impediment to redesignating the Clearfield/Indiana Area to attainment of the 8-hour ozone NAAQS elsewhere in this document.

The CAA, Title I, Part D, contains two sets of provisions—subpart 1 and subpart 2—that address planning and control requirements for nonattainment areas. Subpart 1 (which EPA refers to as "basic" nonattainment) contains general, less prescriptive requirements for nonattainment areas for any pollutant—including ozone—governed by a NAAQS. Subpart 2 (which EPA refers to as "classified" nonattainment) provides more specific requirements for ozone nonattainment areas. In 2004, Clearfield/Indiana Area was designated a basic 8-hour ozone nonattainment area based upon air quality monitoring data from 2001–2003, and therefore, is subject to the requirements of subpart 1 of Part D.

Under 40 CFR part 50, the 8-hour ozone standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.08 ppm (i.e., 0.084 ppm when rounding is considered). *See* 69 FR 23858 (April 30, 2004) for further information. Ambient air quality monitoring data for the 3-year period must meet data completeness requirements. The data completeness requirements are met when the average percent of days with valid ambient monitoring data is greater than 90 percent, and no single year has less than 75 percent data completeness as determined in Appendix I of 40 CFR part 50. The ozone monitoring data from the 3-year period of 2004–2006 indicates that the Clearfield/Indiana Area has a design value of 0.077 ppm. Therefore, the ambient ozone data for the Clearfield/Indiana Area indicates no violations of the 8-hour ozone standard.

B. The Clearfield/Indiana Area

The Clearfield/Indiana Area consists of Clearfield and Indiana Counties in Pennsylvania. Prior to its designation as an 8-hour ozone nonattainment area, the Clearfield/Indiana Area was an attainment/unclassifiable area for the 1-hour ozone nonattainment NAAQS. *See* 56 FR 56694 (November 6, 1991).

On June 14, 2007, PADEP requested that the Clearfield/Indiana Area be redesignated to attainment for the 8-hour ozone standard. The redesignation request included 3 years of complete, quality-assured data for the period of 2004–2006, indicating that the 8-hour NAAQS for ozone had been achieved in the Clearfield/Indiana Area. The data satisfies the CAA requirements when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration (commonly referred to as the area's design value) is less than or equal to 0.08 ppm (i.e., 0.084 ppm when rounding is considered). Under the CAA, a nonattainment area may be redesignated if sufficient complete, quality-assured data is available to determine that the area has attained the standard and the area meets the other CAA redesignation requirements set forth in section 107(d)(3)(E).

III. What Are the Criteria for Redesignation to Attainment?

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation, providing that:

(1) EPA determines that the area has attained the applicable NAAQS;

(2) EPA has fully approved the applicable implementation plan for the area under section 110(k);

(3) EPA determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(4) EPA has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and

(5) The State containing such area has met all requirements applicable to the area under section 110 and Part D.

EPA provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990, on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

- "Ozone and Carbon Monoxide Design Value Calculations", Memorandum from Bill Laxton, June 18, 1990;

• "Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;

• "Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;

• "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992;

• "State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines," Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;

• "Technical Support Documents (TSDs) for Redesignation Ozone and Carbon Monoxide (CO) Nonattainment Areas," Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;

• "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992," Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;

• Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, to Air Division Directors, Regions 1–10, "Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas," dated November 30, 1993;

• "Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment," Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994; and

• "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

IV. Why Is EPA Taking These Actions?

On June 14, 2007, PADEP requested redesignation of the Clearfield/Indiana Area to attainment for the 8-hour ozone standard. Simultaneously, PADEP submitted a maintenance plan for the Clearfield/Indiana Area as a SIP revision to ensure continued attainment at least 10 years after redesignation. PADEP also submitted a 2002 base-year inventory as a SIP revision. On May 23, 2008, PADEP formally submitted a SIP revision encompassing two changes. First, PADEP submitted a new methodology that projects future emissions of NO_X from EGUs to replace the former methodology submitted on June 14, 2007. Second, PADEP separated the MVEBs for the Clearfield/Indiana Area into separate MVEBs for Clearfield County and Indiana County, to replace the MVEBs established in the June 14, 2007 submittal. EPA has determined that the Clearfield/Indiana Area has attained the 8-Hour Ozone Standard and has met the requirements for redesignation set forth in section 107(d)(3)(E).

V. What Would Be the Effect of These Actions?

Approval of the redesignation request would change the designation of the Clearfield/Indiana Area from nonattainment to attainment for the 8-hour ozone NAAQS found at 40 CFR part 81. It would also incorporate into the Pennsylvania SIP a 2002 base-year inventory and a maintenance plan ensuring continued attainment of the 8-hour ozone NAAQS in the Clearfield/Indiana Area for the next 10 years. The maintenance plan includes contingency measures to remedy any future violations of the 8-hour NAAQS (should they occur), and identifies the MVEBs for NO_X and VOC for transportation conformity purposes for the years 2009 and 2018.

Metropolitan Planning Organizations (MPOs) and the Pennsylvania Department of Transportation (PennDOT), in conjunction with state Rural Planning Organizations (RPOs), are responsible for making timely transportation conformity determinations. The Clearfield/Indiana Area contains one MPO and one RPO. The MPO is the Southwestern Pennsylvania Commission for Indiana County, and the RPO is the North Central PA Regional Planning and Development Commission for Clearfield County. Pennsylvania has established separate motor vehicle emission budgets for each MPO/RPO for their respective portion of the Clearfield/Indiana Area. EPA's transportation conformity regulations (40 CFR 93.124(d)) allow a SIP to establish motor vehicle budgets for each MPO/RPO if a nonattainment area includes more than one MPO/RPO.

These motor vehicle emissions budgets displayed in the following table reflect the changes made in the May 23, 2008 SIP revision:

TABLE 1A.—CLEARFIELD/INDIANA MOTOR VEHICLE EMISSIONS BUDGETS NORTH CENTRAL PENNSYLVANIA REGIONAL PLANNING AND DEVELOPMENT COMMISSION RPO (CLEARFIELD COUNTY PORTION OF THE AREA), IN TONS PER SUMMER DAY (TPD)

Year	VOC	NO_X
2009	4.11	11.44
2018	2.71	5.14

TABLE 1B.—CLEARFIELD/INDIANA MOTOR VEHICLE EMISSIONS BUDGETS SOUTHWESTERN PENNSYLVANIA COMMISSION MPO (INDIANA COUNTY PORTION OF THE AREA), IN TONS PER SUMMER DAY (TPD)

Year	VOC	NO_X
2009	3.06	4.85
2018	1.92	2.40

VI. What Is EPA's Analysis of the State's Request?

EPA is proposing to determine that the Clearfield/Indiana Area has attained the 8-hour ozone standard, and that all other redesignation criteria have been met. The following is a description of how PADEP's June 14, 2007 and May 23, 2008 submittals satisfy the requirements of section 107(d)(3)(E) of the CAA.

A. The Clearfield/Indiana Area Has Attained the 8-Hour Ozone NAAQS

EPA is proposing to determine that the Clearfield/Indiana Area has attained the 8-hour ozone NAAQS. For ozone, an area attains the 8-hour ozone NAAQS if there are no violations based on three complete and consecutive calendar years of quality-assured air quality monitoring data, as determined in accordance with 40 CFR 50.10 and Appendix I of part 50. To attain this standard, the design value, which is the three average of the fourth-highest daily maximum 8-hour average ozone concentrations, measured at each monitor within the area over each year must not exceed the ozone standard of 0.08 ppm. Based on the rounding convention described in 40 CFR part 50, Appendix I, the standard is attained if the design value is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the Air Quality System (AQS). The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

In the Clearfield/Indiana Area, there are two ozone monitors, one in Clearfield County (AQS# 42–033–4000) and another in Indiana County (AQS # 42–063–004). At the time of the June 14, 2007 submittal, the Indiana County monitor, had only two years, 2005 and 2006, of quality assured data available. Since the standard requires an average concentration of three years, the air quality status of the Indiana County monitoring site could not be determined using only two years, 2005 and 2006, of ambient data. As part of its redesignation request, Pennsylvania submitted the ozone monitoring data for the Clearfield County monitor for the years 2004–2006 (the most recent three years of data available as of the time of the redesignation request) for the Clearfield/Indiana Area. This data has been quality assured and is recorded in AQS. PADEP uses AQS as the permanent database to maintain its quality assured data. The fourth-highest 8-hour daily maximum concentrations, along with the three-year average, are summarized in Table 2 for the monitor that has three complete and consecutive calendar years of quality-assured air quality monitoring data.

TABLE 2.—CLEARFIELD/INDIANA AREA FOURTH HIGHEST 8-HOUR AVERAGE VALUES; CLEARFIELD COUNTY MONITOR, AQS ID 42–033–4000

Year	Annual 4th high reading (ppm)
2004	0.074
2005	0.086
2006	0.072

The average for the 3-year period 2004 through 2006 is 0.077 ppm.

The air quality data for 2004–2006 show that the Clearfield/Indiana Area has attained the standard with a design value of 0.077 ppm. The data collected at the Clearfield/Indiana Area monitor satisfies the CAA requirement that the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm. PADEP's request for redesignation for the Clearfield/Indiana Area indicates that the data was quality assured in accordance with 40 CFR part 58. In addition, with respect to the maintenance plan, PADEP has committed to continue monitoring in accordance with 40 CFR part 58. In summary, EPA has determined that the data submitted by Pennsylvania and confirmed from AQS indicates that the Clearfield/Indiana Area has attained the 8-hour ozone NAAQS.

B. The Clearfield/Indiana Area Has Met All Applicable Requirements Under Section 110 and Part D of the CAA and Has a Fully Approved SIP Under Section 110(k) of the CAA

EPA has determined that the Clearfield/Indiana Area has met all SIP requirements applicable for purposes of this redesignation under section 110 of the CAA (General SIP Requirements) and that it meets all applicable SIP requirements under Part D of Title I of the CAA, in accordance with section 107(d)(3)(E)(v). In addition, EPA has determined that the SIP is fully approved with respect to all requirements applicable for purposes of redesignation in accordance with section 107(d)(3)(E)(ii). In making these proposed determinations, EPA ascertained what requirements are applicable to the area and determined that the applicable portions of the SIP meeting these requirements are fully approved under section 110(k) of the CAA. We note that SIPs must be fully approved only with respect to applicable requirements.

The September 4, 1992 Calcagni memorandum ("Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992) describes EPA's interpretation of section 107(d)(3)(E) with respect to the timing of applicable requirements. Under this interpretation, to qualify for redesignation, States requesting redesignation to attainment must meet only the relevant CAA requirements that come due prior to the submittal of a complete redesignation request. *See also,* Michael Shapiro memorandum, September 17, 1993, and 60 FR 12459, 12465–12466, (March 7, 1995) (redesignation of Detroit-Ann Arbor). Applicable requirements of the CAA that come due subsequent to the area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the CAA. *Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004). *See also*, 68 FR 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

This section also sets forth EPA's views on the potential effect of the Court's rulings on this proposed redesignation action. For the reasons set forth below, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation, and do not prevent EPA from proposing or ultimately finalizing this redesignation. EPA believes that the Court's December 22, 2006 and June 8, 2007 decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

1. Section 110 General SIP Requirements

Section 110(a)(2) of Title I of the CAA delineates the general requirements for a SIP, which include enforceable emissions limitations and other control measures, means, or techniques, provisions for the establishment and operation of appropriate devices necessary to collect data on ambient air quality, and programs to enforce the limitations. The general SIP elements and requirements set forth in section 110(a)(2) includes, but are not limited to, the following:

- Submittal of a SIP that has been adopted by the State after reasonable public notice and hearing;
- Provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality;
- Implementation of a source permit program; provisions for the implementation of Part C requirement (Prevention of Significant Deterioration (PSD));
- Provisions for the implementation of Part D requirements for New Source Review (NSR) permit programs;
- Provisions for air pollution modeling; and
- Provisions for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a State from significantly contributing to air quality problems in another State. To implement this provision, EPA has required certain States to establish programs to address transport of air pollutants in accordance with the NO_X SIP Call, October 27, 1998 (63 FR 57356), amendments to the NO_X SIP Call, May 14, 1999 (64 FR 26298) and March 2, 2000 (65 FR 11222), and the Clean Air Interstate Rule (CAIR), May 12, 2005 (70 FR 25162). However, the section 110(a)(2)(D) requirements for a State are not linked with a particular nonattainment area's designation and classification in that State. EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate while reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a State regardless of the designation of any one particular area in the State. Thus, we do not believe that these requirements are applicable requirements for purposes of redesignation.

In addition, EPA believes that the other section 110 elements not connected with nonattainment plan submissions and not linked with an area's attainment status are not applicable requirements for purposes of redesignation. The Clearfield/Indiana Area will still be subject to these requirements after it is redesignated. The section 110 and Part D requirements, which are linked with a particular area's designation and classification, are the relevant measures to evaluate while reviewing a redesignation request. This policy is consistent with EPA's existing policy on applicability of conformity (i.e., for redesignations) and oxygenated fuels requirement. *See*, Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24816, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). *See also*, the discussion on this issue in the Cincinnati redesignation (65 FR at 37890, June 19, 2000), and in the Pittsburgh redesignation (66 FR at 50399, October 19, 2001). Similarly, with respect to the NO_X SIP Call rules, EPA noted in its Phase 1 Final Rule to Implement the 8-hour Ozone NAAQS, that the NO_X SIP Call rules are not "an applicable requirement for purposes of section 110(l) because the NO_X rules apply regardless of an area's attainment or nonattainment status for the 8-hour (or the 1-hour) NAAQS." 69 FR 23951, 23983 (April 30, 2004).

EPA believes that section 110 elements not linked to the area's nonattainment status are not applicable for purposes of redesignation. Any section 110 requirements that are linked to the Part D requirements for 8-hour ozone nonattainment areas are not yet due, because no Part D requirements applicable for purposes of redesignation under the 8-hour standard were due prior to submission of the redesignation request.

Because the Pennsylvania SIP satisfies all of the applicable general SIP elements and requirements set forth in section 110(a)(2), EPA concludes that Pennsylvania has satisfied the criterion of section 107(d)(3)(E) regarding section 110 of the CAA.

2. *Part D Nonattainment Area Requirements Under the 1-Hour and 8-Hour Standards*

The Clearfield/Indiana Area was designated a basic nonattainment area for the 8-hour ozone standard. Sections 172–176 of the CAA, found in subpart 1 of Part D, set forth the basic nonattainment requirements for all nonattainment areas. As discussed previously, because the Clearfield/Indiana Area was designated unclassifiable/attainment under the 1-hour standard, and was never designated nonattainment for the 1-hour standard, there are no outstanding 1-hour nonattainment area requirements it would be required to meet. Thus, we find that the Court's ruling does not result in any additional 1-hour requirements for purposes of redesignation.

With respect to the 8-hour standard, EPA notes that the Court's ruling rejected EPA's reasons for classifying areas under subpart 1 for the 8-hour standard, and remanded that matter to the Agency. Consequently, it is possible that this area could, during a remand to EPA, be reclassified under subpart 2. Although any future decision by EPA to classify this area under subpart 2 might trigger additional future requirements for the area, EPA believes that this does not mean that redesignation of the area cannot now go forward. This belief is based upon (1) EPA's longstanding policy of evaluating requirements in accordance with the requirements due at the time the request is submitted; and (2) consideration of the inequity of applying retroactively any requirements that might in the future be applied.

At the time the redesignation request was submitted, the Clearfield/Indiana Area was classified under subpart 1 and was obligated to meet subpart 1 requirements. Under EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA, to qualify for redesignation, states requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. September 4, 1992 Calcagni memorandum ("Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division). *See also*, Michael Shapiro Memorandum, September 17, 1993, and 60 FR 12459, 12465–66 (March 7, 1995) (Redesignation of Detroit-Ann Arbor); *Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004) (which upheld this interpretation); 68 FR 25418, 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

Moreover, it would be inequitable to retroactively apply any new SIP requirements that were not applicable at the time the request was submitted. The DC Circuit recognized the inequity in such retroactive rulemaking. *See, Sierra Club* v. *Whitman*, 285 F. 3d 63 (DC Cir. 2002), in which the DC Circuit upheld a District Court's ruling refusing to make retroactive an EPA determination of nonattainment that was past the statutory due date. Such a determination would have resulted in the imposition of additional requirements on the area. The Court stated: "Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plan in 1997, even though they were not on notice at the time." *Id.* at 68. Similarly, here it would be unfair to

penalize the area by applying to it for purposes of redesignation additional SIP requirements under subpart 2 that were not in effect at the time it submitted its redesignation request.

With respect to the 8-hour standard, EPA proposes to determine that Pennsylvania's SIP meets all applicable SIP requirements under Part D of the CAA, because no 8-hour ozone standard Part D requirements applicable for purposes of redesignation became due prior to submission of the redesignation request for the Clearfield/Indiana Area. Because the Commonwealth submitted a complete redesignation request for the Clearfield/Indiana Area prior to the deadline for any submissions required under the 8-hour standard, we have determined that the Part D requirements do not apply to the Clearfield/Indiana Area for the purposes of redesignation.

In addition to the fact that no Part D requirements applicable under the 8-hour standard became due prior to submission of the redesignation request, EPA believes it is reasonable to interpret the general conformity and NSR requirements of Part D as not requiring approval prior to redesignation.

With respect to section 176, Conformity Requirements, section 176(c) of the CAA requires States to establish criteria and procedures to ensure that Federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects developed, funded or approved under Title 23 U.S.C. and the Federal Transit Act \ ("transportation conformity") as well as to all other Federally supported or funded projects \("general conformity"). State conformity revisions must be consistent with Federal conformity regulations relating to consultation, enforcement and enforceability that the CAA required EPA to promulgate.

EPA believes it is reasonable to interpret the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) since State conformity rules are still required after redesignation and Federal conformity rules apply where State rules have not been approved. *See, Wall* v. *EPA*, 265 F. 3d 426, 438–440 (6th Cir. 2001), upholding this interpretation. *See also,* 60 FR 62748 (December 7, 1995).

In the case of the Clearfield/Indiana Area, EPA has also determined that before being redesignated, the Clearfield/Indiana Area need not comply with the requirement that a NSR program be approved prior to redesignation. Additionally, Pennsylvania's preconstruction permitting program regulations in Chapter 127.200–217 of the Pennsylvania Code (approved into the SIP at 40 CFR 52.2020(c)), apply only to ozone nonattainment area sources that are located in areas classified as marginal or worse, *i.e.* , to subpart 2 nonattainment areas. Pennsylvania's NSR regulations do not apply to sources in nonattainment areas classified as basic nonattainment under subpart 1. Consequently, sources in the Clearfield/Indiana Area are subject to Part D NSR requirements of Appendix S to 40 CFR part 51, pursuant to 40 CFR 52.24(k). Appendix S of 40 CFR part 51 contains the preconstruction permitting program that applies to major stationary sources in nonattainment areas lacking an approved Part D NSR program. Appendix S applies during the interim period after EPA designates an area as nonattainment, but before EPA approves revisions to a SIP to implement the Part D NSR requirements for that pollutant. *See,* 70 FR 71618 (November 29, 2005). The Chapter 127 Part D NSR regulations in the Pennsylvania SIP explicitly apply to attainment areas within the Ozone Transport Region (OTR). *See*, Chapter 127 in 40 CFR 52.2020(c)(1); *See,* 66 FR 53094, October 19, 2001. Therefore, after the Clearfield/Indiana Area is redesignated to attainment, sources in the Clearfield/Indiana Area will be subject to Part D NSR applicable under the permitting regulations in Chapter 127, because the Clearfield/Indiana Area is located in the OTR.

All areas in the OTR, both attainment and nonattainment, are subject to additional control requirements under section 184 for the purpose of reducing interstate transport of emissions that may contribute to downwind ozone nonattainment. The section 184 requirements include reasonably available control technology (RACT), NSR, enhanced vehicle inspection and maintenance (I/M), and Stage II vapor recovery or a comparable measure.

EPA has also interpreted the section 184 OTR requirements, including the NSR program, as not being applicable for purposes of redesignation. The rationale for this is based on two considerations. First, the requirement to submit SIP revisions for the section 184 requirements continues to apply to areas in the OTR after redesignation to attainment. Therefore, the State remains obligated to have NSR, as well as RACT, even after redesignation. Second, the section 184 control measures are region-wide requirements and do not apply to the Clearfield/Indiana Area by virtue of the area's designation and classification, and thus are properly considered not relevant to an action changing an area's designation. *See,* 61 FR 53174, 53175–53176 (October 10, 1996) and 62 FR 24826, 24830–24832 (May 7, 1997).

In the case of Clearfield/Indiana Area, which is located in the OTR, nonattainment NSR will continue to be applicable after redesignation. On October 19, 2001 (66 FR 53094), EPA fully approved the 1-hour Pennsylvania's NSR SIP revision consisting of Pennsylvania's Chapter 127 Part D NSR regulations that cover the Clearfield/Indiana Area. The Chapter 127 Part D NSR regulations in the Pennsylvania SIP explicitly apply the requirements for NSR of section 184 of the CAA to attainment areas within the OTR.

3. *The Clearfield/Indiana Area Has a Fully Approved SIP for the Purposes of Redesignation*

EPA has fully approved the Pennsylvania SIP for the purposes of redesignation. EPA may rely on prior SIP approvals in approving a redesignation request. Calcagni Memo, p. 3; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F. 3d 984, 989–90 (6th Cir. 1998); *Wall* v. *EPA*, 265 F.3d 426 (6th Cir. 2001), plus any additional measures it may approve in conjunction with a redesignation action. *See also*, 68 FR at 25425 (May 12, 2003) and citations therein. The Clearfield/Indiana Area was a 1-hour attainment/unclassifiable area at the time of its designation as a basic 8-hour ozone nonattainment area on April 30, 2004 (69 FR 23857). Because the Clearfield/Indiana Area was a 1-hour attainment/unclassifiable area, there are no previous Part D SIP submittal requirements. Also, no Part D submittal requirements have come due prior to the submittal of the 8-hour maintenance plan for the area. Therefore, all Part D submittal requirements have been fulfilled. Because there are no outstanding SIP submission requirements applicable for the purposes of redesignation of the Clearfield/Indiana Area, the applicable implementation plan satisfies all pertinent SIP requirements. As indicated previously, EPA believes that the section 110 elements not connected with Part D nonattainment plan submissions and not linked to the area's nonattainment status are not applicable requirements for purposes of redesignation. EPA also believes that no 8-hour Part D requirements applicable for purposes of redesignation have yet become due for the Clearfield/Indiana Area, and therefore they need not be

approved into the SIP prior to redesignation.

C. The Air Quality Improvement in the Clearfield/Indiana Area Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions

EPA believes that the Commonwealth has demonstrated that the observed air quality improvement in the Clearfield/Indiana Area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other State-adopted measures. Emissions reductions attributable to these rules are shown in Table 3.

TABLE 3.—TOTAL VOC AND NO_X EMISSIONS FOR 2002 AND 2004 IN TONS PER SUMMER DAY (TPD)

Year	Point	Area	Mobile	Nonroad	Total
Volatile Organic Compounds (VOC)					
Year 2002	1.2	9.5	10.8	3.6	25.1
Year 2004	1.2	9.2	9.4	3.4	23.2
Diff. (02–04)	0.0	−0.3	−1.4	−0.2	−1.9
Nitrogen Oxides (NO_X)					
Year 2002	144.2	1.0	25.1	4.5	174.8
Year 2004	129.3	1.0	22.2	4.2	156.7
Diff. (02–04)	−14.9	0.0	−2.9	−0.3	−18.1

Between 2002 and 2004, VOC emissions were reduced by 1.9 tpd, and NO_X emissions were reduced by 18.1 tpd. These reductions and anticipated future reductions are due to the following permanent and enforceable measures implemented or in the process of being implemented in the Clearfield/Indiana Area:

1. Stationary Point Sources

NO_X SIP Call (66 FR 43795, August 21, 2001).

2. Stationary Area Sources

Solvent Cleaning (68 FR 2206, January 16, 2003).
Portable Fuel Containers (69 FR 70893, December 8, 2004).

3. Highway Vehicle Sources

Federal Motor Vehicle Control Programs (FMVCP)
—Tier 1 (56 FR 25724, June 5, 1991).
—Tier 2 (65 FR 6698, February 10, 2000).
Heavy Duty Engines and Vehicles Standards (62 FR 54694, October 21, 1997 and 65 FR 59896, October 6, 2000).
National Low Emission Vehicle (NLEV) (64 FR 72564, December 28, 1999).
Vehicle Safety Inspection Program (70 FR 58313, October 6, 2005).

4. Nonroad Sources

Nonroad Diesel Engine and Fuel (69 FR 38958, June 29, 2004)

EPA believes that permanent and enforceable emissions reductions are the cause of the long-term improvement in ozone levels and are the cause of the Clearfield/Indiana Area achieving attainment of the 8-hour ozone standard.

D. The Clearfield/Indiana Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA

In conjunction with its request to redesignate the Clearfield/Indiana Area to attainment status, Pennsylvania submitted a SIP revision to provide for maintenance of the 8-hour ozone NAAQS in the Clearfield/Indiana Area for at least 10 years after redesignation. Pennsylvania is requesting that EPA approve this SIP revision as meeting the requirement of section 175A of the CAA. Once approved, the maintenance plan for the 8-hour ozone NAAQS will ensure that the SIP for the Clearfield/Indiana Area meets the requirements of the CAA regarding maintenance of the applicable 8-hour ozone standard.

What Is Required in a Maintenance Plan?

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after approval of a redesignation of an area to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the next 10-year period following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency measures, with a schedule for implementation, as EPA deems necessary to assure prompt correction of any future 8-hour ozone violations. Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. The Calcagni memo provides additional guidance on the content of a maintenance plan. An ozone maintenance plan should address the following provisions:

(1) An attainment emissions inventory;

(2) A maintenance demonstration;

(3) A monitoring network;

(4) Verification of continued attainment; and

(5) A contingency plan.

Analysis of the Clearfield/Indiana Area Maintenance Plan

(a) Attainment Inventory—An attainment inventory includes the emissions during the time period associated with the monitoring data showing attainment. An attainment inventory year of 2004 was used for the Clearfield/Indiana Area since it is a reasonable year within the 3-year block of 2004–2006 and accounts for reductions attributable to implementation of the CAA requirements to date. The 2004 inventory is consistent with EPA guidance and is based on actual "typical summer day" emissions of VOC and NO_X during 2004 and consists of a list

of sources and their associated emissions.

PADEP prepared comprehensive VOC and NO_X emissions inventories for the Clearfield/Indiana Area, including point, area, mobile on-road, and mobile non-road sources for a base-year of 2002.

To develop the NO_X and VOC base-year emissions inventories, PADEP used the following approaches and sources of data:

(i) *Point source emissions*—Pennsylvania requires owners and operators of larger facilities to submit annual production figures and emission calculations each year. Throughput data are multiplied by emission factors from Factor Information Retrieval (FIRE) Data System and EPA's publication series AP–42 and are based on Source Classification Code (SCC). Each process has at least one SCC assigned to it. If the owners and operators of facilities provide more accurate emission data based upon other factors, these emission estimates supersede those calculated using SCC codes.

(ii) *Area source emissions*—Area source emissions are generally estimated by multiplying an emission factor by some known indicator or collective activity for each area source category at the county level. Pennsylvania estimates emissions from area sources using emission factors and SCC codes in a method similar to that used for stationary point sources. Emission factors may also be derived from research and guidance documents if those documents are more accurate than FIRE and AP–42 factors. Throughput estimates are derived from county-level activity data, by apportioning national and statewide activity data to counties, from census numbers, and from county employee numbers. County employee numbers are based upon North American Industry Classification System (NAICS) codes to establish that those numbers are specific to the industry covered.

(iii) *On-road mobile sources*—PADEP employs an emissions estimation methodology that uses current EPA-approved highway vehicle emission model, MOBILE 6.2, to estimate highway vehicle emissions. The Clearfield/Indiana Area highway vehicle emissions in 2004 were estimated using MOBILE 6.2 and PENNDOT estimates of vehicle miles traveled (VMT) by vehicle type and roadway type.

(iv) *Mobile nonroad emissions*—The 2002 and 2004 emissions for the majority of nonroad emission source categories were estimated using the EPA NONROAD 2005 model. The NONROAD model estimates emissions for diesel, gasoline, liquefied petroleum gasoline, and compressed natural gas-fueled nonroad equipment types and includes growth factors. The NONROAD model does not estimate emissions from aircraft or locomotives. For 2002 and 2004 locomotive emissions, PADEP projected emissions from a 1999 survey using national fuel information and EPA emission and conversion factors. There are no commercial aircraft operations in Clearfield and Indiana counties. For 2002 and 2004 aircraft emissions, PADEP estimated emissions using small aircraft operation statistics from *www.airnav.com*, and emission factors and operational characteristics in the EPA-approved model, Emissions and Dispersion Modeling System (EDMS).

The 2004 attainment year VOC and NO_X emissions for the Clearfield/Indiana Area are summarized along with the 2009 and 2018 projected emissions for this area in Tables 4 and 5, which show the demonstration of maintenance for this area. EPA has concluded that Pennsylvania has adequately derived and documented the 2004 attainment year VOC and NO_X emissions for this area.

(b) Maintenance Demonstration—On June 14, 2007, PADEP submitted a maintenance plan as required by section 175A of the CAA. The Clearfield/Indiana Area plan shows maintenance of the 8-hour ozone NAAQS by demonstrating that current and future emissions of VOC and NO_X remain at or below the attainment year 2004 emissions levels throughout the Clearfield/Indiana Area through the year 2018. A maintenance demonstration need not be based on modeling. *See, Wall* v. *EPA, supra; Sierra Club v. EPA, supra. See also,* 66 FR at 53099–53100; 68 FR at 25430–32.

Tables 4 and 5 specify the VOC and NO_X emissions for the Clearfield/Indiana Area for 2004, 2009, and 2018. Table 5 reflects the new methodology used to project future emissions of NO_X from EGUs, submitted on May 23, 2008. PADEP chose 2009 as an interim year in the 10-year maintenance demonstration period to demonstrate that the VOC and NO_X emissions are not projected to increase above the 2004 attainment level during the time of the 10-year maintenance period.

TABLE 4.—TOTAL VOC EMISSIONS FOR 2004–2018

(Tons per summer day)

Source Category	2004	2009	2018
Stationary Point Sources	1.2	1.3	1.5
Stationary Area Sources	9.2	8.4	8.6
Highway Vehicles	9.4	7.2	4.7
Nonroad Engines/Vehicles	3.4	2.8	2.3
Total	23.2	19.7	17.1

TABLE 5.—TOTAL NO_X EMISSIONS 2004–2018

(Tons per summer day)

Source Category	2004	2009	2018
Stationary Point Sources	129.3	89.2	79.1
Stationary Area Sources	1.0	1.1	1.1
Highway Vehicles	22.2	16.3	7.6
Nonroad Engines/Vehicles	4.2	3.5	2.4
Total	156.7	110.1	90.2

The following programs are either effective or due to become effective and will further contribute to the maintenance demonstration of the 8-hour ozone NAAQS:

1. Pennsylvania's Portable Fuel Containers (69 FR 70893, December 8, 2004)
2. Pennsylvania's Consumer Products (69 FR 70895, December 8, 2004)
3. Pennsylvania's Architectural and Industrial Maintenance (AIM) Coatings (69 FR 68080, November 23, 2004)
4. NO_X SIP Call (66 FR 43795, August 21, 2001)
5. Federal Clean Air Interstate Rule (71 FR 25328, April 28, 2006)
6. FMVCP for passenger vehicles and light-duty trucks and cleaner gasoline (2009 and 2018 fleet)—Tier 1 and Tier 2 (56 FR 25724, June 5, 1991 and 65 FR 6698, February 10, 2000)
7. NLEV Program, which includes the Pennsylvania's Clean Vehicle Program for passenger vehicles and light-duty trucks (69 FR 72564, December 28, 1999)—proposed amendments to move the implementation to model year (MY) 2008
8. Heavy duty diesel on-road (2004/2007) and low-sulfur on-road (2006) (66 FR 5002, January 18, 2001)
9. Vehicles Safety Inspection Program (70 FR 58313, October 6, 2005)
10. Non-road emissions standards (2008) and off-road diesel fuel (2007/2010) (69 FR 38958, June 29, 2004)

Based upon the comparison of the projected emissions and the attainment year emissions along with the additional measures, EPA concludes that PADEP has successfully demonstrated that the 8-hour ozone standard should be maintained in the Clearfield/Indiana Area.

(c) Monitoring Network—There are currently two monitors measuring ozone in the Clearfield/Indiana Area. Pennsylvania will continue to operate its current air quality monitors in accordance with 40 CFR part 58.

(d) Verification of Continued Attainment—The Commonwealth will track the attainment status of the ozone NAAQS in the Clearfield/Indiana Area by reviewing air quality and emissions during the maintenance period. The Commonwealth will perform an annual evaluation of two key factors, VMT data and emissions reported from stationary sources, and compare them to the assumptions about these factors used in the maintenance plan. The Commonwealth will also evaluate the periodic (every three years) emission inventories prepared under EPA's Consolidated Emission Reporting Regulation (40 CFR part 51, Subpart A) to see if the area exceeds the attainment year inventory (2004) by more than 10 percent. Based on these evaluations, the Commonwealth will consider whether any further emission control measures should be implemented.

(e) The Maintenance Plan's Contingency Measures—The contingency plan provisions are designed to promptly correct a violation of the NAAQS that occurs after redesignation. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to ensure that the Commonwealth will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the events that would "trigger" the adoption and implementation of a contingency measure(s), the contingency measure(s) that would be adopted and implemented, and the schedule indicating the time frame by which the state would adopt and implement the measure(s).

The ability of the Clearfield/Indiana Area to stay in compliance with the 8-hour ozone standard after redesignation depends upon VOC and NO_X emissions in the area remaining at or below 2004 levels. The Commonwealth's maintenance plan projects VOC and NO_X emissions to decrease and stay below 2004 levels through the year 2018. The Commonwealth's maintenance plan outlines the procedures for the adoption and implementation of contingency measures to further reduce emissions should a violation occur.

Contingency measures will be considered if for two consecutive years the fourth highest eight-hour ozone concentrations at the Clearfield/Indiana Area monitor are above 84 ppb. If this trigger point occurs, the Commonwealth will evaluate whether additional local emission control measures should be implemented in order to prevent a violation of the air quality standard. PADEP will analyze the conditions leading to the excessive ozone levels and evaluate what measures might be most effective in correcting the excessive ozone levels. PADEP will also analyze the potential emissions effect of Federal, state and local measures that have been adopted but not yet implemented at the time excessive ozone levels occurred. PADEP will then begin the process of implementing any selected measures.

Contingency measures will be considered in the event that a violation of the 8-hour ozone standard occurs at the Clearfield/Indiana Area monitors. In the event of a violation of the 8-hour ozone standard, contingency measures will be adopted in order to return the area to attainment with the standard. Contingency measures to be considered for the Clearfield/Indiana Area will include, but not be limited to the following:

Non-regulatory measures:

—Voluntary diesel engine "chip reflash"—installation software to correct the defeat device option on certain heavy duty diesel engines.
—Diesel retrofit, including replacement, repowering or alternative fuel use, for public or private local onroad or offroad fleets.
—Idling reduction technology for Class 2 yard locomotives.
—Idling reduction technologies or strategies for truck stops, warehouses and other freight-handling facilities.
—Accelerated turnover of lawn and garden equipment, especially commercial equipment, including promotion of electric equipment.
—Additional promotion of alternative fuel (e.g., biodiesel) for home heating and agricultural use.

Regulatory measures:

—Additional controls on consumer products
—Additional controls on portable fuel containers

The plan lays out a process to have any regulatory contingency measures in effect within 19 months of the trigger. The plan also lays out a process to implement the non-regulatory contingency measures within 12–24 months of the trigger.

VII. Are the Motor Vehicle Emissions Budgets Established and Identified in the Maintenance Plan for the Clearfield/Indiana Area Adequate and Approvable?

A. What Are the Motor Vehicle Emissions Budgets?

Under the CAA, States are required to submit, at various times, control strategy SIPs and maintenance plans in ozone areas. These control strategy SIPs (i.e., Reasonable Further Progress SIPs and attainment demonstration SIPs) and maintenance plans identify and establish MVEBs for certain criteria pollutants and/or their precursors to address pollution from on-road mobile sources. Pursuant to 40 CFR part 93 and 51.112, MVEBs must be established in an ozone maintenance plan. A MVEB is the portion of the total allowable emissions that is allocated to highway and transit vehicle use and emissions. A MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation

conformity rule (58 FR 62188). The preamble also describes how to establish and revise the MVEBs in control strategy SIPs and maintenance plans.

Under section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must "conform" to (i.e., be consistent with) the part of the State's air quality plan that addresses pollution from cars and trucks. "Conformity" to the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of or reasonable progress towards the NAAQS. If a transportation plan does not "conform," most new projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and ensuring conformity of such transportation activities to a SIP.

When reviewing submitted "control strategy" SIPs or maintenance plans containing MVEBs, EPA must affirmatively find the MVEB budget contained therein "adequate" for use in determining transportation conformity. After EPA affirmatively finds the submitted MVEB is adequate for transportation conformity purposes, that MVEB can be used by State and Federal agencies in determining whether proposed transportation projects "conform" to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining "adequacy" of a MVEB are set out in 40 CFR 93.118(e)(4).

EPA's process for determining "adequacy" consists of three basic steps: public notification of a SIP submission, a public comment period, and EPA's adequacy finding. This process for determining the adequacy of submitted SIP MVEBs was initially outlined in EPA's May 14, 1999 guidance, "Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision." This guidance was finalized in the Transportation Conformity Rule Amendments for the "New 8-Hour Ozone and PM2.5 National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments—Response to Court Decision and Additional Rule Change" on July 1, 2004 (69 FR 40004). EPA consults this guidance and follows this rulemaking in making its adequacy determinations.

The MVEBs for the Clearfield/Indiana Area are listed in Table 1 for 2009 and 2018. Table 1 presents the projected emissions for the on-road mobile sources plus any portion of the safety margin allocated to the MVEBs (safety margin allocation for 2009 and 2018 only). These emission budgets, when approved by EPA, must be used for transportation conformity determinations.

B. What Is a Safety Margin?

A "safety margin" is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. The following example is for the 2018 safety margin: the Clearfield/Indiana Area first attained the 8-hour ozone NAAQS during the 2002 to 2004 time period. The Commonwealth used 2004 as the year to determine attainment levels of emissions for the Clearfield/Indiana Area.

The total emissions from point, area, mobile on-road, and mobile non-road sources in 2004 for the Clearfield/Indiana Area equaled 23.2 tpd of VOC and 156.7 tpd of NO_X . The PADEP projected total emissions out to the year 2018 of 17.1 tpd of VOC and 90.2 tpd of NO_X from all sources in the Clearfield/Indiana Area. The safety margin for 2018 would be the difference between these amounts, or 6.1 tpd of VOC and 66.5 tpd of NO_X . The emissions up to the level of the attainment year, including the safety margins, are projected to maintain the area's air quality consistent with the 8-hour ozone NAAQS. The safety margin is the extra emissions reduction below the attainment levels that can be allocated for emissions by various sources as long as the total emission levels are maintained at or below the attainment levels. Table 6 shows the safety margins for the 2009 and 2018 years.

TABLE 6.—SAFETY MARGINS FOR CLEARFIELD/INDIANA AREA TONS PER SUMMER DAY (TPD) (2009 & 2018)

Inventory year	VOC emissions (tpd)	NO_X emissions (tpd)
2004 Attainment	23.2	156.7
2009 Interim	19.7	110.1
2009 Safety Margin	3.5	46.6
2004 Attainment	23.2	156.7
2018 Final	17.1	90.2
2018 Safety Margin	6.1	66.5

North Central Pennsylvania Regional Planning and Development Commission RPO MVEB (Clearfield County)

The PADEP allocated 0.24 tpd of VOC and 0.33 tpd of NO_X of the 2009 safety margin to the interim VOC projected on-road mobile source emissions and the 2009 interim NO_X projected on-road mobile source emissions to arrive at the 2009 MVEB to be allocated to the Clearfield County portion of the Area covered by the North Central Pennsylvania Regional Planning and Development Commission RPO.

The PADEP also allocated 0.34 tpd of VOC and 0.38 tpd of NO_X of the 2018 safety margins to arrive at the 2018 MVEBs to be allocated to the Clearfield County portion of the Area covered by the North Central PA Regional Planning and Development Commission RPO.

Southwestern Pennsylvania Commission MPO MVEB (Indiana County)

The PADEP allocated 0.24 tpd of VOC and 0.36 tpd of NO_X of the 2009 safety margin to the interim VOC projected on-road mobile source emissions and the 2009 interim NO_X projected on-road mobile source emissions to arrive at the 2009 MVEB to be allocated to the Indiana County portion of the Area covered by the Southwestern Pennsylvania Commission MPO.

The PADEP also allocated 0.34 tpd of VOC and 0.41 tpd of NO_X of the 2018 safety margins to arrive at the 2018 MVEBs to be allocated to the Indiana County portion of the Area covered by the Southwestern Pennsylvania Commission MPO.

Once allocated to the mobile source budgets these portions of the safety

margins are no longer available, and may no longer be allocated to any other source category. Tables 7 and 8 show the final 2009 and 2018 MVEBs for the Clearfield/Indiana Area, including the portion of the each total MVEB that has been allocated to the Clearfield County portion of the Area (served by the North Central PA Regional Planning and Development Commission RPO) and for the Indiana County portion of the Area (served by the Southwestern Pennsylvania Commission MPO) and reflect the changes made in the May 23, 2008 SIP revision:

TABLE 7.—MOTOR VEHICLE EMISSION BUDGETS FOR THE CLEARFIELD COUNTY PORTION OF THE CLEARFIELD/INDIANA AREA (2009 & 2018)* NORTH CENTRAL PENNSYLVANIA REGIONAL PLANNING AND DEVELOPMENT COMMISSION RPO

Inventory year	VOC Emissions (tpd)	NO_X Emissions (tpd)
2009 Projected On Road (Highway) Emissions	3.87	11.11
2009 Safety Margin Allocated to MVEBs	0.24	0.33
2009 MVEBs	4.11	11.44
2018 Projected On Road (Highway) Emissions	2.37	4.76
2018 Safety Margin Allocated to MVEBs	0.34	0.38
2018 MVEBs	2.71	5.14

*PADEP calculates MVEBs using kilograms per summer day, and converts the values to tons per summer day for informational purposes. This may appear to make the totals in the table incorrect, but is merely the result of the rounded tpd values.

TABLE 8.—MOTOR VEHICLE EMISSION BUDGETS FOR THE INDIANA COUNTY PORTION OF THE CLEARFIELD/INDIANA AREA (2009 & 2018)* SOUTHWESTERN PENNSYLVANIA COMMISSION MPO

Inventory year	VOC Emissions (tpd)	NO_X Emissions (tpd)
2009 Projected On Road (Highway) Emissions	2.82	4.49
2009 Safety Margin Allocated to MVEBs	0.24	0.36
2009 MVEBs	3.06	4.85
2018 Projected On Road (Highway) Emissions	1.58	1.99
2018 Safety Margin Allocated to MVEBs	0.34	0.41
2018 MVEBs	1.92	2.40

*PADEP calculates MVEBs using kilograms per summer day, and converts the values to tons per summer day for informational purposes. This may appear to make the totals in the table incorrect, but is merely the result of the rounded tpd values.

C. Why Are the MVEBs Approvable?

The 2009 and 2018 MVEBs for the Clearfield/Indiana Area are approvable because the MVEBs for NO_X and VOC, including the allocated safety margins, continue to maintain the total emissions at or below the attainment year inventory levels as required by the transportation conformity regulations.

D. What Is the Adequacy and Approval Process for the MVEBs in the Clearfield/Indiana Area Maintenance Plan?

The MVEBs for the Clearfield/Indiana Area maintenance plan are being posted to EPA's conformity Web site concurrent with this proposal. The public comment period will end at the same time as the public comment period for this proposed rule. In this case, EPA is concurrently processing the action on the maintenance plan and the adequacy process for the MVEBs contained therein. In this proposed rule, EPA is proposing to find the MVEBs adequate and also proposing to approve the MVEBs as part of the maintenance plan. The MVEBs cannot be used for transportation conformity until the maintenance plan update and associated MVEBs are approved in a final **Federal Register** notice, or EPA otherwise finds the budgets adequate in a separate action following the comment period.

If EPA receives adverse written comments with respect to the proposed approval of the Clearfield/Indiana Area MVEBs, or any other aspect of our proposed approval of this updated maintenance plan, we will respond to the comments on the MVEBs in our final action or proceed with the adequacy process as a separate action. Our action on the Clearfield/Indiana Area MVEBs will also be announced on EPA's conformity Web site: *http://www.epa.gov.otaq/stateresources/transconf/index.htm* (once there, click on "Adequacy Review of SIP Submissions").

VIII. Proposed Actions

EPA is proposing to determine that the Clearfield/Indiana Area has attained the 8-hour ozone NAAQS. EPA is also proposing to approve the redesignation of the Area from nonattainment to attainment for the 8-hour ozone NAAQS. EPA has evaluated Pennsylvania's redesignation request and determined that it meets the redesignation criteria set forth in section 107(d)(3)(E) of the Act. EPA believes that the redesignation request and monitoring data demonstrate that the Area has attained the 8-hour ozone standard. The final approval of this redesignation request would change the designation of the Clearfield/Indiana Area from nonattainment to attainment for the 8-hour ozone standard. EPA is also proposing to approve the associated maintenance plan for the Clearfield/Indiana Area as a revision to the Pennsylvania SIP, submitted on June 14, 2007. EPA is also proposing to approve the May 23, 2008 submittal that replaces the former methodology for projecting future emissions of NO_X from EGUs, as well as the MVEBs submitted on June 14, 2007. EPA is proposing to approve the maintenance plan for the Clearfield/Indiana Area because it meets the requirements of section 175A as described previously in this notice. EPA is also proposing to approve the 2002 base-year inventory for the Clearfield/Indiana Area, submitted by PADEP on June 14, 2007 and a supplemental submittal on May 23, 2008. Finally, EPA is proposing to approve the MVEBs submitted by Pennsylvania for the Clearfield/Indiana Area in conjunction with its redesignation request. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IX. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)). This action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Redesignation of an area to attainment under section 107(d)(3)(e) of the Act does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources. Redesignation of an area to attainment under section 107(d)(3)(E) of the Act does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Because this action affects the status of a geographical area or allows the state to avoid adopting or implementing other requirements and because this action does not impose any new requirements on sources, this proposed rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to approve a state rule implementing a Federal requirement, and does not alter the relationship or the distribution of power and responsibilities established in the Act. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Act. Redesignation is an action that affects the status of a geographical area and does not impose any new requirements on sources. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order.

This rule, proposing to approve the redesignation of the Clearfield/Indiana Area to attainment for the 8-hour ozone NAAQS, the associated maintenance plan, the 2002 base-year inventory, and the MVEBs identified in the maintenance plan, does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

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

Dated: July 9, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–16639 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Parts 5 and 51c

RIN 0906–AA44

Designation of Medically Underserved Populations and Health Professional Shortage Areas

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Proposed rule; status.

SUMMARY: The Health Resources and Services Administration (HRSA) received many substantive comments on the proposed rule and will consider these comments carefully. Based on a preliminary review of the comments, it appears that HRSA will need to make a number of changes in the proposed rule. Instead of issuing a final regulation as the next step, HHS will issue a new Notice of Proposed Rulemaking for further review and public comment prior to issuing a final rule.

FOR FURTHER INFORMATION CONTACT: Andy Jordan, 301–594–0197.

SUPPLEMENTARY INFORMATION: On February 29, 2008, HHS published a Notice of Proposed Rulemaking, "Designation of Medically Underserved Populations and Health Professional Shortage Areas" (73 FR 11232). The initial notice provided a 60-day comment period. Due to the level of interest in the proposed rule, two 30-day extensions of the comment period were published in the **Federal Register**, one on April 21, 2008 (73 FR 21300) and the second on June 2, 2008 (73 FR 31418). The latest comment period closed on June 30, 2008.

Dated: July 17, 2008.

Elizabeth M. Duke,

Administrator, Health Resources and Services Administration.

[FR Doc. E8–16831 Filed 7–22–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–7792]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before October 21, 2008.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–7792, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151, or (e-mail) *bill.blanton@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151 or (e-mail) *bill.blanton@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

Administrative Procedure Act Statement. This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Walton County, Florida, and Incorporated Areas				
Bay Branch	At the confluence with Bruce Creek	None	+106	Unincorporated Areas of Walton County, City of Defuniak Springs.
	Approximately 900 feet upstream of U.S. Highway 331	None	+125	
Black Creek	At County Highway 3280	None	+7	Unincorporated Areas of Walton County.
	Approximately 1,570 feet upstream of County Highway 3280.	None	+7	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Bruce Creek	Approximately 1,100 feet downstream of the confluence with Mill Creek.	None	+72	Unincorporated Areas of Walton County, City of Defuniak Springs.
	Approximately 6,700 feet upstream of the confluence with Bay Branch.	None	+114	
Camp Creek	Approximately 5,400 feet upstream of the confluence with Black Creek.	None	+7	Unincorporated Areas of Walton County.
	At the confluence with Black Creek	None	+7	
Gum Creek	At the confluence with the Shoal River	None	+150	Unincorporated Areas of Walton County.
	Approximately 12,700 feet upstream of the confluence with the Shoal River.	None	+156	
Lafayette Creek	At State Highway 20	None	+10	Unincorporated Areas of Walton County, City of Freeport.
	Approximately 4,000 feet upstream of J.W. Hollington Road.	None	+58	
Mill Creek	At the confluence with Bruce Creek	None	+73	Unincorporated Areas of Walton County.
	Approximately 75 feet upstream of Edgewood Circle	None	+146	
Mill Creek Unnamed Tributary.	At the confluence with Mill Creek	None	+124	Unincorporated Areas of Walton County.
	Approximately 200 feet upstream of Edgewood Circle	None	+175	
Pate Branch	At the confluence with Camp Creek	None	+7	Unincorporated Areas of Walton County.
	Approximately 3,900 feet upstream of the confluence with Camp Creek.	None	+7	
Shoal River	At the Okaloosa/Walton County boundary	None	+111	Unincorporated Areas of Walton County.
	At the confluence with Gum Creek	None	+150	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

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Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Defuniak Springs

Maps are available for inspection at Defuniak Springs City Hall, 71 U.S. Highway 90 West, Defuniak Springs, FL.

City of Freeport

Maps are available for inspection at Town of Freeport Planning and Zoning Department, 112 Highway 20 West, Freeport, FL.

Unincorporated Areas of Walton County

Maps are available for inspection at Walton County Planning and Development Department, South Walton County Courthouse Annex, 31 Coastal Centre Boulevard, Santa Rosa Beach, FL.

Catoosa County, Georgia, and Incorporated Areas

Hurricane Creek	Approximately 660 feet downstream of Cherokee Valley Road.	None	+824	Unincorporated Areas of Catoosa County.
	At confluence of Johnson Branch	None	+825	
Johnson Branch	At confluence with Hurricane Creek	None	+825	Unincorporated Areas of Catoosa County.
	Approximately 840 feet upstream of confluence with Hurricane Creek.	None	+827	
Tributary No. 1 to Black Branch.	Approximately 600 feet upstream of Elaine Circle	None	+715	City of Fort Oglethorpe.
	Approximately 750 feet upstream of Elaine Circle	None	+716	

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Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	

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ADDRESSES

City of Fort Oglethorpe

Maps are available for inspection at City Hall, 500 City Hall Drive, Fort Oglethorpe, GA 30747.

Unincorporated Areas of Catoosa County

Maps are available for inspection at 800 Lafayette Street, Ringgold, GA 30736.

Delaware County, Iowa, and Incorporated Areas

Maquoketa River	Approximately 750 feet downstream of U.S. Highway 20.	None	+919	Unincorporated Areas of Delaware County.
	Approximately 525 feet upstream of U.S. Highway 20 ..	None	+920	
	Approximately 0.89 mile upstream of West Main Street	None	+935	
	Approximately 1.55 miles upstream of West Main Street.	None	+936	

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+ North American Vertical Datum.

Depth in feet above ground.

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Unincorporated Areas of Delaware County

Maps are available for inspection at 301 East Main Street, Manchester, IA 52057.

Gates County, North Carolina, and Incorporated Areas

Acorn Hill Millpond	Approximately 0.5 mile downstream of U.S. Highway 158.	None	+20	Unincorporated Areas of Gates County.
	Approximately 1.0 mile upstream of the confluence with Acorn Hill Millpond Tributary 1.	None	+32	
Beaverdam Creek	Approximately 0.8 mile downstream of confluence of Beaverdam Creek Tributary 1.	None	+12	Unincorporated Areas of Gates County.
	Approximately 1.4 miles upstream of Saunders Road (State Road 1208).	None	+44	
Beaverdam Creek Tributary 1.	At the confluence with Beaverdam Creek	None	+19	Unincorporated Areas of Gates County.
	Approximately 500 feet downstream of Saunders Road (State Road 1208).	None	+24	
Beaverdam Creek Tributary 2.	At the confluence with Beaverdam Creek	None	+28	Unincorporated Areas of Gates County.
	Approximately 0.7 mile upstream of the confluence with Beaverdam Creek.	None	+34	
Beaverdam Creek Tributary 3.	At the confluence with Beaverdam Creek	None	+31	Unincorporated Areas of Gates County.
	Approximately 0.9 mile upstream of the confluence of Beaverdam Creek.	None	+38	
Bennetts Creek	Approximately 3.0 miles upstream of the confluence with Chowan River.	None	+7	Unincorporated Areas of Gates County, Town of Gatesville.
	At the confluence of Harrell Swamp and Raynor Swamp.	+26	+19	
Bennetts Creek Tributary 1	At the confluence with Bennetts Creek	None	+7	Unincorporated Areas of Gates County.
	Approximately 1.5 miles upstream of the confluence with Bennetts Creek Tributary 1A.	None	+12	
Bennetts Creek Tributary 10.	At the confluence with Bennetts Creek	None	+19	Unincorporated Areas of Gates County.
	Approximately 0.6 mile upstream of Gatlin Road (State Road 1407).	None	+37	
Bennetts Creek Tributary 1A.	At the confluence with Bennetts Creek Tributary 1	None	+7	Unincorporated Areas of Gates County.
	Approximately 1.2 miles upstream of the confluence with Bennetts Creek Tributary 1A1.	None	+16	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Bennetts Creek Tributary 1A1.	At the confluence with Bennetts Creek Tributary 1A	None	+7	Unincorporated Areas of Gates County.
	Approximately 60 feet downstream of Horace Carter Road (State Road 1106).	None	+11	
Bennetts Creek Tributary 2	At the confluence with Bennetts Creek	None	+8	Unincorporated Areas of Gates County.
	Approximately 1.1 miles upstream of the confluence with Bennetts Creek.	None	+12	
Bennetts Creek Tributary 3	At the confluence with Bennetts Creek	None	+12	Unincorporated Areas of Gates County.
	Approximately 0.7 mile upstream of the confluence with Bennetts Creek.	None	+36	
Bennetts Creek Tributary 4	At the confluence with Bennetts Creek	None	+12	Unincorporated Areas of Gates County.
	Approximately 1.3 miles upstream of U.S. Highway 158.	None	+24	
Bennetts Creek Tributary 4A.	At the confluence with Bennetts Creek Tributary 4	None	+12	Unincorporated Areas of Gates County.
	Approximately 180 feet upstream of U.S. Highway 158	None	+31	
Bennetts Creek Tributary 4B.	At the confluence with Bennetts Creek Tributary 4	None	+12	Unincorporated Areas of Gates County.
	Approximately 1,750 feet upstream of the confluence with Bennetts Creek Tributary 4.	None	+15	
Bennetts Creek Tributary 5	At the confluence with Bennetts Creek	None	+12	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of Silver Spring Road (State Road 1404).	None	+31	
Bennetts Creek Tributary 5A.	At the confluence with Bennetts Creek Tributary 5	None	+12	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of the confluence with Bennetts Creek Tributary 5.	None	+30	
Bennetts Creek Tributary 6	At the confluence with Bennetts Creek	None	+13	Unincorporated Areas of Gates County.
	Approximately 75 feet downstream of U.S. Highway 158.	None	+33	
Bennetts Creek Tributary 7	At the confluence with Bennetts Creek	None	+15	Unincorporated Areas of Gates County.
	Approximately 900 feet upstream of Silver Spring Road (State Road 1404).	None	+20	
Bennetts Creek Tributary 8	At the confluence with Bennetts Creek	None	+15	Unincorporated Areas of Gates County.
	Approximately 650 feet downstream of Silver Spring Road (Sate Road 1404).	None	+21	
Bennetts Creek Tributary 9	At the confluence with Bennetts Creek	None	+15	Unincorporated Areas of Gates County.
	Approximately 600 feet upstream of Gatlin Road (State Road 1407).	None	+23	
Blackwater River	At the confluence with Chowan River	None	+13	Unincorporated Areas of Gates County.
	Approximately 0.6 mile upstream of the confluence with Chowan River.	None	+13	
Buckland Mill Branch	At the confluence with Cole Creek And Hackley Swamp.	None	+23	Unincorporated Areas of Gates County.
	Approximately 1,600 feet upstream of Gates Bank Road (State Road 1302).	None	+39	
Buckland Mill Branch Tributary 1.	At the confluence with Buckland Mill Branch	None	+28	Unincorporated Areas of Gates County.
	Approximately 0.6 mile upstream of Willeytown Road (State Road 1304).	None	+31	
Buckland Mill Branch Tributary 2.	At the confluence with Buckland Mill Branch	None	+29	Unincorporated Areas of Gates County.
	Approximately 0.4 mile upstream of the confluence with Buckland Mill Branch.	None	+40	
Chowan River	Approximately 0.5 mile upstream of the confluence with Chowan River Tributary 1.	None	+7	Unincorporated Areas of Gates County, Town of Gatesville.
	At the confluence of Blackwater River and Nottoway River.	None	+13	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Cole Creek	At the confluence with Sarem Creek	None	+7	Unincorporated Areas of Gates County.
	At the confluence of Buckland Mill Branch and Hackley Swamp.	None	+23	
Cole Creek Tributary 1	At the confluence with Cole Creek	None	+7	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of Turner Road (State Road 1114).	None	+25	
Cole Creek Tributary 2	At the confluence with Cole Creek	None	+8	Unincorporated Areas of Gates County.
	Approximately 780 feet upstream of U.S. Highway Business 158.	None	+30	
Cole Creek Tributary 3	At the confluence with Cole Creek	None	+9	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of the confluence with Cole Creek.	None	+17	
Cole Creek Tributary 4	At the confluence with Cole Creek	None	+11	Unincorporated Areas of Gates County.
	Approximately 0.6 mile upstream of the confluence with Cole Creek.	None	+16	
Cole Creek Tributary 5	At the confluence with Cole Creek	None	+12	Unincorporated Areas of Gates County.
	Approximately 550 feet upstream of U.S. Highway 158	None	+33	
Cole Creek Tributary 6	At the confluence with Cole Creek	None	+18	Unincorporated Areas of Gates County.
	Approximately 375 feet downstream of Cotton Gin Road (State Road 1315).	None	+24	
Corapeake Swamp	Approximately 500 feet downstream of Daniels Road (State Road 1332).	None	+22	Unincorporated Areas of Gates County.
	At the confluence of Corapeake Swamp Tributary 1	None	+33	
Corapeake Swamp Tributary 1.	At the confluence with Corapeake Swamp	None	+33	Unincorporated Areas of Gates County.
	Approximately 0.9 mile upstream of the confluence with Corapeake Swamp.	None	+35	
Cypress Swamp	Just upstream of NC Highway 137	None	+16	Unincorporated Areas of Gates County.
	Approximately 0.6 mile upstream of NC Highway 137	None	+16	
Duke Swamp	At the confluence with Harrell Swamp	+26	+21	Unincorporated Areas of Gates County.
	Approximately 1.5 miles upstream of the confluence with Duke Swamp Tributary 5.	None	+47	
Duke Swamp Tributary 1	At the confluence with Duke Swamp	None	+23	Unincorporated Areas of Gates County.
	Approximately 0.6 mile upstream of the confluence with Duke Swamp.	None	+33	
Duke Swamp Tributary 2	At the confluence with Duke Swamp	None	+24	Unincorporated Areas of Gates County.
	Approximately 240 feet downstream of NC Highway 32	None	+37	
Duke Swamp Tributary 3	At the confluence with Duke Swamp	None	+25	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of the confluence with Duke Swamp.	None	+28	
Duke Swamp Tributary 4	At the confluence with Duke Swamp	None	+27	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of Union Branch Road (State Road 1305).	None	+31	
Duke Swamp Tributary 5	At the confluence with Duke Swamp	None	+37	Unincorporated Areas of Gates County.
	Approximately 1,000 feet upstream of Drum Hill Road (State Road 1308).	None	+49	
Ellis Swamp	At the confluence with Jady Branch	None	+22	Unincorporated Areas of Gates County.
	Approximately 300 feet upstream of Corner High Road (State Road 1126).	None	+22	
Ellis Swamp Tributary 1	At the confluence with Ellis Swamp	None	+22	Unincorporated Areas of Gates County.
	Approximately 1.3 miles upstream of the confluence with Ellis Swamp.	None	+24	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Flat Branch	At the confluence with Hackley Swamp	None	+24	Unincorporated Areas of Gates County.
	Approximately 150 feet downstream of U.S. Highway 13.	None	+34	
Folly Swamp	Approximately 1.5 miles downstream of NC Highway 32.	None	+26	Unincorporated Areas of Gates County.
	Approximately 1.9 miles upstream of the confluence with Folly Swamp Tributary 1.	None	+38	
Folly Swamp Tributary 1	At the confluence with Folly Swamp	None	+31	Unincorporated Areas of Gates County.
	Approximately 1,750 feet upstream of Maryland Lane	None	+38	
Goodman Swamp	At the confluence with Duke Swamp	None	+31	Unincorporated Areas of Gates County.
	Approximately 1.3 miles upstream of the confluence of Goodman Swamp Tributary 2.	None	+47	
Goodman Swamp Tributary 1.	At the confluence with Goodman Swamp	None	+34	Unincorporated Areas of Gates County.
	Approximately 0.7 mile upstream of Union Branch Road (State Road 1305).	None	+41	
Goodman Swamp Tributary 2.	At the confluence with Goodman Swamp	None	+36	Unincorporated Areas of Gates County.
	Approximately 1.0 mile upstream of Union Branch Road (State Road 1305).	None	+48	
Goose Creek	Approximately 0.7 mile downstream of Folly Road (State Road 1002).	None	+25	Unincorporated Areas of Gates County.
	Approximately 1.3 miles upstream of the confluence of Goose Creek Tributary 1.	None	+36	
Goose Creek Tributary 1	At the confluence with Goose Creek	None	+33	Unincorporated Areas of Gates County.
	Approximately 0.9 mile upstream of the confluence with Goose Creek.	None	+40	
Gum Branch	Approximately 500 feet upstream of the confluence with Jady Branch.	None	+11	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of Taylor Mill Road (State Road 1118).	None	+24	
Hackley Swamp	At the confluence with Cole Creek and Buckland Mill Branch.	None	+23	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of Gates School Road (State Road 1202).	None	+39	
Hackley Swamp Tributary 1	At the confluence with Hackley Swamp	None	+26	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of Sarem Road (State Road 1219).	None	+33	
Harrell Swamp	At the confluence with Bennetts Creek and Raynor Swamp.	+26	+19	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of the confluence of Duke Swamp.	+26	+25	
Jady Branch	Just upstream of NC Highway 137	None	+19	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of Hill Lane Road (State Road 1122).	None	+24	
Jernigan Branch	At the confluence with Somerton Creek	None	+12	Unincorporated Areas of Gates County.
	Approximately 3.1 miles upstream of Gatlington Road (State Road 1302).	None	+31	
Licking Branch	At the confluence with Jady Branch	None	+19	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of Hill Lane Road (State Road 1122).	None	+26	
Middle Swamp	At the confluence with Duke Swamp	None	+27	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of Black Mingle Road (State Road 1312).	None	+32	
Mill Branch	At the confluence with Buckland Mill Branch	None	+35	Unincorporated Areas of Gates County.
	Approximately 500 feet upstream of Paige Riddick Road (State Road 1330).	None	+47	
Mill Swamp	Approximately 2.0 miles downstream of U.S. Highway 13.	None	+28	Unincorporated Areas of Gates County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 400 feet upstream of Drum Hill Road (State Road 1308).	None	+48	
Mill Swamp Tributary 1	At the North Carolina/Virginia boundary	None	+25	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of North Carolina/Virginia boundary.	None	+39	
Mill Swamp Tributary 2	At the confluence with Mill Swamp	None	+40	Unincorporated Areas of Gates County.
	Approximately 1.3 miles upstream of the confluence with Mill Swamp Tributary 2A.	None	+49	
Mill Swamp Tributary 2A	At the confluence with Mill Swamp Tributary 2	None	+40	Unincorporated Areas of Gates County.
	Approximately 800 feet downstream of Paige Riddick Road (State Road 1330).	None	+42	
Mill Swamp Tributary 3	At the confluence with Mill Swamp	None	+41	Unincorporated Areas of Gates County.
	Approximately 950 feet upstream of Mallory Buck Road (State Road 1309).	None	+52	
Perquimans River	Approximately 0.7 mile downstream of the Gates/Perquimans County boundary.	None	+11	Unincorporated Areas of Gates County.
	Approximately 390 feet upstream of the Gates/Perquimans County boundary.	None	+11	
Raynor Swamp	At the confluence with Bennetts Creek and Harrell Swamp.	+26	+19	Unincorporated Areas of Gates County.
	Approximately 0.4 mile upstream of the confluence with Raynor Swamp Tributary 6.	None	+39	
Raynor Swamp Tributary 1	At the confluence with Raynor Swamp	None	+19	Unincorporated Areas of Gates County.
	Approximately 0.6 mile upstream of Silver Spring Lane (State Road 1404).	None	+36	
Raynor Swamp Tributary 2	At the confluence with Raynor Swamp	None	+24	Unincorporated Areas of Gates County.
	Approximately 865 feet upstream of St. Paul Road (State Road 1338).	None	+35	
Raynor Swamp Tributary 2A.	At the confluence with Raynor Swamp Tributary 2	None	+28	Unincorporated Areas of Gates County.
	Approximately 1.1 miles upstream of the confluence with Raynor Swamp Tributary 2.	None	+38	
Raynor Swamp Tributary 3	At the confluence with Raynor Swamp	None	+27	Unincorporated Areas of Gates County.
	Approximately 0.7 mile upstream of Sugar Run Road (State Road 1429).	None	+36	
Raynor Swamp Tributary 4	At the confluence with Raynor Swamp	None	+28	Unincorporated Areas of Gates County.
	Approximately 0.7 mile upstream of the confluence with Raynor Swamp.	None	+31	
Raynor Swamp Tributary 5	At the confluence with Raynor Swamp	None	+31	Unincorporated Areas of Gates County.
	Approximately 1,360 feet upstream of Kees Cross Road (State Road 1427).	None	+35	
Raynor Swamp Tributary 6	At the confluence with Raynor Swamp	None	+37	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of the confluence with Raynor Swamp.	None	+41	
Sarem Creek	At the confluence with Chowan River	None	+7	Unincorporated Areas of Gates County.
	At the confluence with Jady Branch	None	+10	
Somerton Creek	At the confluence with Chowan River	None	+12	Unincorporated Areas of Gates County.
	Approximately 1.8 miles upstream of the confluence of Jernigan Branch.	None	+12	
Taylor Mill Pond	At the confluence with Jady Branch	None	+22	Unincorporated Areas of Gates County.
	Approximately 50 feet downstream of Hill Lane Road (State Road 1122).	None	+22	
Taylor Swamp	At the confluence with Corapeake Swamp	None	+29	Unincorporated Areas of Gates County.
	Approximately 1,130 feet upstream of Brinkley Road (State Road 1307).	None	+39	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
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Taylor Swamp Tributary 1 ..	At the confluence with Taylor Swamp	None	+30	Unincorporated Areas of Gates County.
	Approximately 1.0 mile upstream of the confluence with Taylor Swamp.	None	+34	
Trotman Creek	Approximately 350 feet downstream of Carters Road (State Road 1100).	None	+7	Unincorporated Areas of Gates County.
	Approximately 0.5 mile upstream of Hobbsville Road (State Road 1414).	None	+33	
Trotman Creek Tributary	At the confluence with Trotman Creek	None	+10	Unincorporated Areas of Gates County.
	Approximately 0.4 mile upstream from the confluence with Trotman Creek.	None	+13	
Walton Pond	At the confluence with Trotman Creek	None	+8	Unincorporated Areas of Gates County.
	Approximately 0.8 mile upstream of NC Highway 37	None	+22	

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ADDRESSES

Town of Gatesville

Maps are available for inspection at Gatesville Town Hall, 127 Main Street, Gatesville, NC.

Unincorporated Areas of Gates County

Maps are available for inspection at Gates County Building Inspection Office, 105 New Ferry Road, Gatesville, NC.

Transylvania County, North Carolina, and Incorporated Areas

Horsepasture River	Approximately 200 feet downstream of the Jackson/Transylvania County boundary.	None	+2968	Unincorporated Areas of Transylvania County.
	At the Jackson/Transylvania County boundary	None	+2989	

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Unincorporated Areas of Transylvania County

Maps are available for inspection at Transylvania County Inspections Department, 98 East Morgan Street, Brevard, NC.

Oconee County, South Carolina, and Incorporated Areas

Barton Creek	At the confluence with Tugaloo River	None	+670	Unincorporated Areas of Oconee County.
	Approximately 1,540 feet upstream of Barton Creek Road.	None	+708	
Beaverdam Creek	At Oconee/Pickens County boundary	None	+672	Unincorporated Areas of Oconee County.
	Approximately 5,500 feet upstream of State Highway 59.	None	+808	
Beaverdam Creek Tributary 3.	At the confluence with Beaverdam Creek	None	+677	Unincorporated Areas of Oconee County.
	Approximately 5,500 feet upstream of the confluence with Beaverdam Creek.	None	+700	
Cane Creek	Approximately 1,100 feet upstream of the confluence with Little Cane Creek.	None	+804	Unincorporated Areas of Oconee County, Town of Walhalla, Town of West Union.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 2,460 feet upstream of Rocky Knoll Road.	None	+966	
Choestoea Creek	At the confluence with Tugaloo River	None	+666	Unincorporated Areas of Oconee County.
	Approximately 4,370 feet upstream of the confluence with Choestoea Creek Tributary 9.	None	+744	
Cleveland Creek	At the confluence with Beaverdam Creek	None	+676	Unincorporated Areas of Oconee County.
	Approximately 1.5 miles upstream of Feltman Road	None	+740	
Colonels Fork Creek	At the confluence with Conecross Creek	None	+772	Unincorporated Areas of Oconee County.
	Approximately 1,670 feet upstream of Bennett Road	None	+813	
Conecross Creek	Approximately 2.2 miles downstream of Tokeena Road	None	+678	Unincorporated Areas of Oconee County, City of Seneca.
	Approximately 2,630 feet upstream of Conecross Farm Road.	None	+708	
Conecross Tributary 1	Approximately 2.7 miles upstream of the Oconee/Anderson County boundary.	None	+665	Unincorporated Areas of Oconee County.
	Approximately 3.4 miles upstream of the Oconee/Anderson County boundary.	None	+708	
Conecross Tributary 2	At the confluence with Conecross Creek	None	+784	Unincorporated Areas of Oconee County, Town of Walhalla.
	Approximately 2,420 feet upstream of Bear Swamp Road.	None	+833	
Conecross Tributary 3	At the confluence with Conecross Creek	None	+756	Unincorporated Areas of Oconee County.
	Approximately 850 feet upstream of State Highway 11	None	+780	
Cornhouse Creek	Approximately 1,610 feet downstream of Stamp Creek Road.	None	+813	Unincorporated Areas of Oconee County.
	Approximately 2,195 feet upstream of Stamp Creek Road.	None	+819	
Fair Play Creek	At the confluence with Tugaloo River	None	+665	Unincorporated Areas of Oconee County.
	Approximately 3,200 feet downstream of Rock Creek Road.	None	+665	
Fall Creek	Approximately 1,830 feet downstream of Cliffs South Parkway.	None	+795	Unincorporated Areas of Oconee County.
	Approximately 935 feet downstream of Cliffs Cart Path Drive.	None	+858	
Hartwell Lake Tributary 1	Approximately 360 feet downstream of Martin Creek Road.	None	+665	Unincorporated Areas of Oconee County.
	Approximately 1,850 feet upstream of Martin Creek Road.	None	+672	
Hartwell Lake Tributary 2	At the confluence with Hartwell Lake	None	+665	Unincorporated Areas of Oconee County.
	Approximately 140 feet downstream of Sunshine Road	None	+827	
Hartwell Lake Tributary 3	At the confluence with Hartwell Lake	None	+665	Unincorporated Areas of Oconee County.
	Approximately 185 feet upstream of Rays Road	None	+859	
Keowee River 2 Tributary 7	Approximately 1,295 feet downstream of Maple Avenue.	None	+810	City of Seneca.
	Approximately 2,090 feet upstream of Maple Avenue	None	+877	
Keowee River 2 Tributary 7, Tributary 1.	At the confluence with Lake Keowee	None	+800	City of Seneca.
	Approximately 2,310 feet upstream of Seneca Drive	None	+827	
Keowee River 2 Tributary 7, Tributary 1.	At the confluence with Lake Keowee	None	+800	City of Seneca.
Tributary 1	Approximately 65 feet upstream of North Pine Square	None	+870	
Keowee River 2 Tributary 7, Tributary 1.	At the confluence with Lake Keowee	None	+800	Unincorporated Areas of Oconee County.
Tributary 2	Approximately 1.5 mile upstream of the confluence with Lake Keowee.	None	+824	
Little Beaverdam Creek	At the Oconee/Pickens County boundary	None	+692	Unincorporated Areas of Oconee County.
	Approximately 260 feet upstream of Donald Road	None	+771	
Little Beaverdam Creek Tributary 1.	At the Oconee/Pickens County boundary	None	+695	Unincorporated Areas of Oconee County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
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	Approximately 3,550 feet upstream of the Oconee/Pickens County boundary.	None	+708	
Little Cane Creek	Approximately 5,000 feet downstream of Pickens Highway.	None	+805	Unincorporated Areas of Oconee County.
	Approximately 1,240 feet upstream of Pickens Highway.	None	+902	
Little Choestoea Creek	Approximately 1 mile dowstream of Little Choestoea Road.	None	+670	Unincorporated Areas of Oconee County.
	Approximately 1,570 feet downstream of Mount Pleasant Road.	None	+706	
Martin Creek	Approximately 4,920 feet downstream of the confluence with Martin Creek Tributary 3.	None	+666	City of Seneca, Unincorporated Areas of Oconee County.
	Approximately 2,560 feet upstream of South 6th Square.	None	+891	
Martin Creek Tributary 1	At the confluence with Martin Creek	None	+822	City of Seneca, Unincorporated Areas of Oconee County.
	Approximately 140 feet upstream of South 6th Square	None	+906	
Martin Creek Tributary 2	At the confluence with Martin Creek	None	+717	Unincorporated Areas of Oconee County.
	Approximately 1,125 feet upstream of Owens Road	None	+875	
Martin Creek Tributary 3	At the confluence with Martin Creek	None	+715	Unincorporated Areas of Oconee County.
	Approximately 2,690 feet upstream of Martin Creek Tributary 6.	None	+832	
Martin Creek Tributary 6	At the confluence with Martin Creek Tributary 3	None	+740	Unincorporated Areas of Oconee County.
	Approximately 2,320 feet upstream of Blue Sky Boulevard.	None	+864	
McKinneys Creek	At the confluence with Keowee River	None	+800	Unincorporated Areas of Oconee County.
	Approximately 1.9 mile upstream from the confluence of Keowee River.	None	+809	
Mud Creek	At the confluence with Beaverdam Creek	None	+695	Unincorporated Areas of Oconee County.
	Approximately 1.2 miles upstream of Cedar Lane Road	None	+846	
Mud Creek Tributary 1	At the confluence of Mud Creek	None	+695	Unincorporated Areas of Oconee County.
	Approximately 630 feet upstream of Cody Road	None	+728	
Perkins Creek Tributary 1	At the confluence of Perkins Creek Tributary	None	+833	City of Seneca, Unincorporated Areas of Oconee County.
Tributary 1	Approximately 1,715 feet upstream of Rolling Hills Drive.	None	+889	
Perkins Creek Tributary 1	At the confluence of Perkins Creek Tributary 1	None	+786	Unincorporated Areas of Oconee County, City of Seneca.
Tributary 2	Approximately 2,130 feet upstream of Dalton Road	None	+847	
Perkins Creek Tributary 1, Tributary 2.	At the confluence with Perkins Creek Tributary 1, Tributary 2.	None	+812	City of Seneca.
Tributary 1	Just downstream of W. South 6th Square	None	+897	
Perkins Creek Tributary 1, Tributary 3.	At the confluence of Perkins Creek Tributary 1	None	+801	City of Seneca, Unincorporated Areas of Oconee County.
	Approximately 450 feet upstream of Emaerald Road	None	+878	
Richland Creek	At the confluence of Conecross Creek	None	+758	Unincorporated Areas of Oconee County.
	Approximately 3,400 feet upstream of Bountyland Road.	None	+824	
Seneca Creek	Just upstream of Davis Creek Road	None	+665	Unincorporated Areas of Oconee County, City of Seneca.
	Approximately 3,100 feet upstream of Meadowbrook Drive.	None	+878	
Seneca Creek Tributary 1	At the confluence of Seneca Creek	None	+667	Unincorporated Areas of Oconee County.
	Approximately 1.1 miles upstream of the confluence of Seneca Creek.	None	+745	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Shiloh Branch	Approximately 980 feet upstream of Seneca Creek Road.	None	+665	Unincorporated Areas of Oconee County.
	Approximately 1.5 miles upstream of Seneca Creek Road.	None	+687	
Snow Creek	Approximately 690 feet downstream of Sitton Shoals Road.	None	+665	Unincorporated Areas of Oconee County.
	Approximately 290 feet upstream of Snow Creek Road	None	+789	
Speeds Creek	At the confluence of Lake Hartwell	None	+665	Unincorporated Areas of Oconee County.
	Approximately 3,630 feet upstream of Wells Highway ..	None	+831	
Tugaloo River	Approximately 2.4 miles downstream of Interstate 85 ...	None	+665	Unincorporated Areas of Oconee County.
	Approximately 3,550 feet upstream of the confluence of Battle Creek.	None	+896	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Seneca
Maps are available for inspection at Seneca City Administrator, 221 East North First Street, Seneca, SC 29679.

Town of Walhalla
Maps are available for inspection at City of Walhalla City Administrator, 206 North Church Street, Walhalla, SC 29679.

Town of West Union
Maps are available for inspection at 1442 West Main Street, West Union, SC 29696.

Unincorporated Areas of Oconee County
Maps are available for inspection at Oconee County County Administrator, 415 South Pine Street, Walhalla, SC 29691.

Madison County, Tennessee, and Incorporated Areas

Cane Creek	At Hicks Avenue	+356	+355	City of Jackson, Unincorporated Areas of Madison County.
	Approximately 1.5 miles upstream of Riverside Drive ...	+437	+434	
Dyer Creek	Approximately 1,000 feet upstream of the confluence with Middle Fork of Forked Deer River.	+357	+356	City of Jackson, Unincorporated Areas of Madison County.
	Just downstream of North Royal Street	+444	+441	
Middle Fork of Forked Deer River.	Approximately 2,160 feet upstream of the confluence of Moize Creek.	None	+351	City of Three Way.
	Approximately 650 feet downstream of U.S. Route 45	None	+356	
Turkey Creek	Approximately 3,070 feet above the confluence of Middle Fork of Forked Deer River.	None	+356	City of Three Way.
	Approximately 3,470 feet upstream of Mason Road	None	+367	

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+ North American Vertical Datum.
# Depth in feet above ground.

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Jackson
Maps are available for inspection at Planning Department, 111 East Main Street, Suite 201, Jackson, TN 38301.

City of Three Way
Maps are available for inspection at Office of the Mayor, 136 Green Road, Three Way, TN 38343.

Unincorporated Areas of Madison County
Maps are available for inspection at Madison County Commissioner's Office Building, 100 East Main Street, Jackson, TN 38301.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: July 14, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–16811 Filed 7–22–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–7795]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before October 21, 2008.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–7795, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151, or (e-mail) *bill.blanton@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151 or (e-mail) *bill.blanton@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

Administrative Procedure Act Statement. This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground	
				Existing	Modified
Unincorporated Areas of Siskiyou County, California					
California	Unincorporated Areas of Siskiyou County.	Panther Creek (shallow flooding).	Approximately 1,200 feet southwest of the intersection of Squaw Valley Road and Highway 89. Flood extends west towards Modoc Avenue.	None	#2
California	Unincorporated Areas of Siskiyou County.	Panther Creek Overflow (shallow flooding).	Immediately south of and adjacent to Highway 89, starting near the intersection of Squaw Valley Road and Highway 89. Flooding encompasses portions of both sides of Squaw Valley Road for a southerly distance of approximately 3,000 feet.	None	#2

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Siskiyou County
Maps are available for inspection at the Siskiyou County Public Works Department, 305 Butte Street, Yreka, CA.

Ashland County, Ohio

Ohio	Ashland County	Lang Creek	Approximately 200 feet upstream of eastern corporate limit of the City of Ashland.	None	+983
			At Orange Street	None	+990
Ohio	Ashland County	Town Run	Approximately 410 feet downstream of Brookside Golf Course Drive.	None	+1126
			At Brookside Golf Course Drive	None	+1144

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+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Ashland County
Maps are available for inspection at 110 Cottage Street, Ashland, OH 44805.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Alameda County, California, and Incorporated Areas				
Castro Valley Creek (Line I)	Approximately 800 feet downstream of North 4th Street.	+124	+125	Unincorporated Areas of Alameda County, City of Hayward.
	Upstream side of Pine Street	+167	+168	
Castro Valley Creek (Line J).	At the confluence with Castrol Valley Creek	+165	+164	Unincorporated Areas of Alameda County.
	Approximately 70 feet upstream of Seaview Avenue.	None	+332	
Chabot Creek (Line G)	Approximately 0.5 mile downstream of Grove Way	None	+110	Unincorporated Areas of Alameda County, City of Hayward.
	Approximately 700 feet upstream of Wisteria Street	+173	+172	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Shallow Flooding	Between Pine Street and Castro Valley Boulevard	+168	+169	Unincorporated Areas of Alameda County.

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+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Hayward
Maps are available for inspection at City of Hayward Engineering and Transportation Division, 777 B Street, Hayward, CA.

Unincorporated Areas of Alameda County
Maps are available for inspection at Alameda County Public Works Agency, 399 Elmhurst Street, Hayward, CA.

Buncombe County, North Carolina, and Incorporated Areas

Beaverdam Creek (into French Broad River) Tributary 1.	Approximately 900 feet upstream of Hillcrest Road	None	+2107	Town of Woodfin, Unincorporated Areas of Buncombe County.
	Approximately 340 feet upstream of Baird Cove Road (State Road 2088).	None	+2348	
Sweeten Creek Tributary 4	At the confluence with Sweeten Creek	+2082	+2078	Unincorporated Areas of Buncombe County, City of Asheville.
	Approximately 1,150 feet upstream of West Chapel Road.	+2150	+2139	

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+ North American Vertical Datum.
# Depth in feet above ground.
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Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Asheville
Maps are available for inspection at Asheville City Hall, 70 Court Plaza, Asheville, NC.

Town of Woodfin
Maps are available for inspection at Woodfin Town Hall, 90 Elk Mountain Road, Woodfin, NC.

Unincorporated Areas of Buncombe County
Maps are available for inspection at Buncombe County Planning Department, 46 Valley Street, Asheville, NC.

Surry County, North Carolina, and Incorporated Areas

Ararat River	At the confluence with Yadkin River	None	+803	Unincorporated Areas of Surry County, City of Mount Airy.
	Approximately 1,500 feet upstream of Riverside Drive (State Road 104).	None	+1194	
Ararat River Tributary 1	At the confluence with Ararat River	None	+810	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of the confluence with Ararat River.	None	+870	
Ararat River Tributary 2	At the confluence with Ararat River	None	+813	Unincorporated Areas of Surry County.
	Approximately 0.4 mile upstream of John Scott Road (State Road 2079).	None	+842	
Ararat River Tributary 3	At the confluence with Ararat River	None	+818	Unincorporated Areas of Surry County.
	Approximately 0.6 mile upstream of Reeves Road (State Road 2083).	None	+856	
Ararat River Tributary 4	At the confluence with Ararat River	None	+818	Unincorporated Areas of Surry County.
	Approximately 1.2 miles upstream of Pilot Church Road (State Road 2057).	None	+913	

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Ararat River Tributary 5	At the confluence with Ararat River	None	+825	Unincorporated Areas of Surry County.
	Approximately 0.6 mile upstream of the confluence with Ararat River.	None	+900	
Ararat River Tributary 6	At the confluence with Ararat River	None	+841	Unincorporated Areas of Surry County.
	Approximately 20 feet upstream of Nichols Road (State Road 2105).	None	+872	
Ararat River Tributary 6A	At the confluence with Ararat River Tributary 6	None	+862	Unincorporated Areas of Surry County.
	Approximately 530 feet upstream of the confluence with Ararat River Tributary 6.	None	+869	
Ararat River Tributary 7	At the confluence with Ararat River	None	+867	Unincorporated Areas of Surry County.
	Approximately 0.4 mile upstream of the confluence with Ararat River.	None	+884	
Ararat River Tributary 8	At the downstream side of Riverside Drive	+1036	+1037	City of Mount Airy.
	Approximately 130 feet downstream of Springs Road.	None	+1135	
Ararat River Tributary 9	At the confluence with Ararat River	+1088	+1089	Unincorporated Areas of Surry County.
	Approximately 0.9 mile upstream of the confluence with Ararat River.	None	+1135	
Bear Creek	At the confluence with Fisher River	None	+886	Unincorporated Areas of Surry County.
	Approximately 1.5 miles upstream of the confluence with Fisher River.	None	+940	
Beaver Creek	At the confluence with Fisher River	None	+955	Unincorporated Areas of Surry County.
	Approximately 1.0 mile upstream of Simpson Mill Road (State Road 2200).	None	+1046	
Beaverdam Creek	At the confluence with Little Fisher River	None	+1078	Unincorporated Areas of Surry County.
	Approximately 1.2 miles upstream of the confluence with Hatchers Creek.	None	+1130	
Benson Creek	At the upstream side of Sparger Road	None	+1068	Unincorporated Areas of Surry County.
	Approximately 0.9 mile upstream of Sparger Road	None	+1109	
Brendle Branch	At the confluence with Camp Creek	None	+944	Unincorporated Areas of Surry County.
	Approximately 0.9 mile of Interstate 77	None	+1000	
Brushy Fork	Approximately 700 feet upstream of the confluence with Pauls Creek.	+1119	+1118	Unincorporated Areas of Surry County, City of Mount Airy.
	Approximately 0.5 mile upstream of White Pines Country Club Road (State Road 1627).	None	+1175	
Brushy Fork Tributary 1	At the confluence with Brushy Fork	None	+1130	Unincorporated Areas of Surry County.
	Approximately 0.6 mile upstream of the confluence with Brushy Fork.	None	+1171	
Bull Creek	At the confluence with Ararat River	None	+875	Unincorporated Areas of Surry County.
	Approximately 1.0 mile upstream of Ararat Road (State Road 2019).	None	+1024	
Butler Creek	At the confluence with Mitchell River	None	+1248	Unincorporated Areas of Surry County.
	Approximately 210 feet upstream of Luffman Road	None	+1279	
Caddle Creek	At the confluence with Ararat River	None	+940	Unincorporated Areas of Surry County.
	Approximately 0.6 mile upstream of Siloam Road (State Road 1003).	None	+1018	
Camp Branch	At the confluence with Fisher River	None	+1251	Unincorporated Areas of Surry County.
	Approximately 200 feet upstream of West Pine Street.	None	+1274	
Camp Creek	At the confluence with Mitchell River	None	+914	Unincorporated Areas of Surry County, Town of Elkin.
	Approximately 0.8 mile upstream of I–77 Highway	None	+978	
Candiff Creek	At the confluence with Yadkin River	None	+811	Unincorporated Areas of Surry County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 1,690 feet upstream of the confluence with Candiff Creek Tributary 2.	None	+894	
Candiff Creek Tributary 1 ...	At the confluence with Candiff Creek	None	+811	Unincorporated Areas of Surry County.
	Approximately 1,260 feet upstream of River Siloam Road (State Road 2230).	None	+857	
Candiff Creek Tributary 2 ...	At the confluence with Candiff Creek	None	+875	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of the confluence with Candiff Creek.	None	+923	
Champ Creek	Approximately 450 feet upstream of Slate Road	None	+1040	City of Mount Airy.
	Approximately 700 feet upstream of McBride Road	None	+1065	
Chinquapin Creek	At the confluence with Toms Creek	None	+957	Unincorporated Areas of Surry County, Town of Pilot Mountain.
	Approximately 0.8 mile upstream of Old Westfield Road (State Road 1809).	None	+982	
Cody Creek	At the confluence with Fisher River	None	+904	Unincorporated Areas of Surry County.
	Approximately 1.7 miles upstream of NC 268 Highway.	None	+1021	
Cooks Creek	At the confluence with Fisher River	None	+1025	Unincorporated Areas of Surry County.
	Approximately 0.4 mile upstream of White Buffalo Road (State Road 1353).	None	+1084	
Davenport Creek	At the confluence with Fisher River	None	+850	Unincorporated Areas of Surry County.
	Approximately 0.6 mile upstream of the confluence with Fisher River.	None	+898	
Dunagan Creek	At the confluence with Fisher River	None	+873	Unincorporated Areas of Surry County.
	Approximately 0.4 mile upstream of Buck Fork Road (State Road 2233).	None	+901	
Dutchmans Creek	At the confluence with Yadkin River	None	+896	Town of Elkin.
	Approximately 0.6 mile upstream of the confluence with Yadkin River.	None	+898	
East Double Creek	At the confluence with Yadkin River	None	+822	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of Rome Snow Road (State Road 2229).	None	+941	
East Double Creek Tributary 1.	At the confluence with East Double Creek	None	+874	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of the confluence with East Double Creek.	None	+939	
Elkin Creek	Approximately 50 feet upstream of Dam	+902	+901	Town of Elkin.
	Approximately 0.8 mile upstream of CC Camp Road.	None	+945	
Faulkner Creek	Approximately 0.5 mile upstream of the confluence with Ararat River.	None	+1007	Unincorporated Areas of Surry County, City of Mount Airy.
	Approximately 1.1 miles upstream of Quaker Road (State Road 1742).	None	+1194	
Faulkner Creek Tributary 1	At the confluence with Faulkner Creek	None	+1035	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of the confluence with Faulkner Creek.	None	+1059	
Fisher River	At the confluence with Yadkin River	None	+847	Unincorporated Areas of Surry County, Town of Dobson.
	Approximately 1.1 miles upstream of Lumber Plant Road (State Road 1600).	None	+2009	
Fisher River Tributary 1	At the confluence with Fisher River	None	+915	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of Rockford Road	None	+974	
Fisher River Tributary 1A ...	At the confluence with Fisher River Tributary 1	None	+940	Unincorporated Areas of Surry County.
	Approximately 0.8 mile upstream of the confluence with Fisher River Tributary 1.	None	+1098	
Fisher River Tributary 2	At the confluence with Fisher River	None	+964	Unincorporated Areas of Surry County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
	Approximately 1,420 feet downstream of Turkey Ford Church Road.	None	+1028	
Fisher River Tributary 3	At the confluence with Fisher River	None	+978	Unincorporated Areas of Surry County.
	Approximately 0.8 mile upstream of the confluence with Fisher River.	None	+1010	
Fisher River Tributary 4	At the confluence with Fisher River	None	+1026	Unincorporated Areas of Surry County.
	Approximately 0.8 mile upstream of the confluence with Fisher River.	None	+1109	
Fisher River Tributary 5	At the confluence with Fisher River	None	+1074	Unincorporated Areas of Surry County, Town of Dobson.
	Approximately 820 feet upstream of Tobe Hudson Road (State Road 1342).	None	+1086	
Flat Branch	At the confluence with South Fork Mitchell River	None	+1108	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of the confluence with South Fork Mitchell River.	None	+1156	
Flat Shoal Creek	At the confluence with Ararat River	None	+900	Unincorporated Areas of Surry County.
	Approximately 490 feet upstream of Simmons Road (State Road 1827).	None	+1071	
Flat Shoal Creek Tributary 1.	At the confluence with Flat Shoal Creek	None	+990	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of Willow Shade Lane.	None	+1033	
Grassy Creek	At the confluence with Yadkin River	None	+762	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of Pilot Knob Park Road (State Road 2053).	None	+1027	
Grassy Creek Tributary 1 ...	At the confluence with Grassy Creek	None	+792	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of the confluence with Grassy Creek.	None	+824	
Grassy Creek Tributary 2 ...	At the confluence with Grassy Creek	None	+797	Unincorporated Areas of Surry County.
	Approximately 1.2 miles upstream of the confluence with Grassy Creek.	None	+905	
Grassy Creek Tributary 3 ...	At the confluence with Grassy Creek	None	+804	Unincorporated Areas of Surry County.
	Approximately 1.0 mile upstream of the confluence with Grassy Creek.	None	+892	
Grassy Creek Tributary 4 ...	At the confluence with Grassy Creek	None	+834	Unincorporated Areas of Surry County.
	Approximately 1,390 feet downstream of Shadow Creek Trail.	None	+879	
Grassy Creek Tributary 5 ...	At the confluence with Grassy Creek	None	+845	Unincorporated Areas of Surry County.
	Approximately 0.9 mile upstream of Pinnacle Hotel Road.	None	+1008	
Grassy Creek Tributary 5A	At the confluence with Grassy Creek Tributary 5	None	+858	Unincorporated Areas of Surry County.
	Approximately 240 feet downstream of Pinnacle Hotel Road (State Road 2061).	None	+986	
Grassy Creek Tributary 5B	At the confluence with Grassy Creek Tributary 5	None	+886	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of the confluence with Grassy Creek Tributary 5.	None	+934	
Grassy Creek Tributary 6 ...	At the confluence with Grassy Creek	None	+858	Unincorporated Areas of Surry County.
	Approximately 380 feet upstream of Mt. Zion Road (State Road 2064).	None	+931	
Grassy Creek Tributary 7 ...	At the confluence with Grassy Creek	None	+884	Unincorporated Areas of Surry County.
	Approximately 1.1 miles upstream of Santa Fe Trail	None	+1042	
Grassy Creek Tributary 8 ...	At the confluence with Grassy Creek	None	+905	Unincorporated Areas of Surry County.
	Approximately 1,500 feet upstream of the confluence with Grassy Creek.	None	+915	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Grassy Creek Tributary 9 ...	At the confluence with Grassy Creek	None	+977	Unincorporated Areas of Surry County.
	Approximately 1,500 feet upstream of the confluence with Grassy Creek.	None	+997	
Grassy Creek West	At the Surry/Wilkes County boundary	None	+987	Town of Elkin.
	Approximately 1,300 feet upstream of the Surry/Wilkes County boundary.	None	+1002	
Hagan Creek	At the confluence with Yadkin River	None	+807	Unincorporated Areas of Surry County.
	Approximately 1.9 miles upstream of Miller Gap Road.	None	+1068	
Hagan Creek Tributary 1	At the confluence with Hagan Creek	None	+848	Unincorporated Areas of Surry County.
	Approximately 380 feet upstream of Solitude Trail ..	None	+891	
Hagan Creek Tributary 2	At the confluence with Hagan Creek	None	+939	Unincorporated Areas of Surry County.
	Approximately 0.6 mile upstream of the confluence with Hagan Creek.	None	+973	
Hagan Creek Tributary 3	At the confluence with Hagan Creek	None	+972	Unincorporated Areas of Surry County.
	Approximately 0.9 mile upstream of the confluence with Hagan Creek.	None	+1024	
Hatchers Creek	At the confluence with Beaverdam Creek	None	+1101	Unincorporated Areas of Surry County.
	Approximately 230 feet upstream of Beulah Road ..	None	+1122	
Heatherly Creek	At the confluence with Toms Creek	None	+918	Unincorporated Areas of Surry County, Town of Pilot Mountain.
	Approximately 980 feet upstream of Nelson Street	None	+1130	
Horne Creek	At the confluence with Yadkin River	None	+764	Unincorporated Areas of Surry County.
	Approximately 1,780 feet upstream of the confluence of Horne Creek Tributary 1.	None	+833	
Horne Creek Tributary 1	At the confluence with Horne Creek	None	+818	Unincorporated Areas of Surry County.
	Approximately 0.4 mile upstream of the confluence of Horne Creek Tributary 1A.	None	+861	
Horne Creek Tributary 1A ..	At the confluence with Horne Creek Tributary 1	None	+831	Unincorporated Areas of Surry County.
	Approximately 1,400 feet upstream of the confluence with Horne Creek Tributary 1.	None	+855	
Jackson Creek	At the confluence with Cooks Creek	None	+1025	Unincorporated Areas of Surry County.
	Approximately 1.1 miles upstream of the confluence with Cooks Creek.	None	+1062	
Jackson Creek Tributary 1	At the confluence with Jackson Creek	None	+1028	Unincorporated Areas of Surry County.
	Approximately 200 feet downstream of Rockford Street.	None	+1055	
Jackson Creek Tributary 2	At the confluence with Jackson Creek	None	+1030	Unincorporated Areas of Surry County.
	Approximately 100 feet downstream of Smith Road (State Road 1354).	None	+1067	
Johnson Creek	Approximately 100 feet upstream of Riverside Drive	None	+1062	Unincorporated Areas of Surry County, City of Mount Airy.
	Approximately 1.5 miles upstream of Riverside Drive.	None	+1097	
King Creek	At the confluence with Cody Creek	None	+925	Unincorporated Areas of Surry County.
	Approximately 1,710 feet upstream of U.S. 601 Highway.	None	+1002	
Little Beaver Creek	At the confluence with Fisher River	None	+925	Unincorporated Areas of Surry County.
	Approximately 50 feet downstream of Copeland School Road (State Road 2209).	None	+1046	
Little Creek	At the confluence with Snow Creek	None	+973	Unincorporated Areas of Surry County.
	Approximately 810 feet upstream of Melton Road (State Road 1127).	None	+1244	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Little Fisher River	At the confluence with Fisher River	None	+1027	Unincorporated Areas of Surry County.
	Approximately 2.2 miles upstream of Richards Road (State Road 1614).	None	+1209	
Little Fisher River Tributary 1.	At the confluence with Little Fisher River	None	+1041	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of the confluence with Little Fisher River.	None	+1077	
Little Fisher River Tributary 2.	At the confluence with Little Fisher River	None	+1103	Unincorporated Areas of Surry County.
	Approximately 800 feet downstream of Dynasty Lane.	None	+1151	
Little Fisher River Tributary 3.	At the confluence with Little Fisher River	None	+1112	Unincorporated Areas of Surry County.
	Approximately 550 feet upstream of NC Highway 89.	None	+1143	
Little Fisher River Tributary 3A.	At the confluence with Little Fisher River Tributary 3.	None	+1113	Unincorporated Areas of Surry County.
	Approximately 0.6 mile upstream of the confluence with Little Fisher River Tributary 3.	None	+1135	
Little Yadkin River	At the confluence with Yadkin River	None	+758	Unincorporated Areas of Surry County.
	Approximately 1.0 mile upstream of the confluence with Yadkin River.	None	+767	
Long Creek	At the confluence with Mitchell River	None	+1402	Unincorporated Areas of Surry County.
	Approximately 1.1 miles upstream of the confluence with Mitchell River.	None	+1575	
Lovills Creek	Approximately 0.5 mile upstream of the confluence with Ararat River.	+992	+991	Unincorporated Areas of Surry County, City of Mount Airy.
	Approximately 1.5 miles upstream of Greenhill Road.	None	+1106	
Mill Creek	At the confluence with Mitchell River	None	+1099	Unincorporated Areas of Surry County.
	Approximately 650 feet upstream of Ed Nixon Road (State Road 1321).	None	+1158	
Mitchell River	At the confluence with Yadkin River	None	+875	Unincorporated Areas of Surry County.
	Approximately 2.2 miles upstream of Haystack Road (State Road 1328).	None	+1480	
Moores Fork	Approximately 1,300 feet upstream of the confluence with Stewarts Creek.	+1077	+1078	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of Race Track Road (State Road 1620).	None	+1099	
Moores Fork Tributary 1	At the confluence with Moores Fork	None	+1085	Unincorporated Areas of Surry County.
	Approximately 1,570 feet upstream of NC Highway 89.	None	+1110	
North Fork Mitchell River	At the confluence with Mitchell River	None	+1232	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of the confluence with Mitchell River.	None	+1248	
North Prong South Fork Mitchell River.	At the confluence with South Fork Mitchell River	None	+1212	Unincorporated Areas of Surry County.
	Approximately 0.4 mile upstream of Rams Ridge Trail.	None	+1407	
Pheasant Creek	At the confluence with Fisher River	None	+860	Unincorporated Areas of Surry County.
	Approximately 1,980 feet upstream of Chandler Road (State Road 2238).	None	+910	
Pilot Creek	At the confluence with Ararat River	None	+858	Unincorporated Areas of Surry County, Town of Pilot Mountain.
	Approximately 750 feet upstream of Leonard Road	None	+1083	
Pilot Creek Tributary 1	At the confluence with Pilot Creek	None	+875	Unincorporated Areas of Surry County.
	Approximately 0.4 mile upstream of Jim McKinney Road (State Road 2047).	None	+914	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Pilot Creek Tributary 2	At the confluence with Pilot Creek	None	+880	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of the confluence with Pilot Creek.	None	+912	
Pilot Creek Tributary 3	At the confluence with Pilot Creek	None	+936	Unincorporated Areas of Surry County, Town of Pilot Mountain.
	Approximately 1,130 feet upstream of the confluence with Pilot Creek Tributary 3A.	None	+999	
Pilot Creek Tributary 3A	At the confluence with Pilot Creek Tributary 3	None	+978	Town of Pilot Mountain.
	Approximately 1,240 feet upstream of the confluence with Pilot Creek Tributary 3.	None	+1011	
Pilot Creek Tributary 4	At the confluence with Pilot Creek	None	+1005	Unincorporated Areas of Surry County.
	Approximately 1,870 feet upstream of the confluence with Pilot Creek.	None	+1056	
Pine Branch	At the confluence with Mitchell River	None	+1110	Unincorporated Areas of Surry County.
	Approximately 1,930 feet upstream of Millstone Trail.	None	+1134	
Potters Creek	At the confluence with Mitchell River	None	+1166	Unincorporated Areas of Surry County.
	Approximately 0.9 mile upstream of the confluence with Mitchell River.	None	+1220	
Ring Creek	At the confluence with Little Fisher River	None	+1132	Unincorporated Areas of Surry County.
	Approximately 1.0 mile upstream of Richards Road	None	+1166	
Rutledge Creek	At the confluence with Ararat River	None	+972	Unincorporated Areas of Surry County.
	Approximately 2.1 miles upstream of Reeves Mill Road (State Road 1774).	None	+1218	
Rutledge Creek Tributary 1	At the confluence with Rutledge Creek	None	+1077	Unincorporated Areas of Surry County.
	Approximately 1,220 feet upstream of Reeves Mill Road (State Road 1776).	None	+1107	
Seed Cane Creek	Approximately 100 feet upstream of the confluence with Ararat River.	None	+994	City of Mount Airy.
	Approximately 730 feet upstream of Kirkman Road	None	+1060	
Skin Cabin Creek	At the confluence with Ararat River	None	+834	Unincorporated Areas of Surry County.
	Approximately 0.7 mile upstream of Stanford Church Road (State Road 2086).	None	+950	
Snow Creek	At the confluence with Mitchell River	None	+880	Unincorporated Areas of Surry County.
	Approximately 0.9 mile upstream of I–77 Highway	None	+1260	
Snow Creek Tributary	At the confluence with Snow Creek	None	+919	Unincorporated Areas of Surry County.
	Approximately 1,540 feet downstream of Stanley Mill Road (State Road 1111).	None	+953	
South Fork Mitchell River ...	At the confluence with Mitchell River	None	+984	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of Silver Creek Way.	None	+1623	
South Fork Mitchell River Tributary 1.	At the confluence with South Fork Mitchell River	None	+1068	Unincorporated Areas of Surry County.
	Approximately 80 feet downstream of Pat Nixon Road (State Road 1306).	None	+1091	
South Fork Mitchell River Tributary 2.	At the confluence with South Fork Mitchell River	None	+1159	Unincorporated Areas of Surry County.
	Approximately 250 feet downstream of Abe Mayes Road (State Road 1319).	None	+1205	
South Fork Mitchell River Tributary 2A.	At the confluence with South Fork Mitchell River Tributary 2.	None	+1173	Unincorporated Areas of Surry County.
	Approximately 1,740 feet upstream of the confluence with South Fork Mitchell River Tributary 2.	None	+1206	
South Fork Mitchell River Tributary 2B.	At the confluence with South Fork Mitchell River Tributary 2.	None	+1178	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of Oscar Calloway Road.	None	+1210	

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Stewarts Creek	Approximately 0.5 mile upstream of Interstate 77	None	+1226	Unincorporated Areas of Surry County.
	At the NC/VA State boundary	None	+1309	
Stewarts Creek Tributary 1	At the confluence with Stewarts Creek	None	+1011	Unincorporated Areas of Surry County, City of Mount Airy.
	Approximately 0.5 mile upstream of West Old McKinney Road (State Road 1429).	None	+1078	
Stewarts Creek Tributary 2	At the confluence with Stewarts Creek	None	+1058	Unincorporated Areas of Surry County.
	Approximately 230 feet upstream of Oak Ridge Drive (State Road 1504).	None	+1248	
Stewarts Creek Tributary 2A.	At the confluence with Stewarts Creek Tributary 2	None	+1117	Unincorporated Areas of Surry County.
	Approximately 710 feet upstream of Melrose Trail	None	+1252	
Stoney Creek	At the confluence with Ararat River	None	+916	Unincorporated Areas of Surry County.
	Approximately 170 feet upstream of Mills Road	None	+1208	
Toms Creek	At the confluence with Ararat River	None	+879	Unincorporated Areas of Surry County, Town of Pilot Mountain.
	Approximately 0.5 mile upstream of Matthews Road (State Road 1830).	None	+964	
Toms Creek Tributary 1	At the confluence with Toms Creek	None	+909	Unincorporated Areas of Surry County.
	Approximately 0.8 mile upstream of the confluence of Toms Creek Tributary 1A.	None	+954	
Toms Creek Tributary 1A	At the confluence with Toms Creek Tributary 1	None	+919	Unincorporated Areas of Surry County.
	Approximately 1,430 feet upstream of the confluence with Toms Creek Tributary 1.	None	+934	
Toms Creek Tributary 2	At the confluence with Toms Creek	None	+931	Town of Pilot Mountain.
	Approximately 210 feet upstream of Foothill Farm Lane.	None	+951	
Turkey Creek	At the confluence with Yadkin River	None	+890	Town of Elkin.
	Approximately 0.6 mile upstream of NC 268 Highway.	None	+927	
West Double Creek	At the confluence with East Double Creek	None	+822	Unincorporated Areas of Surry County.
	Approximately 1.5 miles upstream of Old Rockford Road (State Road 2230).	None	+903	
West Double Creek Tributary 1.	At the confluence with West Double Creek	None	+834	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of Dobson Spring Trail.	None	+899	
West Double Creek Tributary 1A.	At the confluence with West Double Creek Tributary 1.	None	+877	Unincorporated Areas of Surry County.
	Approximately 0.5 mile upstream of the confluence with West Double Creek Tributary 1.	None	+907	
Whittier Creek	At the confluence with Bull Creek	None	+931	Unincorporated Areas of Surry County.
	Approximately 1.8 miles upstream of the confluence with Bull Creek.	None	+987	
Wood Branch	At the confluence with South Fork Mitchell River	None	+1117	Unincorporated Areas of Surry County.
	Approximately 0.8 mile upstream of the confluence with South Fork Mitchell River.	None	+1158	
Yadkin River	At the Surry/Yadkin/Forsyth County boundary	None	+758	Unincorporated Areas of Surry County, Town of Elkin.
	Approximately 1.2 miles upstream of the confluence with Elkin Creek.	+904	+903	
Yadkin River Tributary 12	At the confluence with Yadkin River	None	+866	Unincorporated Areas of Surry County.
	Approximately 0.8 mile upstream of Railroad	None	+881	
Yadkin River Tributary 13	At the confluence with Yadkin River	None	+887	Unincorporated Areas of Surry County.
	Approximately 1,260 feet upstream of NC 268 Highway.	None	+895	
Yadkin River Tributary 16	At the confluence with Yadkin River	None	+824	Unincorporated Areas of Surry County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
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Yadkin River Tributary 18 ...	Approximately 0.5 mile upstream of Railroad	None	+850	Unincorporated Areas of Surry County.
	At the confluence with Yadkin River	None	+831	
	Approximately 10 feet upstream of Golden Eagle Trail.	None	+885	
Yadkin River Tributary 37 ...	At the confluence with Yadkin River	None	+800	Unincorporated Areas of Surry County.
	Approximately 1,680 feet upstream of John Mickles Road (State Road 2075).	None	+852	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Mount Airy
Maps are available for inspection at Mount Airy City Hall, 300 South Main Street, Mount Airy, NC.

Town of Dobson
Maps are available for inspection at Dobson Town Hall, 307 North Main Street, Dobson, NC.

Town of Elkin
Maps are available for inspection at Elkin Town Hall, 226 North Bridge Street, Elkin, NC.

Town of Pilot Mountain
Maps are available for inspection at Pilot Mountain Town Hall, 124 West Main Street, Pilot Mountain, NC.

Unincorporated Areas of Surry County
Maps are available for inspection at Surry County Building Codes Administration, 118 Hamby Road, Suite 144, Dobson, NC.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: July 14, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–16812 Filed 7–22–08; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 172, and 173

[Docket No. PHMSA–2008–0182]

Petitions for Interim Standards for Rail Tank Cars Used to Transport Toxic-by-Inhalation Hazard Materials

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of petitions for rulemaking.

SUMMARY: This document solicits comments on the merits of two petitions for rulemaking filed with PHMSA seeking promulgation of an interim standard for railroad tank cars used to transport toxic by inhalation hazard (TIH) materials. One petition was filed jointly by the American Chemistry Council, American Short Line and Regional Railroad Association, Association of American Railroads, Chlorine Institute, and Railway Supply Institute, and a second petition was filed by The Fertilizer Institute.

DATES: Comments must be received by August 22, 2008.

ADDRESSES: You may submit comments identified by the docket number PHMSA–08–0182 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: All submissions must include the agency name and docket number for this notice at the beginning of the comment. Note that all comments received will be posted without change to the docket management system, including any personal information provided.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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).

FOR FURTHER INFORMATION CONTACT: William Schoonover, (202) 493–6229, Office of Safety Assurance and Compliance, Federal Railroad Administration; Lucinda Henriksen, (202) 493–1345, Office of Chief Counsel,

Federal Railroad Administration; or Michael Stevens, (202) 366–8553, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration.

SUPPLEMENTARY INFORMATION:

A. Background

By notice of proposed rulemaking (NPRM) published April 1, 2008, under Docket No. FRA–2006–25169 (HM–246) (73 FR 17818–65), the U.S. Department of Transportation (DOT) through the Pipeline and Hazardous Materials Safety Administration (PHMSA) and Federal Railroad Administration (FRA), proposed regulations to improve the crashworthiness protection of tank cars carrying toxic-by-inhalation hazard (TIH) materials. In addition to certain operational restrictions, the NPRM proposed enhanced TIH tank car performance standards for head and shell impacts.

In petitions dated July 3, 2008 and July 7, 2008, the American Chemistry Council, American Short Line and Regional Railroad Association, Association of American Railroads, Chlorine Institute, and Railway Supply Institute (collectively, the Petitioner Group) and The Fertilizer Institute (TFI), respectively, have requested that the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) be amended to authorize interim standards for tank cars transporting TIIH materials. Both petitions suggest that the interim standards would be effective until such time as PHMSA and FRA adopt enhanced performance standards for TIH tank cars. The Petitioner Group and TFI petitions were received and acknowledged by PHMSA and assigned petition numbers P–1525 and P–1524, respectively, under Docket No. PHMSA–2008–0182.

This document is issued to obtain comments on the merits of the petitions and to assist PHMSA in making a decision of whether to proceed to issue a rule responding to the petitions under the ongoing HM–246 tank car rulemaking. A complete copy of each petition is available in the docket for this proceeding. For convenience, the text of the petitions and accompanying tables are reprinted below.

B. Petition P–1525 Is Quoted As Follows:

The American Chemistry Council (ACC), the American Short Line and Regional Railroad Association (ASLRRA), the Association of American Railroads (AAR), the Chlorine Institute (CI), and the Railway Supply Institute (RSI) (Petitioners) submit this petition to PHMSA to implement a new interim standard for tank cars used to transport TIH materials. ACC is a trade association representing 130 member companies that account for approximately 85 percent of the capacity for the production of basic industrial chemicals in the United States. ASLRRA is an organization which represents over 450 member railroads in the class II and class III railroad industry. AAR is a trade association whose membership includes freight railroads that operate 72 percent of the line-haul mileage, employ 92 percent of the workers, and account for 95 percent of the freight revenue of all railroads in the United States. CI is a 220 member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers accounting for more than 98 percent of the total chlorine production capacity of the U.S., Canada, and Mexico. RSI is the international trade association of suppliers to the nation's freight railroads and rail passenger systems. The RSI Tank Car Committee members include the major North American tank car builders and leasing companies, who own and lease approximately 70% of the North American tank car fleet.

I. Need For A New Interim Tank Car Standard

On April 1, 2008, PHMSA published a notice of proposed rulemaking containing a new tank car standard for TIH materials.[1] Part of that proposal was that two years after issuance of a final rule, newly constructed tank cars transporting TIH materials would be required to comply with the new standard. Five years after issuance of a final rule, only tank cars constructed of normalized steel could be used to transport TIH materials. Eight years after issuance of a final rule, all tank cars transporting TIH materials would need to be in compliance with the new standard.

The proposed standard represents an innovative approach to tank car design. The purpose of the proposed standard is to significantly reduce the probability of release should a tank car be involved in an accident. However, the tank car industry cannot meet the standard today; the NPRM is truly technology-forcing.

Petitioners strongly support PHMSA's initiative to create a new tank car standard that would appreciably improve the safety of TIH transportation. Petitioners are committed to doing their part to minimize the occurrence of accidents and to reduce the possibility of a release should an accident occur. PHMSA's effort to dramatically reduce the probability of a release of TIH materials through enhanced tank car standards is a goal shared by Petitioners.

However, the publication of the NPRM has had two unintended effects. One, publication has delayed the phasing out of aging tank cars. Two, publication has threatened to cause a shortage of cars needed for the transportation of TIH materials.

Since under the NPRM tank cars not meeting the final standard would have to be removed from TIH service within eight years of issuance of the final rule, the NPRM has had the unintended consequence of providing an incentive for shippers and lessors to stop purchasing new tank cars for TIH transportation, pending the issuance of the final rule. From the perspective of both shippers who own tank cars used to transport their TIH materials and lessors who lease tank cars used to transport TIH materials, investments in new tank cars cannot be justified unless those cars will be used for at least two decades. Note that under DOT regulations, tank cars have a service life of fifty years.[2]

Absent the NPRM, many older tank cars likely would be replaced by tank cars exceeding minimum DOT specifications. Unfortunately, because of the economic disincentive to purchase new tank cars for TIH transportation, those tank cars are not being replaced.

During the meetings on the NPRM held in May, shipper after shipper stated that the NPRM threatened to cause a shortage of tank cars for TIH transportation. The shippers stated that lessors are reluctant to renew leases partly due to a concern that the NPRM's call for a dramatically new tank car design will increase their liability should a tank car meeting minimum PHMSA standards be involved in an accident.

II. An Interim Standard Based On Probability Of Release

Petitioners have a solution to these problems. Petitioners propose that PHMSA promulgate an interim standard that provides for the construction of tank cars that significantly reduce the probability of release of product using existing technology and grandfather those cars for twenty-five years following issuance of the final rule. Such a standard is in the public interest for the following reasons:

- By authorizing the use of tank cars that exceed PHMSA minimum standards for a period of time exceeding the eight-year phase-out period suggested in the NPRM, the disincentive to replace minimum specification cars will be reduced.
- To the extent shippers and lessors replace older cars with cars less likely to release TIH in the event of an accident, safety will be significantly enhanced. Similarly, by reducing the disincentive to replace older cars with cars less likely to release TIH in the event of an accident, PHMSA's goal of replacing older cars will be realized sooner.
- By limiting the grandfather period to twenty-five years, instead of the normal fifty year useful life provided by DOT regulations, PHMSA would prevent creating an incentive to replace cars prematurely prior to the effective date of the final TIH standard to avoid, perhaps, the greater costs involved in constructing cars meeting the final standard.
- PHMSA will avoid the unintended consequence of creating a shortage of cars for the transportation of TIH materials.
- An interim standard providing for a significant reduction in the probability of release is consistent with PHMSA's objective of promulgating a new tank car standard representing a significant improvement over the existing minimum specifications. At the

[1] Docket No. FRA–2006–25169, 73 Fed. Reg. 17818.

[2] 49 CFR 215.203.

same time, such an interim standard would reduce the commercial and liability concerns of lessors that are contributing to a reluctance to enter into new leases for TIH tank cars.

III. The Research Underlying Conditional Probability of Release

Petitioners' proposed interim standard is based on research conducted by the University of Illinois at Urbana-Champaign (UIUC) and the RSI–AAR Railroad Tank Car Safety Research and Test Project (Tank Car Project). UIUC set out to analyze the "conditional probability of release" (CPR) of product should a tank car be involved in an accident.[3]

UIUC's work is based on a report assessing lading loss probabilities published by the Tank Car Project.[4] The lading loss report is based on 6,752 cars damaged in accidents. Consequently we can demonstrate with confidence through the CPR method a significant safety improvement.

UIUC calculated the CPR for tank cars used to transport chlorine and anhydrous ammonia, the 105A500W and 112J340W tank cars, respectively.[5] UIUC then compared the CPR for the chlorine and anhydrous ammonia cars with CPRs for enhanced cars. The enhanced cars had thicker heads and shells and improved top fittings protection. In the case of chlorine, the thicker heads and shells were based on the 105J600W specification. For anhydrous ammonia, the thicker heads and shells were based on the 112J500W specification. Because the enhanced cars are existing DOT specification tank cars, the tank car database again served as the basis for the CPR calculation for the head and shell improvements.

The top fittings protection was based on a new top fittings design. The design was intended to survive potential forces exerted on the top fittings in a rollover accident. More specifically, the top fittings were designed to survive a rollover with a 9 mph linear velocity.

IV. Using CPR as the Basis for Improved Performance

UIUC's research points the way to a performance improvement which is PHMSA's ultimate objective in its rulemaking proceeding on TIH tank car standards. In the case of both chlorine and anhydrous ammonia, the CPR improvement as calculated by UIUC is significant. For example, chlorine calculations show an improvement of 63 percent, a reduction from 5 to 2 percent. For anhydrous ammonia, the improvement shown is 71 percent, a reduction from 8 to 2 percent.

Consequently, Petitioners propose an interim tank car design with the following features:

- A design standard achieving CPR improvement from the head and shell through the use of higher DOT class tank cars than currently required by DOT regulations (See the table attached hereto as Exhibit 1);
- An alternative performance standard requiring CPR improvement equivalent or better in the head and shell as compared to the design standard; and
- A top fittings protection performance standard.

The design standard would require that in lieu of 105*300W or 112*340W tank cars, a 105J500W or 112J500W car, respectively, would be required, with a minimum head and shell thickness of 13/16" and a full height ½" thick or equivalent head shield. A minimum head and shell thickness would be included to prevent a shipper from using a peculiar tank car that, for example, contains shell protection but does not contain sufficient head protection.

Similarly, in lieu of a 105*500W car, a 105J600W car would be required, with a minimum head and shell thickness of 15/16" and a full height ½" thick or equivalent head shield. For those commodities currently shipped in 105J600W cars, the minimum thickness would also apply, but no upgrading of the DOT class tank car would be required since the 600-pound car is the highest DOT class tank car.

The top fittings protection standard would require a design that could survive a rollover with a 9 mph linear velocity, the criterion used in the UIUC study. Note that AAR's Tank Car Committee has already approved two designs meeting this standard. In addition, AAR understands the Chlorine Institute is developing its own top fittings standard that will meet the 9 mph criterion and DOT regulations. In order to achieve this performance, a stronger top fittings protection system must be permitted in lieu of the bolted-on protective housing now mandated in the regulations. Welded attachment has proven to be an effective method and should be allowed.

For the alternative performance standard, Petitioners propose that DOT use a formula requiring improvements to the head and shell that are at least as good, from a CPR perspective, as the designs standard. Petitioners propose the following formula:

1 – (CPR of tank car – CPR of minimum specification tank car) ≥ tank improvement factor for the commodity.

The tank improvement factor is a factor that achieves a CPR improvement from the head and shell at least as good as the design specifications. The table in Exhibit 1 shows the tank improvement factors for TIH materials commonly transported by rail. As the table indicates, the tank improvement factor for a specific commodity is based on a particular head and shell thickness. The head and shell thicknesses were derived from the formula in 49 CFR 179.100–6, taking into account design criteria such as commodity density, gross rail load, outage, and car length and diameter.

Petitioners also suggest that DOT permit use of an alternative methodology to demonstrate improvement equivalent to the tank improvement factor calculation. Of course, use of such an alternative would be subject to DOT approval.

Finally, in the case of chlorine, ACC and CI have taken the performance criteria one step further. ACC and CI worked with UIUC to calculate an alternative design that would achieve the desired CPR improvement, 45 percent for head and shell improvements, 63 percent including top fittings.

- The chlorine design has a 0.777 inch head, a 0.777 inch shell, and a 0.375 inch jacket with head shield of 0.625 inch.[6]
- This specific alternative design utilizes jacket material which is steel with minimum tensile strength of 70 ksi and minimum elongation in 2 inches of 21%.

The calculations show that the CPR target can be met in more than one way. With this calculation having been made for chlorine, Petitioners also propose that this alternative specification specifically be included in the interim standard.

V. Proposed Regulatory Language

[Petitioners propose specific amendments to 49 CFR parts 171, 172, and 173. The proposed amendments would address definitions, entries in the Hazardous Materials Table, and tank car authorizations for TIH materials. The complete petition may be reviewed by accessing the docket identified at the beginning of this document.]

TABLE I

Commodity name	DOT minimum specification	Tank improvement factor (TIF)	Conditional probability of release
Acetone Cyanohydrin, Stabilized	105J500W	0.67	0.0855
Acrolein	105J600W	0.80	0.0419

[3] While there have been questions raised as to the extent to which safety is enhanced by top fittings modifications in the UIUC report, there is not doubt that the proposed interim tank car would reduce the CPR by a substantial amount and provide for improved accident survivability.

[4] Railroad Tank Car Safety Research and Test Project, "Safety Performance of Tank Cars in Accidents: Probabilities of Lading Loss" (RA–05–02 January 2006).

[5] Saat and Barkan, "Risk Analysis of Rail Transport of Chlorine & Ammonia on U.S. Railroad Mainlines" (Feb. 27, 2006).

[6] UIUC's CPR calculations assume that an equivalent level of safety performance can be obtained by thickening the head shield and jacket to compensate for equivalent reductions in thickness in the tank head and shell, respectively. Further technical review of the head shield is currently taking place to determine the appropriate thickness. This thickness will be between 0.625 inch and 0.859 inch.

TABLE I—Continued

Commodity name	DOT minimum specification	Tank improvement factor (TIF)	Conditional probability of release
Allyl Alcohol	105J500W	0.67	0.0855
Ammonia, Anhydrous	105J500W	0.69	0.0855
Bromine	105J500W	0.68	0.1028
Chlorine	105J600W	0.69	0.0509
Chloropicrin	105J500W	0.56	0.0855
Chlorosulfonic Acid	105J500W	0.56	0.0855
Dimethyl Sulfate	105J500W	0.57	0.0855
Dinitrogen Tetroxide	105J500W	0.57	0.0855
Ethyl Chloroformate	105J500W	0.57	0.0855
Ethylene Oxide	105J500W	0.67	0.0855
Hexachlorocyclopentadiene	105J500W	0.68	0.1028
Hydrogen Chloride, Refrig. Liquid	105J600W		0.0284
Hydrogen Cyanide, Stabilized	105J600W	0.80	0.0419
Hydrogen Fluoride, Anhydrous	105J500W	0.63	0.0809
Hydrogen Sulfide	105J600W		0.0299
Methyl Bromide	105J500W	0.56	0.0855
Methyl Mercaptan	105J500W	0.67	0.0855
Nitrosyl Chloride	105J500W	0.57	0.0855
Phosphorus Trichloride	105J500W	0.57	0.0855
Sulfur Dioxide	105J500W	0.57	0.0855
Sulfur Trioxide, Stabilized	105J500W	0.56	0.0855
Sulfuric Acid, Fuming	105J500W	0.51	0.0802
Titanium Tetrachloride	105J500W	0.56	0.0855

EXHIBIT 1

Commodity name	Baseline DOT tank (DOT min. or accepted DOT STD)				DOT specification tank car used to calculate TIF				Tank improvement factor (TIF)
	Current DOT specification	Head shields types	Head thickness (in.)	Shell thickness (in.)	Proposed DOT specification meeting TIF	Head shields type	Head thickness (in.)	Shell thickness (in.)	
Acetone Cyanohydrin, Stabilized	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8951	0.8951	0.67
Acrolein	105J500W	No	0.8950	0.8950	105J600W	Full-Height	1.2429	1.2429	0.80
Allyl Alcohol	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8951	0.8951	0.67
Ammonia, Anhydrous	105J300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	1.0300	0.89	0.69
Bromine	105A300W	No	0.5625	0.5625	105J500W	Full-Height	0.8125	0.8125	0.68
Chlorine	105J500W	No	0.7870	0.7870	105J600W	Full-Height	1.1360	0.9810	0.69
Chloropicrin	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8125	0.8125	0.56
Chlorosulfonic Acid	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8125	0.8125	0.56
Dimethyl Sulfate	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8179	0.8179	0.57
Dinitrogen Tetroxide	105J300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8179	0.81798	0.57
Ethyl Chloroformate	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8179	0.8179	0.57
Ethylene Oxide	105J300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8951	0.8951	0.67
Hexachlorocyclo-pentadiene	105S300W	No	0.5625	0.5625	105J500W	Full-Height	0.8125	0.8125	0.68
Hydrogen Chloride, Refrig. Liquid	105J600W	Full-Height			105J600W	Full-Height			
Hydrogen Cyanide, Stabilized	105A500W	No	0.8950	0.8950	105J600W	Full-Height	1.2429	1.2429	0.80
Hydrogen Flouride, Anhydrous	112A340W	No	0.7040	0.7040	105J500W	Full-Height	0.8951	0.8951	0.63
Hydrogen Sulfide	105J600W	No			105J600W	Full-Height			
Methyl Bromide	105J300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8125	0.8125	0.56
Methyl Mercaptan	105J300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8951	0.8951	0.67
Nitrosyl Chloride	105J300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8179	0.8179	0.57
Phosphorus Trichloride	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8179	0.8179	0.57
Sulfur Dioxide	105J300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8179	0.8179	0.57
Sulfur Trioxide, Stabilized	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8125	0.8125	0.56
Sulfuric Acid, Fuming	105S300W	Full-Height	0.5980	0.5980	105J500W	Full-Height	0.8125	0.8125	0.51
Titanium Tetrachloride	105S300W	Full-Height	0.5625	0.5625	105J500W	Full-Height	0.8125	0.8125	0.56

C. Petition P–1524 Is Quoted as Follows:

The Fertilizer Institute (TFI) is the national trade association representing fertilizer producers, importers, wholesalers and retailers. TFI's mission is to promote and protect the fertilizer industry. Fertilizer nutrients provide the "food" plants need to grow, ensure there is an adequate supply of nutritious food and animal feed, and a bountiful supply of fiber and biofuels to help meet the nation's energy needs. Without fertilizer in general, and in particular ammonia, our nation's food and energy supply would be adversely affected and the world would be without forty percent of today's harvest.

TFI and its anhydrous ammonia shipper members support DOT's efforts for enhanced safety of tank cars, and the anhydrous ammonia industry is committed to doing its part to minimize the occurrence of accidents and to reduce the probability of a release should an accident occur. We have been active participants in the Department of Transportation's (DOT) efforts prior to the April 1 issuance of the notice of proposed rulemaking for enhanced safety standards for tank cars carrying toxic-by-inhalation materials. TFI members ship approximately 52,000 carloads of anhydrous ammonia each year and own or lease over 4,000 tank cars.

Since the issuance of the proposal, and after testimony given during public hearings held in May, it has become evident that there is much confusion and concern not only by

shippers of anhydrous ammonia but from car manufacturers as well. The timeline for compliance, the lack of focus by the Volpe Center on an ammonia concept car, and the action by the Association of American Railroads (AAR) to put into effect CPC 1187, are examples of the concerns raised. Our specific concerns were detailed in comments submitted to the docket on June 2. In our comments we point out that car builders and leasing companies have not been willing to renew current leases due to this confusion. As a result, an unintentional consequence of the proposal will create a serious shortage of cars needed in the near future for anhydrous ammonia. Unless this situation is addressed, it could result in a switch to truck or business interruptions.

TFI has reviewed the petition for an interim standard for tank cars used to transport toxic-by-inhalation (TIH) materials submitted by the American Chemistry Council, American Short Line and Regional Railroad Association, Association of American Railroads, The Chlorine Institute and the Railway Supply Institute.

TFI supports an interim standard for tank cars and many aspects of the petition filed by the above associations. However, since attempts to include stipulations for an interim anhydrous ammonia tank car could not be agreed to by some of the associations above, TFI submits this petition for an interim tank car standard for anhydrous ammonia to DOT for consideration.

The Current Anhydrous Ammonia Tank Car

The ammonia industry has specific reasons for requesting an accommodation for the current 112J340W car:

- Making an accommodation will also allow more time for infrastructure upgrades to handle the eventual 286,000 pound car. Without an appropriate phase-in schedule, there could be serious business interruptions in the marketplace or a switch to truck transportation.
- The 112J340W cars in ammonia service are on average only 10–12 years old. Without an extended life, there will be reluctance for these car companies to remain in the ammonia market. Some leasing companies have already indicated that they will not renew leases upon expiration of the current lease agreements for the 112J340W ammonia tank cars due, in part, to uncertainties surrounding this NPRM. This could cause a shortage of ammonia cars available for lease and force ammonia shippers to find alternate sources of transportation.
- The tank cars involved in the Minot, N.D. accident were 105J300W non-normalized cars with half head shields welded to the jacket, tank and head thickness of .5625, and equipped with F double shelf couplers. The typical 112J340W car, the current ammonia car, built since 1989 has improved TC–128B normalized steel specifications that include in excess of .608 heads and shells that proved themselves in the Minot derailment. In response to the Minot derailment, ammonia shippers voluntarily modernized their fleet of ammonia tank cars, swapping out non-normalized steel cars (pre-1989 built) for normalized steel cars (post-1989 built). Ammonia shippers have already spent considerable effort to change out their fleet from the pre-1989 built car to the current 112J340W. These shippers had the understanding that this effort would be considered with the NPRM.

Interim Standard for Tank Cars in Anhydrous Ammonia Service

TFI's petition requests that DOT consider the following for tank cars in anhydrous ammonia service as an interim standard:

- Require the retirement of all ammonia pre-1989 non-normalized steel cars by Dec. 31, 2010;
- Authorize the use of 112J340W ammonia cars built prior to 2001 until Dec. 31, 2021;
- Authorize the use of 112J340W ammonia cars built after 2001 for a life of 20 years; and
- Authorize the use of an 112J400 pound car enhanced with a thicker jacket for ammonia service beginning Jan. 1, 2009, with a 25 year service life from the date of the final ruling.

Summary

In conclusion, the TFI suggests that the following timeline concerning the design of anhydrous ammonia cars be considered:

Car type	Date car can be built	Service life
Pre-1989	Not in production	Until December 31, 2010.
340	Until Jan. 1, 2009	Pre-2001 built: To December 31, 2021. Post-2001 built: 20 years from built date.
400/500	Jan. 1, 2009 until DOT final rule	25 years from date of DOT final rule.
DOT	Effective date of final rule	Full life.

Ammonia shippers are voluntarily removing pre-1989 non-normalized steel cars from their fleet and this has come at considerable expense. The current 112J340W car has a full head shield and the ammonia industry has voluntarily implemented a five year, rather than ten year mandated, requalification test schedule.

This overall plan is reasonable, makes sound business sense and accomplishes the smooth transition of the ammonia car fleet. TFI and its ammonia shipper members respectively request approval of our request.

D. Purpose of the Notice

The purpose of this Notice is to solicit comments on the merit of petitions for rulemaking filed by Petitioner Group and TFI. Both petitions request PHMSA to issue interim standards for tank cars used for the transportation of TIH hazard material by railroad tank car. The safety implications of the proposals in the petitions will be given careful consideration as we determine whether regulatory action is needed.

Issued in Washington, DC on July 15, 2008 under authority delegated in 49 CFR part 106.

Theodore L. Willke,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. E8–16535 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 080702817–8838–01]

RIN 0648–AX00

Fisheries in the Western Pacific; Western Pacific Pelagic Fisheries; Control Date; Northern Mariana Islands Pelagic Longline Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking; notification of control date; request for comments.

SUMMARY: NMFS announces that anyone who enters the pelagic longline fishery in the Commonwealth of the Northern Mariana Islands (CNMI) after June 19, 2008 (the "control date"), is not guaranteed future participation in the fishery if the Western Pacific Fishery Management Council (Council) recommends, and NMFS approves, a program that limits entry into the fishery, or other fishery management measures. The Council is concerned about potentially-uncontrolled expansion of the CNMI-based pelagic longline fishery and the potential resultant interactions with and impacts on small-boat pelagic fisheries and localized depletion of pelagic fish stocks.

DATES: Comments must be submitted in writing by September 22, 2008.

ADDRESSES: You may submit comments on this action, identified by 0648–AX00, to either of the following addresses:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov*; or
- Mail: William L. Robinson, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700.

Instructions: All comments received are a part of the public record and will generally be posted to *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the commenter may be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Brett Wiedoff, NMFS PIR, 808–944–2272.

SUPPLEMENTARY INFORMATION: At its 142nd meeting held from June 16–19, 2008, the Council adopted a control date of June 19, 2008, applicable to persons who are contemplating entering the CNMI-based longline fishery for pelagic fishes. The purpose of the control date is to notify fishermen that after June 19, 2008, they may not be guaranteed access to the fishery if the Council recommends, and NMFS approves, establishing a limited entry program or other measures to manage the fishery. The Council has not yet recommended limiting new entry or imposing any other management measures in this fishery.

This control date addresses the Council's concern over the potential for rapid and uncontrolled expansion of the CNMI longline fishery. This concern is based on previous rapid and uncontrolled expansions of the pelagic longline fisheries in Hawaii and American Samoa, and the resulting concerns about localized deletion of resources and impacts on small-boat fisheries. In Hawaii from 1988 to 1990, the longline fleet doubled from 50 to 100 vessels. In American Samoa from 1996 to 1997, the fleet tripled from 7 to 21 vessels. To control these previous rapid expansions, the Council recommended and NMFS implemented limited entry programs in both of these fisheries (in 1993 and 2004, respectively). The Council adopted the June 19, 2008, control date to notify current and potential fishery participants that it may also consider limiting participation in the CNMI-based longline fishery, if necessary.

Two domestic longline vessels began fishing in U.S. EEZ waters around CNMI in 2007, and other longline vessel operators have expressed interest in fishing there. Some of these other operators already hold the necessary general longline permits issued by NMFS allowing them to participate in the open-access CNMI fishery. If a rapid expansion of the fishery were to occur, there is a potential for gear conflicts between the longline fishery and the CNMI small-boat pelagic troll fishery, which harvests many of the same species targeted by longline vessels. A large and uncontrolled longline fishery could cause localized depletion of pelagic fish stocks, which would jeopardize the sustainability of the small trolling fleet. There is also a potential for longline vessels to fish at the CNMI's offshore seamounts. The seamounts are important to the pelagic trolling fleet, and localized depletion of fish stocks at the seamounts would have significant negative impacts on the troll fishery.

The Council established a control date of June 2, 2005, for pelagic longline and purse seine fisheries in the U.S. EEZ of the western Pacific (70 FR 47782, August 15, 2005) in response to concerns about overfishing of bigeye tuna Pacific-wide and yellowfin tuna in the central and western Pacific. The June 19, 2008, control date supersedes the previous control date, as it applies to the CNMI longline fishery.

The Council and NMFS seek public comment about whether or not a control date is needed, whether this is an appropriate control date, and how the control date might be applied to a future management program for the CNMI-based pelagic longline fishery, if such a program is developed by the Council and NMFS.

Control dates are intended to discourage speculative entry into fisheries, as new participants entering the fisheries after the control date are put on notice that they are not guaranteed future participation in the fisheries. Establishment of this control date does not commit the Council or NMFS to any particular management regime or criteria for entry into the CNMI pelagic longline fishery. Fishermen are not guaranteed future participation in the fishery, regardless of their level of participation before or after the control date. The Council may choose a different control date, or it may choose a management regime that does not involve a control date. Other criteria, such as documentation of landings or sales, may be used to determine eligibility for participation in a limited access fishery. The Council or NMFS also may choose to take no further action to control entry or access to the fishery, in which case the control date may be rescinded.

Classification

This advance notice of proposed rulemaking has been determined to be not significant for the purposes of Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 17, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

[FR Doc. E8–16843 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 73, No. 142
Wednesday, July 23, 2008

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 COMMERCE

Internatioal Trade Administration

(A–570–848)

Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: July 23, 2008.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0665 and (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 31, 2007, the Department of Commerce (Department) published a notice of initiation of an administrative review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China (PRC). See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 72 FR 61621 (October 31, 2007). The review was initiated with respect to six companies[1] and covers the period September 1, 2006, through August 31, 2007.

On November 15, 2007, we selected Xuzhou and Hi–King for individual examination in this administrative review. See memorandum to Abdelali Elouaradia entitled "2006–2007 Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China: Respondent Selection Memorandum," dated November 15, 2007. On November 16, 2007, the Department issued the antidumping questionnaire to Xuzhou and Hi–King. The Department also issued either a separate–rate status application or separate–rate status certification to the firms not selected for individual examination (*i.e.*, Anhui, Jingdezhen, Shanghai Now Again, and Xiping Opeck), in which the Department asked these companies to submit their separate–rate information in the event they wished to qualify for separate–rate status for the POR.

On December 12, 2007, Jingdezhen, Shanghai Now Again, and Xiping Opeck submitted letters to the Department, stating that they did not make any sale or entry, directly or through any third parties, of the subject merchandise to the United States during the POR. On January 16, 2008, Anhui stated that it did not have any entries or export sales, directly or indirectly, of subject merchandise to the United States during the POR. Pursuant to 19 CFR 351.213(d)(3), Jingdezhen, Shanghai Now Again, Xiping Opeck, and Anhui requested that the Department rescind its review with respect to these companies.

On January 29, 2008, the Crawfish Processors Alliance, the petitioner, withdrew its request for a review with respect to Anhui. Jingdezhen, and Xuzhou. Further, on February 20, 2008, Xuzhou withdrew its request for a review.

Rescission of Administrative Review in Part

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, 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 or withdraws its request at a later date if the Department determines that it is reasonable to extend the time limit for withdrawing the request. As indicated above, Xuzhou withdrew its request for a review on February 20, 2008, which is after the 90-day deadline. Xuzhou maintained that its request to withdraw its request was made early in the review and, with the exception of the petitioner's request for a review (which was withdrawn in a timely manner[2]), no other party has requested a review for Xuzhou.

Given the fact that we have not yet committed significant resources to the review of Xuzhou, we find it reasonable to accept Xuzhou's request to withdraw from this review. Specifically, we have not issued supplemental questionnaires regarding Xuzhou's section C and D responses, we have not calculated a preliminary margin for Xuzhou, nor have we verified Xuzhou's data.

As indicated above, the petitioner withdrew its request for a review of Jingdezhen, Xuzhou, and Anhui in a timely manner. Because no party has opposed the request for the withdrawal of the review of Jingdezhen, Xuzhou, or Anhui and for the reasons stated above regarding Xuzhou's withdrawal, the Department is rescinding this review in part with respect to these companies in accordance with 19 CFR 351.213(d)(1).

The Department intends to examine claims made by Shanghai Now Again and Xiping Opeck of no sales or entries of the subject merchandise to the United States during the POR by examining U.S. Customs and Border Protection (CBP) entry data.

Assessment

The Department will instruct CBP to assess antidumping duties on all appropriate entries. For Jingdezhen, Anhui, and Xuzhou, antidumping duties shall be assessed at a rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department will issue liquidation instructions to CBP 15 days after the publication of this notice.

This notice is issued and published in accordance with section 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: July 16, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–16855 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–DS–S

[1] These companies are Anhui Tongxin Aquatic Product & Food Co., Ltd. (Anhui), Jingdezhen Garay Foods Co., Ltd. (Jingdezhen), Shanghai Now Again International Trading Co., Ltd. (Shanghai Now Again), Xiping Opeck Food Co., Ltd. (Xiping Opeck), Xuzhou Jinjiang Foodstuffs Co., Ltd. (Xuzhou), and Yancheng Hi-King Agriculture Developing Co., Ltd. (Hi-King).

[2] The petitioner withdrew its request for a review of Jingdezhen, Xuzhou, and Anhui within 90 days after date of publication of notice of initiation in the **Federal Register**.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ14

Marine Mammals; File No. 10133

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that Zvi Livnat, P.O. Box 1209, Kealakekua, Hawaii 96750 has been issued a permit to conduct commercial/educational photography.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI 96814–4700; phone (808)944–2200; fax (808)973–2941;

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: On March 21, 2008, notice was published in the **Federal Register** (73 FR 15137) that a request for a commercial/educational photography permit to take spinner dolphins (*Stenella longirostris*) had been submitted by the above-named individual. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant is authorized to film human interactions with spinner dolphins in the coastal waters of Hawaii and Maui. The purpose of the filming is to produce a public service announcement to educate residents and tourists of the Hawaiian Islands about the dangers that swim-with programs pose to the species and illustrate proper dolphin watching techniques. Up to 2,710 spinner dolphins could be harassed annually during aerial and vessel-based close approaches for filming, including underwater filming. Up to 230 pantropical spotted dolphins (*Stenella attenuata*), and 50 bottlenose dolphins (*Tursiops truncatus*) could be incidentally harassed or filmed annually. Filming would occur from March to October of each year over a period of 4 years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: July 17, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–16844 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Federal Consistency Appeal by Foothill/Eastern Transportation Corridor Agency

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (Commerce).

ACTION: Notice of Public Hearing.

SUMMARY: This notice is provided to cancel the July 25, 2008 public hearing that was to be held by the National Oceanic and Atmospheric Administration (NOAA) in Irvine, California regarding the appeal filed with the Department of Commerce by the Foothill/Eastern Transportation Corridor Agency (TCA). The public hearing was noticed in the **Federal Register** on July 8, 2008, and is being canceled because the venue that had agreed to serve as the site for the hearing—the Bren Events Center of the University of California, Irvine—has withdrawn its agreement to do so. The public and Federal agency comment period for the TCA Consistency Appeal will remain open July 21, 2008 through August 4, 2008.

DATES: NOAA will not be conducting a public hearing in the TCA Consistency Appeal on July 25, 2008, but the public and Federal agency comment period will remain open from July 21, 2008 to August 4, 2008.

ADDRESSES: Comments on the appeal may be submitted by e-mail to *gcos.comments@noaa.gov* or by mail addressed to Thomas Street at the NOAA Office of the General Counsel for Ocean Services, 1305 East-West Highway, Room 6111, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Thomas Street, Attorney-Advisor, NOAA Office of the General Counsel, 301–713–2967, or Stephanie Campbell, Attorney-Advisor, NOAA Office of the General Counsel, 301–713–2967, or *gcos.inquiries@noaa.gov*.

SUPPLEMENTARY INFORMATION: On February 15, 2008, TCA filed notice of an appeal with the Secretary of Commerce (Secretary), pursuant to the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.*, and implementing regulations found at 15 CFR part 930, subpart H. TCA appealed an objection by the California Coastal Commission (Commission) to TCA's proposed construction of an extension to California State Route 241 in northern San Diego and southern Orange Counties, California.

Under the CZMA, the Secretary may override the Commission's objection if he determines that the project is consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interest of national security. To make the determination that the proposed activity is consistent with the objectives or purposes of the CZMA, the Secretary must find that: (1) The proposed activity furthers the national interest as articulated in sections 302 or 303 of the CZMA, in a significant or substantial manner; (2) the adverse effects of the proposed activity do not outweigh its contribution to the national interest, when those effects are considered separately or cumulatively; and (3) no reasonable alternative is available that would permit the activity to be conducted in a manner consistent with enforceable policies of the state's coastal management program. 15 CFR 930.121.

On March 17, 2008, NOAA published a notice in the **Federal Register** announcing, among other things, that a public hearing might be held concerning this appeal. On July 8, 2008, NOAA published notice in the **Federal Register** describing scheduling and procedural information about the hearing. The hearing was to be held at the Bren Events Center of the University of California, Irvine (Bren Center) on July 25, 2008. The Bren Center was chosen in part because of its capacity. The facility can seat 4,700 people, which is substantially more than the crowd of approximately 3,500 that attended the Commission's hearing on the TCA project earlier this year.

After notice of the hearing was published, the Bren Center was contacted by a number of interested individuals and groups that intend to attend the hearing. Based on these communications, the Bren Center staff estimated over 10,000 people may

attend the public hearing, and determined their facility could not accommodate a crowd of this size, as it would exceed the facility's capacity and security resources. On July 10, the Bren Center staff informed NOAA that they withdrew their agreement to serve as the site for the hearing, forcing NOAA to cancel the July 25 hearing date.

NOAA is currently looking at later dates for a hearing and alternative sites that are consistent with available resources. In the meantime, the public may submit written comments on the appeal from July 21 through August 4, the period established in NOAA's July 8 **Federal Register** notice. Specifically, written comments may be submitted by e-mail to *gcos.comments@noaa.gov* or by mail addressed to Thomas Street, NOAA Office of General Counsel for Ocean Services, 1305 East-West Highway, Room 6111, Silver Spring, MD 20910. Comments must be received by August 4, 2008.

A summary of relevant issues as well as additional background on the appeal appeared in the **Federal Register** notice of March 17, 2008, announcing the appeal, and may be found on the Internet at *http://www.ogc.doc.gov/czma.com.htm*. Questions should be directed to Thomas Street, Attorney-Advisor, NOAA Office of the General Counsel, 301–713–2967, or Stephanie Campbell, Attorney-Advisor, NOAA Office of the General Counsel, 301–713–2967, or *gcos.inquiries@noaa.gov*.

(Federal Domestic Assistance Catalog No. 11.419 Coastal Zone Management Program Assistance.)

Dated: July 18, 2008.

Jeffrey S. Dillen,

Acting Assistant General Counsel for Ocean Services.

[FR Doc. E8–16880 Filed 7–22–08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG64

Small Takes of Marine Mammals Incidental to Specified Activities; Low-Energy Marine Seismic Survey in the Northeastern Pacific Ocean, June–July 2008

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of incidental harassment authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the University of Texas, Institute for Geophysics (UTIG) for the take of marine mammals, by Level B harassment only, incidental to conducting a low-energy marine seismic survey in the northeastern Pacific Ocean during June–July, 2008.

DATES: Effective June 30, 2008, through July 31, 2008.

ADDRESSES: A copy of the IHA and application are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, or by telephoning the contact listed here. A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Ken Hollingshead, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either approve or deny the authorization.

Summary of Request

On March 4, 2008, NMFS received an application from UTIG for the taking, by Level B harassment only, of several species of marine mammals incidental to conducting, with research funding from the National Science Foundation (NSF), a bathymetric and seismic survey program approximately 100 km (62 mi) off the Oregon coast in the northeastern Pacific Ocean during June-July, 2008. The purpose of the research program was outlined in NMFS' notice of the proposed IHA (72 FR 42045, August 1, 2007).

Description of the Activity

The seismic surveys will involve one vessel, the R/V *Thomas G. Thompson* (Thompson), which is scheduled to depart from Seattle, Washington on June 30, 2008 and return on July 19, 2008. The exact dates of the activities may vary by a few days because of weather conditions, scheduling, repositioning, streamer operations and adjustments, Generator-Injector airgun (GI gun) deployment, or the need to repeat some lines if data quality is substandard. The ultra-high resolution 3–dimensional (3–D) seismic surveys around the methane vent systems of Hydrate Ridge will take place off the Oregon coast in the northeastern Pacific Ocean. The overall

area within which the seismic surveys will occur is located between approximately 44° and 45° N. and 124.5° and 126° W. (Figure 1 in UTIG's application). The surveys will occur approximately 100 km (62 mi) offshore from Oregon in water depths between approximately 650 and 1,200 m (2,132 and 3,936 ft), entirely within the Exclusive Economic Zone (EEZ) of the U.S.

The seismic survey will image the subsurface structures that control venting. The vent systems control whether the methane is directly released into the ocean and atmosphere or stored in methane hydrate. Methane hydrate storage has the potential for rapid dissociation and release into the ocean or atmosphere. The subsurface structure that will be imaged will determine the mechanisms involved in methane venting. The results will be applicable to the numerous vent systems that exist on continental margins worldwide. The data will also be used to design observatories that can monitor and assess the methane fluxes and mechanisms of methane release that operate on Hydrate Ridge.

The *Thompson* will deploy two low-energy GI guns as an energy source (with a discharge volume of 40–60 in^3 for each gun or a total of 80–120 in^3), and a P-Cable system. The 12 m (39.5 ft) long P-cable system is supplied by Northampton Oceanographic Center in the U.K. The towed system will consist of at least 12 streamers (and possibly up to 24) spaced approximately 12.5 m (41 ft) apart and each containing 11 hydrophones, all summed to a single channel. The energy to the GI guns is compressed air supplied by a compressor on board the source vessel. As the GI guns are towed along the survey lines, the P-Cable system will receive the returning acoustic signals.

The seismic program will consist of three survey grids: two of the surveys each cover a 15 km^2 area and the third covers a 25 km^2 (see Figure 1 in UTIG's application). The line spacing within the three survey grids will either be 75 m (246 ft) (if 12 streamers are used) or 150 m (492 ft) (if 24 streamers are used). The total line km to be surveyed in the grids at the 75 m spacing is 975 km (605.8 mi), including turns. Water depths at the seismic survey locations range from 650 to 1,200 m (2,132 to 3,936 ft). Most (92 percent) of the survey will take place over intermediate (100–1,000 m) water depths; the remaining 8 percent will be in water deeper than 1,000 m. If time permits, an additional 300 line km will be surveyed along the outside edges of the three grids. The GI guns are expected to operate for a total of approximately 150 hours during the cruise. There will be additional seismic operations associated with equipment testing, start-up, and repeat coverage of any areas where initial data quality is sub-standard.

In addition to the operations of the two GI guns and P-cable system, a Simrad EM300 30 kHz multibeam echosounder, and a Knudsen 12 kHz 320BR sub-bottom profiler will be used during the proposed cruise.

A more detailed description of the authorized action, including vessel and acoustic source specifications, was included in the notice of the proposed IHA (72 FR 42045, August 1, 2007).

Safety Radii

Received sound levels have been modeled by Lamont-Doherty Earth Observatory (L-DEO) for a number of airgun configurations, including one 45–in^3 GI gun, in relation to distance and direction from the airgun(s). The model does not allow for bottom interactions and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from the GI guns where sound levels of 190, 180, and 160 dB re 1 µPa (rms) are predicted to be received in deep (>1000–m, 3,280–ft) water are 8, 23, and 220 m (26.2, 75.5, and 721.8 ft), respectively and 12, 35, and 330 m (39.4, 115, and 1,082.7 ft), respectively for intermediate water depths (100–1000m, 328–3,280 ft). Because the model results are for a 2.5–m (8.2–ft) tow depth, the above distances slightly underestimate the distances for the 45–in3 GI gun towed at 4–m (13–ft) depth.

A general discussion of acoustic thresholds and safety radii, as well as further discussion of the modeling conducted by L-DEO, was included in the notice of the proposed IHA (72 FR 42045, August 1, 2007).

Comments and Responses

A notice of receipt of the UTIG application and proposed IHA was published in the **Federal Register** on May 23, 2008 (73 FR 30076). During the comment period, NMFS received comments from the Marine Mammal Commission (MMC) and the Center for Regulatory Effectiveness (CRE).

MMC Comment: The MMC states that because the applicant is requesting authority to take marine mammals by harassment only, NMFS should require that operations be suspended immediately if a dead or seriously injured marine mammal is found in the vicinity of the operations and the death or injury could have occurred incidental to the seismic survey. The MMC further recommends that any such suspension should remain in place until NMFS has: (1) reviewed the situation and determined that further mortalities or serious injuries are unlikely to occur; or (2) issued regulations authorizing such takes under section 101(a)(5)(A) of the MMPA.

Response: NMFS concurs with MMC's recommendations and has included a requirement to this effect in the IHA.

CRE Comment: The CRE states that it does not oppose the NMFS-issued IHA to UTIG because it does not believe that the proposed seismic activities will harm marine mammals. However, CRE requests that the IHA be consistent with the Council for Regulatory Effectiveness White Paper (CRE White Paper): The NMFS Should Regulate Seismic Under the Marine Mammal Protection Act in a Two-Tier Manner.

Response: NMFS concurs with CRE's that the UTIG's seismic activities will not harm marine mammals provided the described monitoring and mitigation measures are implemented and acknowledges the receipt of the CRE White Paper. The recommendations stated in the document will be reviewed and considered by the agency on the issuance of future regulations.

CRE Comment: The CRE White Paper recommends that the final IHA issued to UTIG for the proposed operations should use line transect analysis to estimate exposures including: (1) the number of line miles (or line kilometers) traversed, (2) estimated radial distance to edge of a safety, impact, or exclusion zone; and (3) the densities of marine mammals present. No models should be used to estimate exposures before the models meet Data Quality Act ("DQA") guidelines; before they meet Council for Regulatory Environmental Modeling ("CREM") guidelines; and before they pass external peer review. No models should be used before they have been demonstrated to be more reliable than the currently approved and used methodology: line transect analysis.

Response: UTIG's application was prepared for UTIG and NSF by LGL Ltd., Environmental Research Associates (LGL). In the application for the proposed seismic operations, LGL notes that it is using the line transect method to estimate marine mammal exposures and determine safety zones, it is not using the Acoustic Integration Model (AIM). AIM was developed and is proprietary to Marine Acoustics, Inc. This is consistent with applications for recent previous NSF-funded research seismic cruises conducted by Scripps Institution of Oceanography (SIO) and Lamont-Doherty Earth Observatory (L-DEO). The use of AIM is proposed for use by NSF in its Draft Programmatic

Environmental Impact Statement (Draft PEIS) for the R/V *Marcus Langseth*. NMFS expects the Draft PEIS will be released for public comment this summer. In that regard, AIM has been independently reviewed and found to be compliant with the Environmental Protection Agency's Council for Regulatory Environmental Modeling (CREM) (see *http://www.nmfs.noaa.gov/pr/pdfs/permits/lfa_aim_review.pdf* for more information on this model).

CRE Comment: The CRE White Paper recommends that the final IHA issued to UTIG for the proposed operations should use average density numbers to estimate marine mammal exposures to seismic.

Response: NMFS agrees that the best science available supports the use of average density estimates whenever possible. However, there may be situations where NMFS needs to use maximum density estimates. For example, if there are seasonal differences in abundance and distribution between dates when the marine mammal surveys were conducted and the dates for seismic data acquisition. Also, NMFS has stated several times in previous IHA authorizations, that the estimates for "exposure" do not mean that all animals will be harassed at the sound pressure level being calculated.

CRE Comment: The CRE White Paper recommends that the final IHA issued to UTIG for the proposed operations should explain that exposure to seismic does not necessarily equate to harassment and a taking under the MMPA. CRE explains that "simple exposure to sound, or brief reactions that do not disrupt behavioral patterns in a potentially significant manner, do not constitute harassment or 'taking'. By potentially significant, CRE means 'in a manner that might have deleterious effects to the well-being of individual marine mammals or their populations." CRE would like this explanation factored into NMFS' use and discussion of Line Transect Analysis. Also, CRE would like the fact that "whales do not sit still and therefore do not get the full dose of sound on every shot" factored into exposure estimates.

Response: When marine mammals are exposed to very strong sound sources underwater, like pulses from seismic airguns, temporary or permanent hearing impairment due to threshold shifts is a possibility. Non-auditory physical effects or injuries may also theoretically occur, such as stress, neurological effects, bubble formation, and other types of organ or tissue damage (Cox *et al.* (2006), Southall *et al.* (2007); both as cited in UTIG's application (2008)). NMFS concurs that momentary behavioral reactions to a sound source such as an echosounder or seismic airgun pulse do not necessarily rise to the level of "take" by behavioral harassment. NMFS has stated several times in previous IHA authorizations, that the estimates for "exposure" do not mean that all animals will be harassed by the sound source. See UTIG's application for more information on estimating "exposures" and "takes" of marine mammals during the seismic operations. No explanation or justification for the statement "whales do not sit still and therefore do not get the full dose of sound on every shot" was provided and it is unclear how CRE expects NMFS to factor it in, therefore, NMFS cannot address this statement at this time.

CRE Comment: The CRE White Paper recommends that the final IHA issued to UTIG for the proposed operations should regulate the 180 dB at 500 m (1,640 ft) unless and until other levels are shown DQA compliant and necessary. These standards have been consistently applied in the Gulf of Mexico (GOM) and elsewhere without harm to marine mammals.

Response: Consistent with CRE's comment, NMFS is using the 180 dB isopleth to estimate take of cetaceans (and the 190 dB isopleth for pinnipeds) by Level A harassment and to determine a trigger for implementing mitigation, in regards to non-explosive sounds.

CRE Comment: The CRE White Paper recommends that the final IHA issued to UTIG for the proposed operations should require passive acoustic monitoring ("PAM") if and when PAM is demonstrated to be accurate and reliable after public comment on the issue.

Response: In regard to the use of PAM, UTIG does not propose to use PAM for this seismic research activity on the *Thompson* as the safety zones for marine mammals are fairly small and easily visible to MMVO's. Still, it remains difficult to locate a marine mammal based solely upon its call and determining whether or not the animals is inside the safety zone. The use of PAM systems may be proposed to be used by an IHA or LOA applicant to assist in the detection and monitoring of vocalizing marine mammals in the study area of the seismic vessel due to distance of safety zones or viewing conditions (i.e., inclement weather and/or sea state conditions, or night-time). However, prior to allowing use of PAM under an IHA, the applicant would be required to validate its effectiveness for detecting those marine mammals expected to be encountered during the activity. Also, NMFS is currently developing guidelines for PAM systems.

CRE Comment: The CRE encourages NMFS to regulate seismics in the GOM and elsewhere through the promulgation of five-year rules. NMFS is urged to follow the Tier II recommendations of the CRE White Paper when developing seismic rules and Tier I recommendations when issuing individual IHAs in the absence of seismic rules.

Response: NMFS is currently preparing an Environmental Impact Statement for the issuance of five-year rules in a Letter of Authorization for seismic activities in the GOM. Also, NMFS will review and consider the recommendations stated in the CRE White Paper

Description of Marine Mammals in the Activity Area

Thirty-two marine mammal species, including 19 odontocete (dolphins and small and large toothed whales) species, seven mysticete (baleen whales) species, five pinniped species, and the sea otter, may occur or have been documented to occur in the marine waters off Oregon and Washington, excluding extralimital sightings or strandings (Table 1 here). Six of the species that may occur in the project area are listed under the U.S. Endangered Species Act (ESA) as Endangered, including sperm, humpback, blue, fin, sei, and North Pacific right whales. In addition, the southern resident killer whale stock is also listed as endangered, but is unlikely to be seen in the offshore waters of Oregon. The threatened northern sea otter is only known to occur in coastal waters and is not expected in coastal waters and is not expected in the project area (the sea otter is under the jurisdiction of the U.S. Fish and Wildlife Service).

Additional information regarding the status and distribution of the marine mammals in the area and how the densities were calculated was included in the notice of the proposed IHA (73 FR 30076, May 23, 2008) and may be found in UTIG's application.

Species	Habitat	Abundance[1]	Avg Density[4]	Max Density[4]	Number of Exposures
Mysticetes					
North Pacific right whale (Eubalaena japonica) *	Inshore, occasionally offshore	N.A.[2]	0	0	0
Humpback whale (Megaptera novaeangliae) *	Mainly nearshore waters and banks	1391	0.69	1.50	1
Minke whale (Balaenoptera acutorostrata)	Pelagic and coastal	1015	0.68	1.1	2
Sei whale (Balaenoptera borealis) *	Primarily offshore, pelagic	56	0.13	0.5	0
Fin whale (Balaenoptera physalus) *	Continental slope, mostly pelagic	3279	0.95	1.3	1
Blue whale (Balaenoptera musculus) *	Pelagic and coastal	1744	0.19	0.4	1
Odontocetes					
Sperm whale (Physeter macrocephalus) *	Usually pelagic and deep seas	1233	1.39	3.4	2
Pygmy sperm whale (Kogia breviceps)	Deep waters off the shelf	247	1.24	2.8	4
Dwarf sperm whale (Kogia sima)	Deep waters off the shelf	N.A.	0	0	0
Cuvier's beaked whale (Ziphius cavirostris)	Pelagic	1884	0	0	0
Baird's beaked whale (Berardius bairdii)	Pelagic	228	1.64	4.1	2
Blainville's beaked whale (Mesoplodon densirostris)	Slope, offshore	1247[3]	0	0	0
Mesoplodon sp (unidentified)	Slope, offshore	1247[3]	0.66	2.9	4
Hubb's beaked whale (Mesoplodon carlhubbsi)	Slope, offshore	1247[3]	0	0	0
Stejneger's beaked whale (Mesoplodon stejnegeri)	Slope, offshore	1247[3]	0	0	0
Offshore bottlenose dolphin (Tursiops truncatus)	Offshore, slope	5,065	0.04	0	0
Striped dolphin (Stenella coeruleoalba)	Off continental shelf	13,934	0.04	0.1	0
Short-beaked common dolphin (Delphinus delphis)	Shelf and pelagic, seamounts	449,846	14.14	35	49
Pacific white-sided dolphin (Lagenorhynchus obliquidens)	Offshore, slope	59,274	24.84	33.2	46
Northern right whale dolphin (Lissodelphis borealis)	Slope, offshore waters	20.362	19.39	26.7	37
Risso's dolphin (Grampus griseus)	Shelf, slope, seamounts	16,066	12.91	17.3	24
False killer whale (Pseudorca crassidens)	Pelagic, occasionally inshore	N.A.	0	0	0
Killer whale (Orcinus orca)	Widely distributed	466 (offshore)	1.62	2.7	4
Short-finned pilot whale (Globicephala macrorhynchus)	Mostly pelagic, high-relief topography	304	0	0	0

Species	Habitat	Abundance[1]	Avg Density[4]	Max Density[4]	Number of Exposures
Harbor porpoise (Phocoena phocoena)	Coastal and inland waters	37,745 (OR/WA)	0	0	0
Dall's porpoise (Phocoenoides dalli)	Shelf, slope, offshore	99,517	150.17	250.9	349
Pinnipeds					
Northern fur seal (Callorhinus ursinus)	Pelagic, offshore	721,935[2]	10	100	139
California sea lion (Zalophus californianus californianus)	Coastal, shelf	237,000-244,000	N.A.	N.A.	0
Steller sea lion (Eumetopias jubatus) *	Coastal, shelf	47,885(Eastern U.S.)	6	N.A.	1
Harbor seal (Phoca vitulina richardsi)	Coastal	24,732 (OR/WA)	4	N.A.	0
Northern elephant seal (Mirounga ngustirostris)	Coastal, pelagic when migrating	101,000 (CA)	N.A.	N.A.	0

Table 1. Species expected to be encountered (and potentially harassed) and their densities in the survey area during UTIG=s NE Pacific Ocean cruise. The far right column indicates the number of exposures expected under the IHA.
N.A. B Data not available or species status was not assessed.
* Species are listed as threatened or endangered under the Endangered Species Act.
[1] Abundance given for U.S., Eastern North Pacific, or California/Oregon/Washington Stock, whichever is included in the 2005 U.S. Pacific Marine Mammal Stock Assessments (Carretta *et al.* 2006), unless otherwise stated.
[2] Angliss and Outlaw (2005).
[3] All mesoplodont whales
[4] Density is /1000 km^2

Potential Effects on Marine Mammals

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory physical or physiological effects (Richardson *et al.*, 1995; Gordon *et al.*, 2004). To avoid injury, NMFS has determined that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 µPa (rms). Given the small size of the GI guns (two 40–60 in^3 GI gun) planned for the present project and the required mitigation and monitoring measures, effects are anticipated to be considerably less than would be the case with a large array of airguns. It is very unlikely that there would be any cases of temporary or, especially, permanent hearing impairment or any significant non-auditory physical or physiological effects. Also, behavioral disturbance is expected to be limited to relatively short distances.

The notice of the proposed IHA (73 FR 30076, May 23, 2008) included a discussion of the effects of sounds from airguns on mysticetes, odontocetes, and pinnipeds, including tolerance, masking, behavioral disturbance, hearing impairment, and other non-auditory physical effects. Additional information on the behavioral reactions (or lack thereof) by all types of marine mammals to seismic vessels can be found in Appendix A (e) of UTIG's application.

The notice of the proposed IHA also included a discussion of the potential effects of the multibeam echosounder and sub-bottom profiler. Because of the shape of the beams and the power of the multibeam echosounder and sub-bottom profiler, NMFS believes it unlikely that marine mammals will be exposed to the multibeam echosounder and sub-bottom profiler at levels at or above those likely to cause harassment.

Estimated Take by Incidental Harassment

The notice of the proposed IHA (73 FR 30076, May 23, 2008) included an in-depth discussion of the methods used to calculate the densities of the marine mammals in the area of the seismic survey and the take estimates. Additional information was included in UTIG's application.

All anticipated "takes by harassment" authorized by this IHA are Level B harassment only, involving temporary changes in behavior. Take calculations were based on maximum exposure estimates (based on maximum density estimates) as opposed to best estimates and are based on the 160–dB isopleth of a larger array of airguns. Given these considerations, the predicted number of marine mammals that might be exposed to sounds 160 dB may be somewhat overestimated.Extensive systematic aircraft- and ship-based surveys have been conducted for marine mammals offshore of Oregon and Washington (Bonnell *et al.*, 1992; Green *et al.*, 1992, 1993; Barlow, 1997, 2003; Barlow and Taylor, 2001; Calambokidis and Barlow, 2004; Barlow and Forney, 2007). Some of the most comprehensive and recent density data available for cetacean species off slope and offshore waters of Oregon are from the 1996 and 2001 NMFS SWFSC "ORCAWALE" ship surveys as synthesized by Barlow (2003). The surveys were conducted from late July to early November (1996) or early December (2001). They were conducted up to approximately 556 km (346 mi) offshore from Oregon and Washington. In 2005, NMFS SWFSC "CSCAPE" ship survey assessed the abundance and distribution of marine mammals along the U.S. West Coast and California Current pelagic ecosystem. Systematic, offshore, at-sea survey data for pinnipeds are more limited. The most comprehensive such studies are reported by Bonnell *et al.* (1992) and Green *et al.* (1993) based on systematic aerial surveys conducted in 1989 1990 and 1992, primarily from coastal to slope waters with some offshore effort as well.

Ten species of odontocete whales, four species of mysticete whale, and two species of pinnipeds are expected to be harassed. Since the take estimates authorized in this IHA are no more than 0.02 percent of any cetacean species and no more than 0.0002 percent of any pinniped species found along or offshore of the Oregon coast, NMFS believes that the estimated take numbers for these species and stocks are both small relative to the worldwide abundance and population of these affected species.

Table 2 (see below) outlines the species, estimated stock population (minimum and best), and estimated percentage of the stock exposed to seismic impulses in the project area. Additional information regarding the status, abundance, and distribution of the marine mammals in the area and how the densities were calculated was included in Table 1 (see above), the notice of the proposed IHA (73 FR 30076, May 23, 2008) and may be found in UTIG's application.

Species	Estimated Min. Pop'n of Stock	Estimated Best Pop'n of Stock	% of Stock Pop'n Exposed to Sound Levels > 160 dB
Mysticetes			
North Pacific right whale (Eubalaena japonica) *	N.A.	N.A.	0
Humpback whale (Megaptera novaeangliae) *	1,158	1,391	0.0009
Minke whale (Balaenoptera acutorostrata)	544	898	0.004
Sei whale (Balaenoptera borealis) *	27	43	0
Fin whale (Balaenoptera physalus) *	2,541	3,279	0.0008
Blue whale (Balaenoptera musculus) *	1,005	1,186	0.001
Odontocetes			
Sperm whale (Physeter macrocephalus) *	1,719	2,265	0.001
Pygmy sperm whale (Kogia breviceps)	N.A.	247	0.02
Dwarf sperm whale (Kogia sima)	N.A.	N.A.	0
Cuvier's beaked whale (Ziphius cavirostris)	1,234	2,171	0
Baird's beaked whale (Berardius bairdii)	203	313	0.007
Blainville's beaked whale (Mesoplodon densirostris)	N.A.	N.A.	0
Mesoplodon sp (unidentified)	576	1,024	0.004
Hubb's beaked whale (Mesoplodon carlhubbsi)	N.A.	N.A.	0
Stejneger's beaked whale (Mesoplodon stejnegeri)	N.A.	N.A.	0
Offshore bottlenose dolphin (Tursiops truncatus)	2,295	3,257	0
Striped dolphin (Stenella coeruleoalba)	9,165	13,934	0
Short-beaked common dolphin (Delphinus delphis)	392,687	487,622	0.0001
Pacific white-sided dolphin (Lagenorhynchus obliquidens)	20,441	25,233	0.002
Northern right whale dolphin (Lissodelphis borealis)	16,417	20,362	0.002
Risso's dolphin (Grampus griseus)	9,947	12,093	0.002
False killer whale (Pseudorca crassidens)	N.A.	N.A.	0
Killer whale (Orcinus orca)	331	422	0.01
Short-finned pilot whale (Globicephala macrorhynchus)	123	245	0
Harbor porpoise (Phocoena phocoena)	27,705	37,745	0

Species	Estimated Min. Pop'n of Stock	Estimated Best Pop'n of Stock	% of Stock Pop'n Exposed to Sound Levels > 160 dB
Dall's porpoise (Phocoenoides dalli)	43,425	57,549	0.008
Pinnipeds			
Northern fur seal (Callorhinus ursinus)	709,881	721,935	0.0002
California sea lion (Zalophus californianus californianus)	141,842	238,000	0
Steller sea lion (Eumetopias jubatus) *	44,584	54,989	0.00002
Harbor seal (Phoca vitulina richardsi)	22,380	24,732	0
Northern elephant seal (Mirounga ngustirostris)	74,913	124,000	0

Table 2. Species expected to be encountered (and potentially harassed) during UTIG=s NE Pacific Ocean cruise. The far right column indicates the percentage of stock exposed to sound levels greater than or equal 160 dB.
* Species are listed as threatened or endangered under the Endangered Species Act.

Potential Effects on Habitat

A detailed discussion of the potential effects of this action on marine mammal habitat, including physiological and behavioral effects on marine fish and invertebrates, was included in the notice of the proposed IHA (73 FR 30076, May 23, 2008). Based on the discussion in the proposed IHA and the nature of the activities (small airgun array and limited duration), the authorized operations are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations or stocks.

Monitoring

Vessel-based marine mammal visual observers (MMVOs) will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during all daytime GI gun operations and during start-ups of the gun at night. MMVOs will also watch for marine mammals near the seismic vessel for at least 30 minutes prior to the start of GI gun operations. When feasible, MMVOs will also make observations during daytime periods when the seismic system is not operating for comparison of animal abundance and behavior. Based on MMVO observations, the airgun will be shut down when marine mammals are observed within or about to enter a designated exclusion zone (EZ; safety radius). The EZ is a region in which a possibility exists of adverse effects on animal hearing or other physical effects.

MMVOs will be appointed by the academic institution conducting the research cruise, with NMFS Office of Protected Resources concurrence. At least one MMVO will monitor the EZ during daytime GI gun operations and any nighttime startups. MMVOs will normally work in shifts of 4 hours duration or less. The vessel crew will also be instructed to assist in detecting marine mammals.

The *Thompson* is a suitable platform for marine mammal observations. Two locations are likely as observation stations onboard the *Thompson*. At one station on the bridge, the eye level will be approximately 13.8 m (45.3 ft) above sea level and the location will offer a good view around the vessel (approximately 310 degrees for one observer and a full 360 degrees when two observers are stationed at different vantage points). A second observation site is the 03 deck where the observer's eye level will be approximately 10.8 m (35.4 ft) above sea level. The 03 deck offers a view of 330 degrees for two observers. MMVOs will repair to the enclosed bridge during any inclement weather.

Standard equipment for MMVOs will be 7 x 50 reticule binoculars and optical range finders. At night, night-vision equipment will be available. Observers will be in wireless communication with ship officers on the bridge and scientists in the ship's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or GI guns shut down.

MMVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document any apparent disturbance reactions. Data will be used to estimate the numbers of mammals potentially "taken" by harassment. It will also provide the information needed to order a shutdown of the GI guns when a marine mammal is within or near the EZ. When a mammal sighting is made, the following information about the sighting will be recorded:

(1) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the GI guns or seismic vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

(2) Time, location, heading, speed, activity of the vessel (shooting or not), sea state, visibility, cloud cover, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch and during a watch, whenever there is a change in one or more of the variables.

All mammal observations and airgun shutdowns will be recorded in a standardized format. Data accuracy will be verified by the MMVOs at sea, and preliminary reports will be prepared during the field program and summaries forwarded to the operating institution's shore facility and to NSF weekly or more frequently. MMVO observations will provide the following information:

(1) The basis for decisions about shutting down the GI guns.

(2) Information needed to estimate the number of marine mammals potentially "taken by harassment, which must be reported to NMFS.

(3) Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

(4) Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

Mitigation

Mitigation and monitoring measures proposed to be implemented for the proposed seismic survey have been developed and refined during previous

SIO and L-DEO seismic studies and associated EAs, IHA applications, and IHAs. The mitigation and monitoring measures described herein represent a combination of the procedures required by past IHAs for other SIO and L-DEO projects. The measures are described in detail below.

The number of individual animals expected to be approached closely during the proposed activity will be small in relation to regional population sizes. With the proposed monitoring and shut-down provisions (see below), any effects on individuals are expected to be limited to behavioral disturbance and will have only negligible impacts on the species and stocks.

Mitigation measures that will be adopted will include: (1) vessel speed or course alteration, provided that doing so will not compromise operational safety requirements, (2) GI guns shut down, (3) GI guns ramp up, and (4) minimizing approach to slopes and submarine canyons, if possible, because of sensitivity of beaked whales. Another standard mitigation measure airgun array power down is not possible because only two, low-volume GI guns will be used for the surveys.

Speed or Course Alteration – If a marine mammal is detected outside the EZ but is likely to enter it based on relative movement of the vessel and the animal, then if safety and scientific objectives allow, the vessel speed and/or direct course will be adjusted to minimize the likelihood of the animal entering the EZ. Major course and speed adjustments are often impractical when towing long seismic streamers and large source arrays but are possible in this case because only two GI guns and a short (12–m, 39.4–ft) P-Cable streamer system will be used. If the animal appears likely to enter the EZ, further mitigative actions will be taken, i.e., either further course alterations or shut down of the airgun.

Shut-down Procedures – If a marine mammal is within or about to enter the EZ for the two GI guns, it will be shut down immediately. Following a shut down, GI gun activity will not resume until the marine mammal is outside the EZ for the full array. The animal will be considered to have cleared the EZ if it: (1) is visually observed to have left the EZ; (2) has not been seen within the EZ for 10 minutes in the case of small odontocetes and pinnipeds; or (3) has not been seen within the EZ for 15 minutes in the case of mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, and beaked whales.

Ramp-up Procedures – If no marine mammals have been observed while undertaking previously mentioned monitoring and mitigation measures, the airgun array may be ramped-up at no greater than 1 GI-gun per 5–minute interval or approximately 6 dB per 5–minute period. Ramp-ups shall occur at the commencement of seismic operations, and, anytime after the airgun array has been shut down for more than 4 minutes.

Minimize Approach to Slopes and Submarine Canyons – Although sensitivity of beaked whales to airguns is not known, they appear to be sensitive to other sound sources (mid-frequency sonar; see UTIG's application). Beaked whales tend to concentrate in continental slope areas and in areas where there are submarine canyons. Avoidance of airgun operations over or near submarine canyons has become a standard mitigation measure.

Reporting

A report will be submitted to NMFS within 90 days after the end of the cruise. The report will describe the operations that were conducted and the marine mammals that were detected near the operations. The report will be submitted to NMFS, providing full documentation of methods, results, and interpretation pertaining to all monitoring. The 90–day report will summarize the dates and locations of seismic operations, all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities), and estimates of the amount and nature of potential "take" of marine mammals by harassment or in other ways.

ESA

Pursuant to Section 7 of the ESA, the NSF has consulted formally with NMFS for this action since take of listed species is anticipated and authorized. NMFS has also formally consulted internally pursuant to Section 7 of the ESA on the issuance of an IHA under Section 101(a)(5)(D) for this activity. NMFS Section 7 biologists issued a Biological Opinion, which concluded that the endangered humpback, blue, fin, and sperm whales, and the threatened eastern population of Steller sea lion are not likely to be jeopardized by the proposed seismic survey. Other endangered and threatened cetacean species were also considered by risk that individuals of these species would be adversely affected is reduced to discountable levels because of the: (1) type and short time frame of the proposed activity (single airgun source with nominal source level (peak to peak) of 237 dB re 1 μPa executed for a short period of time (3 survey sites, no more than a total of approximately 150 hours of seismic activity, during a three week period); (2) unlikelihood of encountering listed species in the action area during the time of the proposed project; and/or (3) monitoring and minimization measures to be implemented as part of the proposed project.

National Environmental Policy Act (NEPA)

NSF prepared an Environmental Assessment (EA) of a Planned Low-Energy Marine Seismic Survey by the Scripps Institution of Oceanography in the Northeast Pacific Ocean, September 2007. NMFS has adopted NSF's EA and issued a Finding of No Significant Impact for the issuance of the IHA. NMFS has also conducted a separate NEPA analysis and prepared a Supplemental EA prior to the issuance of the IHA.

Determinations

NMFS has determined that the impact of conducting the seismic survey in the northeast Pacific Ocean may result, at worst, in a temporary modification in behavior (Level B Harassment) of small numbers of seventeen species of marine mammals. Further, this activity is expected to result in a negligible impact on the affected species or stocks. The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses does not apply for this action.

This determination is supported by: (1) the likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious; (2) the fact that cetaceans would have to be closer than either 104 m (341 ft) in intermediate depths or 69 m (226 ft) in deep water (180 dB) and pinnipeds would have to be closer than 30 m (98.4 ft) in intermediate depths or 20 m (65.6) in deep water from the vessel to be exposed to levels of sound believed to have even a minimal chance of causing TTS or PTS (180 dB for cetaceans and 190 dB for pinnipeds); and (3) the likelihood that marine mammal detection ability by trained observers is high at that short distance from the vessel. As a result, no take by injury or death is anticipated or authorized and the potential for temporary or permanent hearing impairment is very low and will be avoided through the incorporation of the required mitigation measures.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small, less than a percent of any of the estimated population sizes, and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

Authorization

As a result of these determinations, NMFS has issued an IHA to UTIG for conducting a low-energy seismic survey in the northeast Pacific Ocean during June-July, 2008, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 17, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–16845 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No.: PTO–P–2008–0024]

Scope of Foreign Filing Licenses

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: Applicants and registered patent practitioners are reminded that the export of subject matter abroad pursuant to a license from the United States Patent and Trademark Office (USPTO), such as a foreign filing license, is limited to purposes related to the filing of foreign patent applications. Applicants who are considering exporting subject matter abroad for the preparation of patent applications to be filed in the United States should contact the Bureau of Industry and Security (BIS) at the Department of Commerce for the appropriate clearances.

DATES: *Effective Date:* July 23, 2008.

FOR FURTHER INFORMATION CONTACT: Mike Carone, Supervisory Patent Examiner, Technology Center 3600, by telephone at (571) 272–6873.

SUPPLEMENTARY INFORMATION: The USPTO has become aware that a number of law firms or service provider companies located in foreign countries are sending solicitations to U.S. registered patent practitioners offering their services in connection with the preparation of patent applications to be filed in the United States. Applicants and registered patent practitioners are reminded that the export of subject matter abroad pursuant to a license from the USPTO, such as a foreign filing license, is limited to purposes related to the filing of foreign patent applications. Applicants who are considering exporting subject matter abroad for the preparation of patent applications to be filed in the United States should contact the Bureau of Industry and Security (BIS) at the Department of Commerce for the appropriate clearances. *See* MPEP § 140 (8th ed., Rev. 5, Aug. 2006). The BIS has promulgated the Export Administration Regulations (EAR) governing exports of dual-use commodities, software, and technology, including technical data, which are codified at 15 CFR Parts 730–774. Furthermore, if the invention was made in the United States, technical data in the form of a patent application, or in any form, can only be exported for purposes related to the preparation, filing or possible filing and prosecution of a foreign patent application, after compliance with the EAR or following the appropriate USPTO foreign filing license procedure. *See* 37 CFR 5.11(c). A foreign filing license from the USPTO does not authorize the exporting of subject matter abroad for the preparation of patent applications to be filed in the United States.

The Commissioner for Patents has been delegated the authority for controlling exports of technology for purposes of the filing of patent applications in foreign countries. *See* 15 CFR 734.3(b)(1)(v) and 734.10(b) and 35 U.S.C. 184. The USPTO grants foreign filing licenses in accordance with USPTO regulations. *See* 37 CFR Part 5. The scope of a foreign filing license granted by the USPTO is set forth in 37 CFR 5.15. Applicants and registered patent practitioners are also advised that foreign filing licenses (for the filing of a patent application in a foreign country) do not authorize the export of any technology that is not specifically submitted to the USPTO as part of a U.S. patent application or a petition for a foreign filing license. For example, the USPTO has received short abstracts, PowerPoint® slides and even titles of inventions as the disclosure for which a foreign filing license is requested. Although the USPTO will usually process such requests, any foreign filing license granted under 37 CFR 5.15(a) or 5.15(b) on such short description may not authorize filing abroad the ultimate resulting patent applications and may not authorize any additional material added after the initial foreign filing license request. Such additional material that was not submitted to the USPTO for its review may be deemed to have altered "the general nature of the invention in a manner which would require such application to be made available for inspection under such section 181." *See* 35 U.S.C. 184. The USPTO has established a Licensing and Review Web page on its Web site that includes frequently asked questions regarding foreign filing licenses and related matters. This Web page is located at *http://www.uspto.gov/web/offices/pac/dapp/opla/lr/licensing_review.htm.*

This notice does not change existing law or regulations. Thus, while the notice is effective on July 23, 2008, this notice does not excuse or otherwise affect the legal consequence of a failure to comply with existing law or regulations that occurred prior to July 23, 2008.

Information regarding the EAR may be obtained from the BIS Web site at *http://www.bis.doc.gov.* Questions regarding the EAR should be directed to the BIS's Outreach and Educational Services Division at (202) 482–4811.

Dated: July 16, 2008.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E8–16830 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination under the Textile and Apparel Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR Agreement)

July 18, 2008.

AGENCY: The Committee for the Implementation of Textile Agreements.

ACTION: Determination to add a product in unrestricted quantities to Annex 3.25 of the CAFTA–DR Agreement.

EFFECTIVE DATE: July 23, 2008.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain twill fabrics, as specified below, are not available in commercial quantities in a timely manner in the CAFTA–DR countries. The product will be added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

FOR FURTHER INFORMATION ON-LINE: http://web.ita.doc.gov/tacgi/CaftaReqTrack.nsf. Reference number: 80.2008.06.18.Fabric.GovofDominican Republic.

SUPPLEMENTARY INFORMATION:

Authority: Section 203(o)(4) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (CAFTA–DR Act); the Statement of Administrative Action (SAA), accompanying the CAFTA–DR Act; Presidential Proclamations 7987 (February 28, 2006) and 7996 (March 31, 2006).

BACKGROUND:

The CAFTA–DR Agreement provides a list in Annex 3.25 for fabrics, yarns, and fibers that the Parties to the CAFTA–DR Agreement have determined are not available in commercial quantities in a timely manner in the territory of any Party. The CAFTA–DR Agreement provides that this list may be modified pursuant to Article 3.25(4)–(5), when the President of the United States determines that a fabric, yarn, or fiber is not available in commercial quantities in a timely manner in the territory of any Party. See Annex 3.25, Note; see also section 203(o)(4)(C) of the CAFTA–DR Act.

The CAFTA–DR Act requires the President to establish procedures governing the submission of a request and providing opportunity for interested entities to submit comments and supporting evidence before a commercial availability determination is made. In Presidential Proclamations 7987 and 7996, the President delegated to CITA the authority under section 203(o)(4) of CAFTA–DR Act for modifying the Annex 3.25 list. On March 21, 2007, CITA published final procedures it would follow in considering requests to modify the Annex 3.25 list (72 FR 13256).

On June 18, 2008, the Chairman of CITA received a commercial availability request from the Government of the Dominican Republic for certain twill fabrics, of the specifications detailed below. On June 19, 2008, CITA notified interested parties of, and posted on its website, the accepted request. In its notification, CITA advised that interested entities objecting to the request may provide a response, no later than July 2, 2008, advising CITA of its objection to the request and its ability to supply the subject product by providing an offer to supply the subject product as described in the request. CITA also notified interested parties that that any rebuttals to responses must be submitted to CITA by July 9, 2008.

No interested entity filed a response advising of its objection to the request or its ability to supply the subject product.

In accordance with section 203(o)(4)(C) of the CAFTA–DR Act, and its procedures, as no interested entity submitted a response objecting to the request or expressing an ability to supply the subject product, CITA has determined to add the specified fabrics to the list in Annex 3.25 of the CAFTA–DR Agreement.

The subject fabric has been added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities. A revised list has been published on-line.

Specifications:

Certain Twill Fabrics

HTS: 5212.23.6060
Fiber Content: 55% cotton/45% linen
Average Yarn Number:
Metric: 18/1 - 19/1; 18/1 - 19/1
English: 11/1; 11/1
Weave: Twill
Weight:
Metric: 231–243 gm/sq. m.
English: 6.9 - 7.2 oz/sq. yd.
Width:
Metric: 141-148 cm
English: 56–58 inches
Finish: Piece dyed

R. Matthew Priest,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E8–16856 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination under the Textile and Apparel Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR Agreement)

July 18, 2008.

AGENCY: The Committee for the Implementation of Textile Agreements.

ACTION: Determination to add a product in unrestricted quantities to Annex 3.25 of the CAFTA–DR Agreement.

EFFECTIVE DATE: July 23, 2008.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain corduroy fabrics, as specified below, are not available in commercial quantities in a timely manner in the CAFTA–DR countries. The product will be added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

FOR FURTHER INFORMATION ON-LINE: http://web.ita.doc.gov/tacgi/CaftaReqTrack.nsf. Reference number: 79.2008.06.18.Fabric.GovofDominican Republic.

SUPPLEMENTARY INFORMATION:

Authority: Section 203(o)(4) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (CAFTA–DR Act); the Statement of Administrative Action (SAA), accompanying the CAFTA–DR Act; Presidential Proclamations 7987 (February 28, 2006) and 7996 (March 31, 2006).

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The CAFTA–DR Act requires the President to establish procedures governing the submission of a request and providing opportunity for interested entities to submit comments and supporting evidence before a commercial availability determination is made. In Presidential Proclamations 7987 and 7996, the President delegated to CITA the authority under section 203(o)(4) of CAFTA–DR Act for modifying the Annex 3.25 list. On March 21, 2007, CITA published final procedures it would follow in considering requests to modify the Annex 3.25 list (72 FR 13256).

On June 18, 2008, the Chairman of CITA received a commercial availability request from the Government of the Dominican Republic for certain corduroy fabrics, of the specifications detailed below. On June 19, 2008, CITA notified interested parties of, and posted on its website, the accepted request. In its notification, CITA advised that interested entities objecting to the request may provide a response, no later than July 2, 2008, advising CITA of its objection to the request and its ability to supply the subject product by providing

an offer to supply the subject product as described in the request. CITA also notified interested parties that that any rebuttals to responses must be submitted to CITA by July 9, 2008.

No interested entity filed a response advising of its objection to the request and its ability to supply the subject product.

In accordance with section 203(o)(4)(C) of the CAFTA–DR Act, and its procedures, as no interested entity submitted a response objecting to the request or expressing an ability to supply the subject product, CITA has determined to add the specified fabrics to the list in Annex 3.25 of the CAFTA–DR Agreement.

The subject fabric has been added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities. A revised list has been published on-line.

Specifications:

Certain Corduroy Fabrics

HTS: 5801.22.90
Fiber Content: 100% cotton
Average Yarn Number:
Metric: 20/1 - 21/1; 20/1 - 21/1;
English: 12/1; 12/1;
Thread Count:
Metric: 18–19 warp ends/ 57–60 filling picks per cm.
English: 47–49 warp ends/144–152 filling picks per inch
Weave: Corduroy 3.1 wales/cm. (8 wales per inch).
Weight:
Metric: 393–413 gm/sq. m.
English: 11.6–12.2 oz/sq. yd.
Width:
Metric: 139–146 cm
English: 55–57 inches
Finish: Piece dyed

R. Matthew Priest,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E8–16888 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination under the Textile and Apparel Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR Agreement)

July 18, 2008.

AGENCY: The Committee for the Implementation of Textile Agreements.

ACTION: Determination to add a product in unrestricted quantities to Annex 3.25 of the CAFTA–DR Agreement.

EFFECTIVE DATE: July 23, 2008.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain corduroy fabrics, as specified below, are not available in commercial quantities in a timely manner in the CAFTA–DR countries. The product will be added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

FOR FURTHER INFORMATION ON-LINE: http://web.ita.doc.gov/tacgi/CaftaReqTrack.nsf. Reference number: 78.2008.06.18.Fabric.GovofDominican Republic.

SUPPLEMENTARY INFORMATION:

Authority: Section 203(o)(4) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (CAFTA–DR Act); the Statement of Administrative Action (SAA), accompanying the CAFTA–DR Act; Presidential Proclamations 7987 (February 28, 2006) and 7996 (March 31, 2006).

BACKGROUND:

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The CAFTA–DR Act requires the President to establish procedures governing the submission of a request and providing opportunity for interested entities to submit comments and supporting evidence before a commercial availability determination is made. In Presidential Proclamations 7987 and 7996, the President delegated to CITA the authority under section 203(o)(4) of CAFTA–DR Act for modifying the Annex 3.25 list. On March 21, 2007, CITA published final procedures it would follow in considering requests to modify the Annex 3.25 list (72 FR 13256).

On June 18, 2008, the Chairman of CITA received a commercial availability request from the Government of the Dominican Republic for certain corduroy fabrics, of the specifications detailed below. On June 19, 2008, CITA notified interested parties of, and posted on its website, the accepted request. In its notification, CITA advised that interested entities objecting to the request may provide a response, no later than July 2, 2008, advising CITA of its objection to the request and its ability to supply the subject product by providing an offer to supply the subject product as described in the request. CITA also notified interested parties that that any rebuttals to responses must be submitted to CITA by July 9, 2008.

No interested entity filed a response advising of its objection to the request and its ability to supply the subject product.

In accordance with section 203(o)(4)(C) of the CAFTA–DR Act, and its procedures, as no interested entity submitted a response objecting to the request or expressing an ability to supply the subject product, CITA has determined to add the specified fabrics to the list in Annex 3.25 of the CAFTA–DR Agreement.

The subject fabric has been added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities. A revised list has been published on-line.

Specifications:

Certain Corduroy Fabrics

HTS: 5801.22.90
Fiber Content: 100% cotton
Average Yarn Number:
Metric: 20/1 - 21/1; 20/1 - 21/1;
English: 12/1; 12/1;
Thread Count:
Metric: 25–26 warp ends/ 49–52 filling picks per cm.
English: 62–66 warp ends/125–131 filling picks per inch
Weave: Corduroy 4.3 wales/cm. (11 wales per inch).
Weight:
Metric: 297–313 gm/sq. m.
English: 8.8 - 9.2 oz/sq. yd.
Width:
Metric: 139–146 cm
English: 55–57 inches
Finish: Piece dyed

R. Matthew Priest,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E8–16890 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination under the Textile and Apparel Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR Agreement)

July 18, 2008.

AGENCY: The Committee for the Implementation of Textile Agreements.

ACTION: Determination to add a product in unrestricted quantities to Annex 3.25 of the CAFTA–DR Agreement.

EFFECTIVE DATE: July 23, 2008.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain twill fabrics, as specified below, are not available in commercial quantities in a timely manner in the CAFTA–DR countries. The product will be added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3651.

FOR FURTHER INFORMATION ON-LINE: http://web.ita.doc.gov/tacgi/CaftaReqTrack.nsf. Reference number: 81.2008.06.18.Fabric.GovofDominican Republic.

SUPPLEMENTARY INFORMATION:

Authority: Section 203(o)(4) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (CAFTA–DR Act); the Statement of Administrative Action (SAA), accompanying the CAFTA–DR Act; Presidential Proclamations 7987 (February 28, 2006) and 7996 (March 31, 2006).

BACKGROUND:

The CAFTA–DR Agreement provides a list in Annex 3.25 for fabrics, yarns, and fibers that the Parties to the CAFTA–DR Agreement have determined are not available in commercial quantities in a timely manner in the territory of any Party. The CAFTA–DR Agreement provides that this list may be modified pursuant to Article 3.25(4)–(5), when the President of the United States determines that a fabric, yarn, or fiber is not available in commercial quantities in a timely manner in the territory of any Party. See Annex 3.25, Note; see also section 203(o)(4)(C) of the CAFTA–DR Act.

The CAFTA–DR Act requires the President to establish procedures governing the submission of a request and providing opportunity for interested entities to submit comments and supporting evidence before a commercial availability determination is made. In Presidential Proclamations 7987 and 7996, the President delegated to CITA the authority under section 203(o)(4) of CAFTA–DR Act for modifying the Annex 3.25 list. On March 21, 2007, CITA published final procedures it would follow in considering requests to modify the Annex 3.25 list (72 FR 13256).

On June 18, 2008, the Chairman of CITA received a commercial availability request from the Government of the Dominican Republic for certain twill fabrics, of the specifications detailed below. On June 19, 2008, CITA notified interested parties of, and posted on its website, the accepted request. In its notification, CITA advised that interested entities objecting to the request may provide a response, no later than July 2, 2008, advising CITA of its objection to the request and its ability to supply the subject product by providing an offer to supply the subject product as described in the request. CITA also notified interested parties that that any rebuttals to responses must be submitted to CITA by July 9, 2008.

No interested entity filed a response advising of its objection to the request and its ability to supply the subject product.

In accordance with section 203(o)(4)(C) of the CAFTA–DR Act, and its procedures, as no interested entity submitted a response objecting to the request or expressing an ability to supply the subject product, CITA has determined to add the specified fabrics to the list in Annex 3.25 of the CAFTA–DR Agreement.

The subject fabric has been added to the list in Annex 3.25 of the CAFTA–DR Agreement in unrestricted quantities. A revised list has been published on-line.

Specifications:

Certain Twill Fabrics

HTS: 5212.23.6060
Fiber Content: 55% cotton/45% linen
Average Yarn Number:
Metric: 20/1 - 21/1; 18/1 - 19/1
English: 12/1; 11/1
Thread Count:
Metric: 28–29 warp ends/ 18–19 filling picks per cm.
English: 70–74 warp ends/47–49 filling picks per inch
Weave: Twill
Weight:
Metric: 268–281 gm/sq. m.
English: 7.9 - 8.3 oz/sq. yd.
Width:
Metric: 139–146 cm
English: 55–57 inches
Finish: Piece dyed

R. Matthew Priest,
Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E8–16891 Filed 7–22–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF DEFENSE

Office of the Secretary

U.S. Nuclear Command and Control System Comprehensive Review Advisory Committee

AGENCY: Department of Defense.

ACTION: Closed Meeting Notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. paragraph 552b, as amended), and 41 CFR paragraph 102–3.150, the Department of Defense announces the following Federal Advisory Committee meetings of the U.S. Nuclear Command and Control System Comprehensive Review Advisory Committee.

DATES: August 4, 2008 (8:30 a.m.–3:30 p.m.), August 5, 2008 (8:30 a.m.–4:30 p.m.) and August 6, 2008 (8:30 a.m.–4:30 p.m.).

ADDRESSES: August 4: White House; August 5 and 6: Pentagon Conference Center M3.

FOR FURTHER INFORMATION CONTACT: Mr. William L. Jones, (703) 681–8681, U.S. Nuclear Command and Control System Support Staff (NSS), Skyline 3, 5201 Leesburg Pike, Suite 500, Falls Church, Virginia 22041.

SUPPLEMENTARY INFORMATION:

Purposes of the Meetings: To provide an overview of Nuclear Command and Control System personnel security and crisis management requirements, nuclear weapons inspection processes, physical security threat assessments and performance measures, and security and vulnerability modeling and assessment tools.

AGENDA

Time	Topic	Presenter
August 4, 2008		
8:30 a.m.	Administrative Remarks	CAPT Budney, USN (NSS).
9 a.m.	Personnel Reliability Program (PRP)	DoD.
9:30 a.m.	Human Reliability Program (HRP)	NNSA.
10 a.m.	Human Reliability Program	NSA.
10:30 a.m.	Yankee White	WHMO.
10:45 a.m.	Break	
11 a.m.	Nuclear Personnel Expertise issues	ADM (Ret) Chiles.
11:30 a.m.	Lunch	
12:30 p.m.	Crisis Management System (CMS)	WHSR or DISA.
1:30 p.m.	Tour PEOC, WHSR (include capability briefings)	PEOC & WHSR.
3:30 p.m.	Adjourn.	
August 5, 2008		
8:30 a.m.	Administrative Remarks	CAPT Budney, USN (NSS).
8:45 a.m.	NUWEX Program	OATSD(NCB)/NM.
9:15 a.m.	DOE Inspection Oversight Processes and Results	NNSA.
9:45 a.m.	Air Force Operational Readiness and Technical Inspection Programs (processes, frequencies, issues).	SAF/IG.
10:15 a.m.	Break	
10:30 a.m.	Navy Operational and Technical Inspection Programs (processes, frequencies, results/trends, issues).	Navy Staff, ComSubFor.
11 a.m.	DoD Nuclear Weapons Technical Inspections (processes, frequencies, results/trends, issues).	DTRA.
11:30 a.m.	Lunch	
12:30 p.m.	Postulated/Design Basis Threat	DOE.
1 p.m.	Nuclear Security Threat Capabilities Assessment	OATSD(NCB)/NM.
1:30 p.m.	Common Nuclear Threat Characterization	ODNI.
2 p.m.	MIGHTY GUARDIAN Series (include MG results and corrective actions, Grand Forks Engineering Study).	AFSPC.
2:30 p.m.	Break	
2:45 p.m.	Matrix Briefing	Mr. Brad Mickelsen.
3:30 p.m.	Exec Session	
4:30 p.m.	Adjourn.	
August 6, 2008		
8:30 a.m.	Administrative Remarks	CAPT Budney USN (NSS).
8:45 a.m.	Security Models (JCATS, DANTE)	SNL Rep.
9:30 a.m.	Red Team Brief	DTRA/SRF.
10 a.m.	Break	
10:15 a.m.	Balanced Survivability Assessment Brief	DTRA/SRF.
11 a.m.	DOE Security Roadmap, Modeling and Risk Assessment	NNSA.
11:45 a.m.	Lunch	TBD.
12:30 p.m.	Office of Secure Transport	NNSA.
1 p.m.	DoD Security Roadmap, Modeling and Risk Assessment	ATSD(NCB)/NM.
13 p.m.	AF Action Plan/Security Roadmap	A3Sxx/A7xx.
2:30 p.m.	Navy Action Plan/Security Roadmap	SSPO.
2:45 p.m.	Break	
3 p.m.	Recapture/Recovery (requirements, responsibilities, capabilities, exercises)	ATSD(NCB)/NM NNSA. FBI. DHS. DOS.
4:30 p.m.	Adjourn.	

Pursuant to 5 U.S.C. paragraph 552b, as amended, and 41 CFR paragraph 102–3.155, the Department of Defense has determined that these meetings shall be closed to the public. The Director, U.S. Nuclear Command and Control System Support Staff, in consultation with his General Counsel, has determined in writing that the public interest requires that all sessions of the committee's meetings will be closed to the public because they will be concerned with classified information and matters covered by section 5 U.S.C. paragraph 552b(c)(1).

Committee's Designated Federal Officer: Mr. William L. Jones, (703) 681–8681, U.S. Nuclear Command and Control System Support Staff (NSS), Skyline 3, 5201 Leesburg Pike, Suite 500, Falls Church, Virginia 22041. *William.jones@nss.pentagon.mil.*

Pursuant to 41 CFR paragraphs 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements at any time to the Nuclear Command and Control System Federal Advisory Committee about its mission and functions. All written statements shall be submitted to the Designated Federal Officer for the Nuclear Command and Control System Federal Advisory Committee. He will ensure that written statements are provided to the membership for their consideration. Written statements may also be submitted in response to the stated agenda of planned committee meetings. Statements submitted in response to this notice must be received by the Designated Federal Official at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after that date may not be provided or considered by the Committee until its next meeting. All submissions provided before that date will be presented to the committee members before the meeting that is subject of this notice. Contact information for the Designated Federal Officer is listed above.

Dated: July 15, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–16907 Filed 7–22–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[DoD–2008–OS–0081]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice for a new system of records.

SUMMARY: The Office of the Secretary of Defense is adding a new system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on August 22, 2008 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Office of Freedom of Information, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Mrs. Cindy Allard at (703) 588–2386.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on July 14, 2008, to the House Committee on Government Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 15, 2008.

Patricia Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

DHRA 05 DoD

SYSTEM NAME:

Joint Advertising, Market Research & Studies (JAMRS) Survey Database.

SYSTEM LOCATION:

Equifax Database Services, Inc., 500 Edgewater Drive, Suite 525, Wakefield, MA 01880–6222.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals aged 16 through maximum recruiting age; Selective Service System registrants; individuals who have taken the Armed Services Vocational Aptitude Battery (ASVAB) test; current military personnel who are on Active Duty or in the Reserves; prior service individuals who still have remaining Military Service Obligation (commonly known as the Individual Ready Reserve or IRR); individuals who are in the process of enlisting or enrolled in ROTC (commonly known as the Military Entrance Program Command (MEPCOM) applicant file); and individuals who have asked to be removed from consideration as a participant in any future JAMRS survey.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, gender, mailing address, date of birth, information source code.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 503(a), Enlistments: recruiting campaigns; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 8013, Secretary of the Air Force; and 10 U.S.C. 2358, Research and development projects.

PURPOSE(S):

To compile names of individuals aged 16 through maximum recruiting age to create a mailing frame from which to conduct surveys. These surveys will be conducted multiple times per year and each survey will be designed so that appropriate levels of precision can be achieved for inferences to be made at various geographic levels. The system also provides JAMRS with the ability to remove the names of individuals who are current/former members of, or are enlisting in, the Armed Forces, and individuals who have asked to be removed from consideration as a participant in any future JAMRS survey.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD's Blanket Routine Uses set forth at the beginning of OSD's compilation of systems of records notices do not apply to this system except:

To any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department, in pending or potential litigation to which the record is pertinent.

To the General Services Administration and the National Archives and Records Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Individual's full name, address, and date of birth.

SAFEGUARDS:

Access to information in the database is highly restricted and limited to those that require the records in the performance of their official duties. The database utilizes a layered approach of

overlapping controls, monitoring and authentication to ensure overall security of the data, network and system resources. Sophisticated physical security, perimeter security (firewall, intrusion prevention), access control, authentication, encryption, data transfer, and monitoring solutions prevent unauthorized access from internal and external sources.

RETENTION AND DISPOSAL:

If selected for a survey: Records will be retained for one year after the completion of the survey. If not selected for a survey, the record will be deleted after other records have been selected. Opt-outs will be deleted when the individual is no longer eligible for recruiting.

SYSTEM MANAGER(S) AND ADDRESS:

Program Manager, Joint Advertising, Market Research & Studies (JAMRS), 4040 N. Fairfax Drive, Suite #200, Arlington, VA 22203–1613.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Joint Advertising, Market Research & Studies (JAMRS), Survey Project Officer, 4040 N. Fairfax Drive, Suite #200, Arlington, Virginia 22203–1613.

Requests must include the requester's name, current address, and be signed. In addition, the name and ID number of this system of records notice.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written requests to the OSD FOIA Requester Service Center, 1155 Defense Pentagon, Washington DC 20301–1155.

Requests must include the requester's name, current address, and be signed. In addition, the name and ID number of this system of records notice.

Note 1: Individuals, who are 15½ years old or older, or parents or legal guardians acting on behalf of individuals who are between the ages of 15½ and 18 years old, seeking to have their name or the name of their child or ward, as well as other identifying data, removed from this system of records (or removed in the future when such information is obtained), should address written Opt-Out requests to Joint Advertising, Marketing Research & Studies (JAMRS), ATTN: Survey Project Officer, 4040 N. Fairfax Drive, Suite #200, Arlington, Virginia 22203–1613. Such requests must contain the full name, date of birth, and current address of the individual.

Note 2: Opt-Out requests will be honored until the individual is no longer eligible for recruitment. However, because opt-out screening is based, in part, on the current address of the individual, any change in address will require the submission of a new opt-out request with the new address.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are contained in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

State Department of Motor Vehicle offices; commercial information brokers/vendors; the Selective Service System; the Defense Manpower Data Center (DMDC); the United States Military Entrance Processing Command for individuals who have taken the ASVAB test; and individuals who have submitted written "opt-out" requests.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–16733 Filed 7–22–08; 8:45 am]
BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

ACTION: Correction Notice.

SUMMARY: On July 16, 2008, the Department of Education published a comment period notice in the **Federal Register** (Page 40854, Column 1) for the information collection, "Study of Pell Grant Recipients Who Transfer Among Eligible Institutions." This notice hereby corrects the invitation for comment period for interested persons to July 31, 2008. The IC Clearance Official, Regulatory Information Management Services, Office of Management, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: July 17, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

[FR Doc. E8–16817 Filed 7–22–08; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 22, 2008.

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 IC Clearance Official, Regulatory Information Management Services, Office of Management, 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.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: July 18, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.

Title: Mapping the Adopted Core Curriculum in the Mid Atlantic Region.

Frequency: On Occasion.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 1,496.

Burden Hours: 748.

Abstract: It is important to identify adopted local educational agencies (LEA) curricula in language arts/literacy, mathematics and science to map the landscape of the Mid-Atlantic region and to inform policy and practice data-driven decision-making. After collecting information from interviews with key LEA staff from each Regional Educational Laboratory (REL) Mid-Atlantic district, the lab will produce a foundational database from which to analyze trends and strategically develop appropriate research and evaluation agendas. A descriptive report summarizing the adopted K–12 curricula in the region and a user-friendly on-line interface will also be developed.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 3768. 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., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@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. E8–16864 Filed 7–22–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management 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 August 22, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response "Comment: [insert OMB number], [insert abbreviated collection name, e.g., "Upward Bound Evaluation"]. Persons submitting comments electronically should not submit paper copies.

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 IC Clearance Official, Regulatory Information Management Services, Office of Management, 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: July 18, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Revision.

Title: Annual Progress Reporting Form for the American Indian Vocational Rehabilitation Services (AIVRS) Program.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 73.

Burden Hours: 1,022.

Abstract: This data collection will be conducted annually to obtain program and performance information from the AIVRS grantees on their project activities. The information collected will assist federal Rehabilitation Services Administration (RSA) staff in responding to the Government Performance and Results Act (GPRA). Data will primarily be collected through an Internet form.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 3686. 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., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@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. E8–16865 Filed 7–22–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education

Overview Information; Fund for the Improvement of Postsecondary Education, FIPSE-Special Focus Competition: The U.S.-Russia Program: Improving Research and Educational Activities in Higher Education; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2008.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.116S.

DATES: *Applications Available:* July 23, 2008.

Deadline for Transmittal of Applications: August 22, 2008.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: To provide grants that demonstrate partnerships between Russian and American institutions of higher education (IHEs)

that contribute to the development and promotion of educational opportunities between the two nations, particularly in the areas of mutual foreign language learning and advancement of education in science, technology, and the humanities. Russian institutions will apply to The Russian Ministry of Education and Science for funding under a separate but parallel competition.

Priority: Under this competition, we are particularly interested in applications that address the following priority.

Invitational Priority: For FY 2008, this priority is an invitational priority. Under 34 CFR 75.105(c)(1), we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is designed to support the formation of educational consortia of American and Russian IHEs to encourage mutual socio-cultural-linguistic cooperation; the coordination of joint development of curricula, educational materials, and other types of educational and methodological activities; and the conduct of related joint educational research. The invitational priority is issued in cooperation with the Russian Ministry of Education and Science. These awards support only the participation of faculty and students in partnership arrangements with American institutions. Applicants must describe the capacity of the institution to contribute to and benefit from a collaborative project with a Russian institution to advance foreign language and cultural understanding as well as educational research and opportunities in one of the following three areas:

(1) Engineering.

(2) Economics.

(3) Application of Information Technology (IT) for the Teaching and Learning of Foreign Languages.

Russian institutions eligible to form a consortium with an American IHE and to submit a joint proposal have been selected by the Russian Federation through the "Development of Higher Education" competition that has been conducted by the Russian Ministry of Education and Science in Russia prior to this competition. As a result of this Russian competition, the Russian Federation has identified the following Russian institutions in each of the three disciplines identified above, as being eligible for participation in this competition:

(1) Engineering—Bauman Moscow State Technical University. *POC:* Gennadiy Petrovich Pavlikhin, Vice-Rector. *Tel:* 7–499–261–40–55, *e-mail: irina@interd.bmstu.ru.*

(2) Economics—State University of Higher Economics. *POC:* Boris Valeryevich Zhelezov, Head, Department of International Academic Mobility. *Tel:* 7–495–621–32–20, *e-mail: bzhelezov@gmail.com.*

(3) Application of Information Technology (IT) for the Teaching and Learning of Foreign Languages—Russian People's Friendship University. *POC:* Nur Serikovich Kirabayev, Vice-Rector. *Tel:* 7–495–952–52–26, *e-mail: kirabaev@gmail.com.*

These Russian institutions, if part of a U.S.-Russian consortium, will receive separate but parallel funding from the Russian Ministry of Education and Science.

Program Authority: 20 U.S.C. 1138–1138d.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $600,000.

Estimated Range of Awards: $150,000–$250,000 for the first year of the award.

Estimated Average Size of Awards: $400,000 for the two-year duration of grant.

Maximum Award: We will reject any application that proposes a budget exceeding $270,000 for a single budget period of 12 months. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 3.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs or combinations of IHEs and other public and private nonprofit institutions and agencies.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.Grants.gov.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, PO Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. *Fax:* (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA Number 84.116S.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the person listed under *Alternative Format* in Section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative (Part III) to the equivalent of no more than 20 pages, using the following standards:

- A "page" is 8.5′ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page

limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit; or, if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: July 23, 2008.

Deadline for Transmittal of Applications: August 22, 2008.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, if you qualify for an exception to the electronic submission requirement, please refer to Section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in Section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR part 74. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:*

Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the U.S.-Russia Program: Improving Research and Educational Activities in Higher Education, CFDA Number 84.116S, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the U.S.-Russia Program: Improving Research and Educational Activities in Higher Education at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA Number. Do not include the CFDA Number's alpha suffix in your search (e.g., search for 84.116, not 84.116S).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted, and must be date and time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) Registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf).* You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition, you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).
- You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you

upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award Number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30 p.m., Washington, DC time, on the application deadline date, please contact the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** in Section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time; or, if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days; or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Krish Mathur, U.S. Department of Education, 1990 K Street, NW., Room 6155, Washington, DC 20006–8544. *FAX*: (202) 502–7877.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:
U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.116S), 400 Maryland Avenue, SW., Washington, DC 20202–4260;

or

By mail through a commercial carrier:
U.S. Department of Education, Application Control Center, Stop 4260, *Attention:* (CFDA Number 84.116S), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.116S), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA Number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for evaluating the applications for this program are from 34 CFR 75.210 of EDGAR and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notice (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act (GPRA), the Department will use the following measures to assess the performance of the program:

(a) The percentage of FIPSE grantees reporting project dissemination to others.

(b) The percentage of FIPSE projects reporting institutionalization on their home campuses.

If funded, you will be asked to collect and report data on these measures in your project's annual performance report (EDGAR, 34 CFR 75.590). Applicants are also advised to consider these two measures in conceptualizing the design, implementation, and evaluation of the proposed project because of their importance in the application review process. Collection of data on these measures should be part of the project evaluation plan, along with any measures of progress on goals and objectives that are specific to your project.

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Krish Mathur, FIPSE—Fund for the Improvement of Postsecondary Education, 1990 K Street NW., Room 6155, Washington, DC 20006–8544. *Telephone:* (202) 502–7512 or by *e-mail: krish.mathur@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package 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** in Section VII in this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: July 17, 2008.

Sara Martinez Tucker,

Under Secretary of Education.

[FR Doc. E8–16840 Filed 7–22–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Migrant Education Coordination Program—Migrant Student Information Exchange (MSIX) State Data Quality Grants

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice of final requirements.

SUMMARY: The Assistant Secretary for Elementary and Secondary Education establishes the final requirements for Migrant Student Information Exchange (MSIX) State Data Quality grants funded under section 1308(b) of Title I, Part C of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001. Subject to the availability of funds in any fiscal year, the Department will use the requirements to make annual grant awards by formula, beginning in FY 2008, to provide additional resources to State educational agencies (SEAs) in order to assist them and their local operating agencies (LOAs) in implementing the interstate electronic exchange of migrant children's records through the Migrant Student Information Exchange (MSIX).

DATES: *Effective Date:* These requirements are effective August 22, 2008.

FOR FURTHER INFORMATION CONTACT: Alejandra Vélez-Paschke, U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, room 3E249, Washington, DC 20202–6135. Telephone: (202) 260–2834 or via Internet: *MsixTeam@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION:

Background: The Migrant Education Program (MEP), authorized in Title I, Part C, of the ESEA, is a State-operated, formula grant program under which SEAs receive funds to help improve the academic achievement of migratory children who reside in their States. Under section 1304(b)(3) of the ESEA, SEAs receiving MEP funds have a responsibility to carry out activities that promote the interstate and intrastate coordination of services for migratory children. This responsibility includes carrying out activities that provide for educational continuity through the timely transfer of pertinent school records, including health information, for migratory children whether or not they move during the regular school year.

Section 1308(b) of the ESEA requires, among other things, that the Department (1) Assist States in developing methods for the electronic transfer of migrant student records, (2) ensure the linkage of State electronic records-exchange systems, and (3) establish the minimum

data elements (MDEs) that States must collect and maintain in their migrant student databases for the purpose of electronically exchanging health and educational records on migrant children. To meet these statutory responsibilities, on September 28, 2007, the Department established the MSIX. When fully operational, the MSIX will allow all States participating in the MEP (and all LOAs in those States) to share an established set of MDEs on their migrant children with any State and LOA in which a migrant child enrolls by electronically linking the States' existing migrant student databases. On November 27, 2007, the Office of Management and Budget (OMB) approved an information collection package (1810–0683) that establishes 66 MDEs.

We published a notice of proposed requirements for this program in the **Federal Register** on April 1, 2008 (73 FR 17341). The notice proposed that the Department establish a grant program under which, subject to the availability of funds in any fiscal year, the Department would make annual grant awards by formula beginning in FY 2008 to SEAs in order to provide additional resources to assist them and their LOAs in implementing the interstate exchange of migrant children's records electronically through MSIX. The notice of proposed requirements included a discussion of how SEAs could use these supplemental funds and a proposed formula for distributing available money to the SEAs that requested this assistance.

Except for some minor editorial and technical changes, there are two differences between the proposed requirements identified in that notice and the final requirements announced in this notice. These changes are explained in the following *Analysis of Comments and Changes.*

Analysis of Comments and Changes

In response to our invitation in the notice of proposed requirements, one party submitted comments on the proposed requirements. An analysis of the comments follows.

Generally, we do not address technical and other minor changes—and suggested changes we are not authorized to make under the applicable statutory authority.

Comment: One commenter recommended that the Department allow States that have already shown that they have met the MDE requirements and implemented MSIX to use the MSIX State Data Quality Grant funds for instructional services for migrant students under Title I, Part C.

Discussion: The Department appreciates the commenter's concerns. However, the Department proposed this new program in response to specific concerns expressed by representatives of many SEAs about the costs of connecting their State migrant information systems with MSIX and implementing related records exchange activities, and their strong desire for additional funds to help pay for these costs. Responding to this call for support, the Department proposed the MSIX State Data Quality Grants as a way to supplement SEA efforts to pay for expenses incurred by States in their efforts to link to and use the MSIX. The Department believes that the needs of States for this additional assistance is such that the entire $2 million that we proposed to set aside for MSIX-related activities should be devoted to this purpose. In this regard, as explained in the notice of proposed requirements (73 FR 17342), SEAs may use these funds for a wide variety of MSIX-related activities, both for the ongoing costs of maintaining records and for one-time costs incurred. Ongoing costs may include such activities as paying for additional data entry personnel hired to enter migrant student data into the State's migrant database, further MSIX training of new staff, and refresher training once live data are entered into the system. One-time costs may include the purchase of equipment, such as computers, to be used for entering migrant student data. The funds that are used for these MSIX-related activities will make MEP Basic Formula Grant funds, which otherwise would have been spent on MSIX-related activities, available for purposes of providing educational services to migrant children under Title I, Part C of the ESEA.

Because the statement of Requirement 1 as proposed may not have clarified that funds may be used for any of a variety of activities only if the activities relate to the use of MSIX for transferring MDEs, we have clarified this point.

Change: Requirement 1 is revised to clarify that SEAs may use MSIX State Data Quality grant funds for various activities only to the extent that these activities are related to the transfer of the MDEs to and through MSIX.

Comment: None.

Discussion: In the course of our internal review of the proposed requirements, we determined that the following sentence, included in the notice of proposed requirements under the heading *Amount of the Grants*, should be included in Requirement 4 because it relates to the formula for determining an SEA's share of grant funds.

If an SEA does not apply for these funds or does not receive a MEP Basic State formula grant in any given year, its share of grant funds would be distributed to the requesting SEAs on the basis of the formula established in the notice of final requirements.

Change: We have revised Requirement 4 to include the following sentence:

If an SEA does not apply for these funds or does not receive a MEP Basic State formula grant in any given year, its share of grant funds will be distributed to the requesting SEAs on the basis of the formula established in this notice of final requirements.

Note: This notice does not solicit applications. In any year in which we choose to use these requirements, we invite applications through a separate document that will be sent to States directly.

Requirements

Requirement 1—In consultation with the LOAs and the State's parent advisory council, each SEA will determine how these funds will be used in the State. SEAs must use these funds only to help pay for additional costs that their agencies and the LOAs in their States may assume for various activities related to the transfer of the MDEs to and through MSIX. Examples of these activities include:

(a) Enhancements to the State's migrant or State student database to ensure the inclusion of the MDEs in accordance with MSIX data specifications;

(b) Staffing or information technology (IT) services needed for the collection, data entry, and maintenance of the MDEs or the connectivity to MSIX;

(c) Development of manuals, procedures, pamphlets, or other materials that support the implementation of the State's records exchange program; and

(d) Support for activities directly related to staff training on the use of MSIX, including staff attendance and travel to MSIX meetings and workshops.

Requirement 2—Only an SEA that receives an MEP Basic State Formula grant award is eligible to receive an MSIX State Data Quality grant. To receive an MSIX State Data Quality grant, an SEA must submit a letter, signed by the Chief State School Officer or his or her authorized representative, (a) requesting an MSIX State Data Quality grant award, and (b) providing an assurance that these funds will be used only for activities that comport with the requirements in this notice of final requirements. In each fiscal year for which sufficient section 1308 funds are available, the Department will

announce the estimated amount of each grant award and invite SEAs to submit their letters of application on or before a date that the Department specifies.

Requirement 3—These grant awards are subject to the financial reporting requirements in section 80.41 of the Education Department General Administrative Regulations (EDGAR) (34 CFR 80.41). With regard to performance reporting, the Department does not apply the provisions contained in section 80.40(b) of EDGAR. Instead, the Department will use program monitoring conducted in conjunction with the overall MEP Basic State Formula Grant program as a means of obtaining information, including supporting documentation, on how the SEA and LOAs in the State used MSIX State Data Quality grant funds to support MSIX-related activities. Monitoring activities will examine progress relative to the MSIX efficiency measure, which assesses the percentage of migrant student records that are consolidated when school enrollment has occurred in more than one State.

Requirement 4—Beginning in FY 2008 and in any subsequent fiscal year in which sufficient funds are available under section 1308, the Department will award these MSIX State Data Quality grants using the following formula:

- 75 percent of the total amount available will be awarded in equal amounts to each SEA with a MEP Basic State Formula grant award; and
- The remaining 25 percent of the funds will be awarded proportionally relative to the amount of each State's Basic MEP State Formula grant award amount made on July 1 of the fiscal year; except that
- No SEA may receive an MSIX State Data Quality grant award that exceeds 20 percent of its MEP Basic State Formula grant award.

If an SEA does not apply for these funds or does not receive a MEP Basic State formula grant in any given year, its share of grant funds will be distributed to the requesting SEAs on the basis of the formula established in this notice of final requirements.

Amount of the Grants

For FY 2008, the Department expects to award approximately $2 million for the MSIX State Data Quality grant awards. An appendix to this notice contains a table presenting the size of each State's FY 2008 award assuming that all eligible SEAs apply and that $2 million are available for FY 2008 awards. In subsequent fiscal years, the Department will inform the States of the total amount of funds available, if any, under this grant program.

Executive Order 12866

This notice of final requirements has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the notice of final requirements are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice of final requirements, we have determined that the benefits of the final requirements justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

We fully discussed the costs and benefits in the notice of proposed requirements.

Paperwork Reduction Act of 1995 (PRA)

The application procedure has been approved under OMB control number 1810–0683.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Applicable Statutory and Regulatory Requirements

This grant program is subject to the requirements established in this notice of final requirements and to the definitions used to determine the eligibility of a "migrant child" found in section 1309(2) of the ESEA and 34 CFR § 200.81. Consistent with the "Tydings Amendment" (section 421(b) of the General Education Provisions Act, and restated in section 76.709 of EDGAR), funds awarded under this program are available for obligation until September 30 of the fiscal year following the fiscal year in which they are awarded. Because it is a formula grant program, receipt of funds also is subject to the requirements of parts 76 and 80 of EDGAR (34 CFR parts 76 and 80).

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number 84.144, Migrant Education Coordination Program).

Program Authority: 20 U.S.C. 6398.

Dated: July 18, 2008.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

Appendix

Note: The estimated size of awards is based on the amount of FY 2008 MEP Basic State Grant awards issued on July 1, 2008, and assumes that (1) exactly $2 million will be available for FY 2008 MSIX State Data quality grant awards, and (2) each SEA with a Migrant Education Program Basic Formula Grant requests an award.

NATIONAL TOTALS	$2,000,000
ALABAMA	33,039.00
ALASKA	40,025.00
ARIZONA	39,449.00
ARKANSAS	37,580.00
CALIFORNIA	216,509.00
COLORADO	40,577.00
CONNECTICUT	31,475.00
DELAWARE	30,437.00
DIST. COLUMBIA	0.00

Appendix

ESTIMATED PROPOSED AWARD AMOUNTS FOR THE FY 2008 MSIX STATE DATA QUALITY GRANTS

FLORIDA	$63,523.00
GEORGIA	41,851.00
HAWAII	31,089.00
IDAHO	35,360.00
ILLINOIS	32,819.00
INDIANA	37,616.00
IOWA	32,460.00

ESTIMATED PROPOSED AWARD AMOUNTS FOR THE FY 2008 MSIX STATE DATA QUALITY GRANTS—Continued

KANSAS	47,023.00
KENTUCKY	40,555.00
LOUISIANA	33,549.00
MAINE	31,557.00
MARYLAND	30,773.00
MASSACHUSETTS	32,384.00
MICHIGAN	42,597.00
MINNESOTA	32,471.00
MISSISSIPPI	30,875.00
MISSOURI	32,241.00
MONTANA	31,404.00
NEBRASKA	37,541.00
NEVADA	30,331.00
NEW HAMPSHIRE	28,094.00
NEW JERSEY	32,998.00
NEW MEXICO	31,275.00
NEW YORK	43,935.00
NORTH CAROLINA	38,454.00
NORTH DAKOTA	30,326.00
OHIO	33,635.00
OKLAHOMA	31,519.00
OREGON	44,086.00
PENNSYLVANIA	43,389.00
RHODE ISLAND	13,374.00
SOUTH CAROLINA	30,790.00
SOUTH DAKOTA	31,202.00
TENNESSEE	30,782.00
TEXAS	114,584.00
UTAH	32,558.00
VERMONT	30,896.00
VIRGINIA	31,169.00
WASHINGTON	52,452.00
WEST VIRGINIA	16,147.00
WISCONSIN	30,905.00
WYOMING	30,320.00
PUERTO RICO	0.00

[FR Doc. E8–16857 Filed 7–22–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

July 17, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP00–70–019.

Applicants: Algonquin Gas Transmission Company.

Description: Algonquin Gas Transmission, LLC submits its FERC Gas Tariff, Fifth Revised Volume 1 effective 5/1/08.

Filed Date: 07/15/2008.

Accession Number: 20080716–0139.

Comment Date: 5 p.m. Eastern Time on Monday, July 28, 2008.

Docket Numbers: RP05–422–028.

Applicants: El Paso Natural Gas Company.

Description: El Paso Natural Gas Company submits Second Revised Volume 1A *et al.* effective 5/1/08.

Filed Date: 07/15/2008.

Accession Number: 20080716–0138.

Comment Date: 5 p.m. Eastern Time on Monday, July 28, 2008.

Docket Numbers: RP96–272–078.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Co submits Third Revised Sheet 66B.07 to its FERC Gas Tariff, Fifth Revised Volume 1.

Filed Date: 07/15/2008.

Accession Number: 20080716–0140.

Comment Date: 5 p.m. Eastern Time on Monday, July 28, 2008.

Docket Numbers: RP08–444–000.

Applicants: MGI Supply Ltd.

Description: Petition of MGI Supply Ltd for Clarification or Waiver pursuant to Rule 207 of the Commission's Rules of Practice and Procedure 18 CFR Section 207 etc.

Filed Date: 07/14/2008.

Accession Number: 20080715–0199.

Comment Date: 5 p.m. Eastern Time on Monday, July 28, 2008.

Docket Numbers: RP08–445–000.

Applicants: Dauphin Island Gathering Partners.

Description: Cash Out Activity Report.

Filed Date: 07/16/2008.

Accession Number: 20080716–5022.

Comment Date: 5 p.m. Eastern Time on Monday, July 28, 2008.

Docket Numbers: CP08–406–002.

Applicants: Columbia Gulf Transmission Company.

Description: Columbia Gulf Transmission Company submits a compliance filing to cancel Rate Schedules X–53, X–82, X–87, X–92 and X–101.

Filed Date: 07/11/2008.

Accession Number: 20080715–0005.

Comment Date: 5 p.m. Eastern Time on Tuesday, July 22, 2008.

Docket Numbers: CP07–32–006.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits Substitute Fourtheenth Revised Sheet No. 20 *et al.* to FERC Gas Tariff, Sixth Revised Volume No. 1, to be effective 6/1/08.

Filed Date: 07/15/2008.

Accession Number: 20080716–0137.

Comment Date: 5 p.m. Eastern Time on Tuesday, July 22, 2008.

Docket Numbers: CP00–6–015.

Applicants: Gulfstream Natural Gas Company, LLC.

Description: Gulfstream Natural Gas Company, LLC submits Second Revised Sheets 5 and 6 to their FERC Gas Tariff, Original Volume 1.

Filed Date: 07/15/2008.

Accession Number: 20080716–0141.

Comment Date: 5 p.m. Eastern Time Tuesday, July 22, 2008.

Any person desiring to intervene or to protest in any of the above proceedings 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) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also 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 dockets(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.

Nathaniel J. Davis, Sr.

Deputy Secretary.

[FR Doc. E8–16816 Filed 7–22–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0550; FRL–8375–3]

FIFRA Scientific Advisory Panel; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 4–day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review selected issues associated with the risk assessment process for pesticides with persistent, bioaccumulative and toxic characteristics.

DATES: The meeting will be held on October 28 – 31, 2008, from approximately 8:30 a.m. to 5:00 p.m, eastern time.

Comments. The Agency encourages that written comments be submitted by October 14, 2008 and requests for oral comments be submitted by October 21, 2008. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after October 14, 2008 should contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT.** For additional instructions, see Unit I.C. of the **SUPPLEMENTARY INFORMATION.**

Nominations. Nominations of candidates to serve as ad hoc members of the FIFRA SAP for this meeting should be provided on or before August 4, 2008.

Special accommodations. For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Environmental Protection Agency, Conference Center - Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, Virginia 22202.

Comments. Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0550, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions. Direct your comments to docket ID number EPA–HQ–OPP–2008–0550. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket. All documents in the docket are listed in a docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in a docket index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

Nominations, requests to present oral comments, and requests for special accommodations Submit nominations to serve as ad hoc members of the FIFRA SAP, requests for special seating accommodations, or requests to present oral comments to the DFO listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Myrta R. Christian, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8498; fax number: (202) 564–8382; e-mail addresses: *christian.myrta@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), FIFRA, and the Food Quality Protection Act of 1996 (FQPA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the DFO listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

When submitting comments, remember to:

1. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

2. Follow directions. The Agency may ask you to respond to specific questions

or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

C. How May I Participate in this Meeting?

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPP–2008–0550 in the subject line on the first page of your request.

1. *Written comments.* The Agency encourages that written comments be submitted, using the instructions in **ADDRESSES**, no later than October 14, 2008, to provide the FIFRA SAP the time necessary to consider and review the written comments. Written comments are accepted until the date of the meeting, but anyone submitting written comments after October 14, 2008 should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT.** Anyone submitting written comments at the meeting should bring 30 copies for distribution to the FIFRA SAP.

2. *Oral comments.* The Agency encourages that each individual or group wishing to make brief oral comments to the FIFRA SAP submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than October 21, 2008, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting and, to the extent that time permits, the Chair of the FIFRA SAP may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (e.g., overhead projector, 35 mm projector, chalkboard). Oral comments before the FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

3. *Seating at the meeting.* Seating at the meeting will be open and on a first-come basis.

4. *Request for nominations to serve as ad hoc members of the FIFRA SAP for this meeting.* As part of a broader process for developing a pool of candidates for each meeting, the FIFRA SAP staff routinely solicits the stakeholder community for nominations of prospective candidates for service as ad hoc members of the FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas: toxicity, residue-based toxicity approaches, bioaccumulation, persistence, long-range transport, sediment dynamics and general risk assessment methodology. Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before August 4, 2008. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on the FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency except the EPA. Other factors considered during the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected to serve on the FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 8 to 10 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, prospective candidates for service on the FIFRA SAP will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The EPA will evaluate the candidates financial disclosure form to assess whether there are financial conflicts of interest, appearance of a lack of impartiality or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on the FIFRA SAP. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP website at *http://epa.gov/scipoly/sap* or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

II. Background

A. Purpose of the FIFRA SAP

The FIFRA SAP serves as the primary scientific peer review mechanism of EPA's Office of Prevention, Pesticides and Toxic Substances (OPPTS) and is structured to provide scientific advice, information and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. The FIFRA SAP is a Federal advisory committee established in 1975 under FIFRA that

operates in accordance with requirements of the Federal Advisory Committee Act. The FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA, as amended by FQPA, established a Science Review Board consisting of at least 60 scientists who are available to the Scientific Advisory Panel on an ad hoc basis to assist in reviews conducted by the Scientific Advisory Panel. As a peer review mechanism, the FIFRA SAP provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of the FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendation to the Agency.

B. Public Meeting

This Scientific Advisory Panel meeting will address selected scientific issues associated with assessing the potential ecological risks resulting from use of a pesticide active ingredient which has persistent, bioaccumulative, and toxic (PBT) characteristics. EPA will pose specific charge questions to the SAP on issues involving:

- The range and combination of characteristics of persistence, bioaccumulation, and toxicity that should employ a modified approach to ecological risk assessment;
- The need for changes to the conceptual model used to evaluate the potential ecological effects of pesticides with varying P and B characteristics;
- Toxicity endpoints and methods OPP should consider when assessing pesticides with varying P and B characteristics;
- Pathways of potential exposure that should be considered in assessing the ecological risks of a pesticide with varying P and B characteristics;
- Data and model(s) appropriate for estimating and characterizing bioaccumulation and estimating steady and non-steady state pesticide residue concentrations in biota;
- Data and model(s) appropriate for estimating and characterizing environmental fate in soil, water and sediment; andData and model(s) most appropriate for assessing exposure to biota through multiple pathways.

Office of Pesticides Programs (OPP) has recently completed ecological risk assessments on several pesticides with varying P and B characteristics. OPP will draw on information and analyses from these assessments to illustrate the evolving approach OPP is using to address selected issues and how differences across chemicals – for example, in terms of data, characteristics, and available models – influence OPP's approaches. This meeting with the SAP is the first of what OPP anticipates will be several meetings over the next few years to improve OPP's evolving approach to evaluating pesticides with varying P and B characteristics.

C. FIFRA SAP Documents and Meeting Minutes

EPA's background paper, related supporting materials, charge/questions to the FIFRA SAP, FIFRA SAP composition (i.e., members and ad hoc members for this meeting), and the meeting agenda will be available by mid-October 2008. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, at *http://www.regulations.gov* and the FIFRA SAP homepage at *http://www.epa.gov/scipoly/sap*.

The FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP website or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: July 16, 2008.

Elizabeth Resek,

Acting Director, Office of Science Coordination and Policy.

[FR Doc. E8–16738 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0522; FRL–8373–3]

North American Free Trade Agreement Technical Working Group on Pesticides; Proposed Five-Year Strategy, 2008–2013; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is releasing for public comment the proposed Five-Year Strategy, 2008–2013, of the North American Free Trade Agreement Technical Working Group on Pesticides. In this document, the North American Free Trade Agreement (NAFTA) Technical Working Group (TWG) on Pesticides states its goal to create an aligned North American registration system for pesticides and products treated with pesticides and make work-sharing a way of doing business. The strategic objectives are to: provide U.S., Canadian and Mexican growers with equal access to—and at the same time introduction of—pest management tools, including safer alternatives; work cooperatively to re-evaluate and reregister older pesticides using each country's re-evaluation programs to the fullest extent possible to increase efficiency; and integrate smart business approaches and practices into NAFTA TWG work.

DATES: Comments must be received on or before August 18, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0522, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0522. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an

"anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Lorry Frigerio, Field and External Affairs Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–605–0654; fax number: 703–308–1850; e-mail address: *frigerio.lorry@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are a U.S., Canadian or Mexican grower, registrant, researcher, manufacturer, operator, distributor or government regulator of pesticide products in one of the NAFTA countries, as well as an public group or member of the public interested in their use.

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

The Agency is releasing for public comment the proposed Five-Year Strategy, 2008–2013, of the North American Free Trade Agreement Technical Working Group on Pesticides. It can be found in docket ID number EPA–HQ–OPP–2008–0522. EPA and its North American counterparts, Pest Management Regulatory Agency (PMRA) of Canada and Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentatíon (SAGARPA) of Mexico, provide overall guidance and policy direction in developing easier and less expensive pesticide regulation and trade among the three countries and in meeting the environmental, ecological and human health objectives of NAFTA.

The Five-Year Strategy will guide the TWG's future work and direction. It reflects the collective goal of creating an aligned North American registration system for pesticides and for products treated with pesticides as well as a commitment to partners. It also presents the NAFTA TWG governance structure. The environment within which the TWG operates is constantly changing. A number of drivers, both external and internal, are critical in influencing TWG's strategic directions. They define the work that the TWG must deliver to meet stakeholder needs and improve overall outcomes. The TWG aims to ensure it is well positioned to take advantage of opportunities, monitor trends and assess implications.

List of Subjects

Environmental protection, harmonization of data requirements, human safety and science issues, effective communication and planning, maintaining high international standards, performance measurement and evaluation.

Dated: July 11, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E8–16381 Filed 7–16–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0401; FRL–8365–4]

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 currently registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Comments must be received on or before August 22, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0401, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0401. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are 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: Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8715; e-mail address: *mendelsohn.mike@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. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. 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 New Active Ingredients not Included in any Previously Registered Products

1. *File Symbol*: 67979–RU. *Applicant*: Syngenta Seeds Inc., P.O. Box 12257, Research Triangle Park, North Carolina 27709. *Product name*: MIR162 Maize. Plant-Incorporated Protectant. *Active ingredient*: *Bacillus thuringiensis* Vip3Aa20 and the genetic material necessary for its production (vector pNOV1300) in event MIR162 maize (SYN-IR162-4). *Proposal classification/Use*: For use on corn.

2. *File Symbol*: 67979–RE. *Applicant*: Syngenta Seeds Inc. *Product name*: Bt11 x MIR162 Corn. Plant-Incorporated Protectant. *Active ingredients*: *Bacillus thuringiensis* Vip3Aa20 and the genetic material necessary for its production (vector pNOV1300) in event MIR162 maize (SYN-IR162-4) and *Bacillus thuringiensis* Cry1Ab delta-endotoxin and the genetic material (as contained in plasmid vector pZO1502) necessary for its production in corn. *Proposal classification/Use*: For use on corn.

3. *File Symbol*: 67979–RG. *Applicant*: Syngenta Seeds Inc., P.O. Box 12257, Research Triangle Park, North Carolina 27709. *Product name*: Bt11 x MIR162 x MIR604 Corn. Plant-Incorporated Protectant. *Active ingredients*: *Bacillus thuringiensis* Vip3Aa20 and the genetic material necessary for its production (vector pNOV1300) in event MIR162 maize (SYN-IR162-4) and *Bacillus thuringiensis* Cry1Ab delta-endotoxin and the genetic material (as contained in plasmid vector pZO1502) necessary for its production in corn and Modified Cry3A protein and the genetic material necessary for its production (via elements of pZM26) in corn (SYN-IR604-8). *Proposal classification/Use*: For use on corn.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: July 10, 2008.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–16878 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8696–5]

EPA Science Advisory Board Staff Office; Request for Nominations of Experts for a Science Advisory Board Committee To Provide Advice on Future Development of EPA's Report on the Environment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB or the Board) Staff Office is soliciting nominations of nationally recognized scientists for consideration of membership on an SAB committee to provide advice on future development of EPA's Report on the Environment (ROE).

DATES: Nominations should be submitted by August 13, 2008 per the instructions below.

FOR FURTHER INFORMATION CONTACT: For information regarding this Request for Nominations please contact Dr. Thomas Armitage, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, or via telephone/voice mail (202) 343–9995; fax (202) 233–0643; or e-mail at *armitage.thomas@epa.gov*. General information concerning the EPA SAB can be found on the SAB Web site at: *http://www.epa.gov/sab*.

SUPPLEMENTARY INFORMATION:

Background: The SAB (42 U.S.C. 4365) is a chartered Federal Advisory Committee that provides independent scientific and technical peer review, advice, consultation, and recommendations to the EPA Administrator on the technical basis for EPA actions. As a Federal Advisory Committee, the SAB conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. C) and related regulations. Generally, SAB meetings are announced in the **Federal Register**, conducted in public view, and provide opportunities for public input during deliberations. Additional information about the SAB and its committees can be obtained on the SAB Web site at: *http://www.epa.gov/sab*.

EPA recently published its 2008 Report on the Environment (hereinafter referred to as ROE 2008). This report is available on the EPA Office of Research and Development Web site at: *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=190806*. In the ROE 2008, EPA presents environmental and human health indicator information to represent the status of and trends in the condition of the nation's environment. The ROE will be used by EPA to: (1) Inform strategic planning, priority setting, and decision making across the Agency, and (2) provide information to enable the public to assess whether EPA is succeeding in its overall mission to protect human health and the environment. Individual chapters in the ROE 2008 provide information on the condition of air, water, and land environments. The air chapter focuses outdoor and indoor air quality and greenhouse gases. The water chapter addresses the condition of surface waters, watersheds, ground water, wetlands, coastal waters, drinking water, recreational waters, and consumable fish and shellfish. The land chapter contains indicator information on land cover, land use, wastes on land, chemicals used on land, and contaminated land. Two other chapters in the ROE 2008 focus on human health and ecological condition. The human health chapter provides indicator information on human disease and disease conditions and environmental exposure to pollutants. The ecological condition chapter provides indicator information on the extent and distribution of ecological systems, diversity and biological balance of ecological systems, ecological processes, critical physical and chemical attributes, and exposure to pollutants. The environmental indicators in the ROE 2008 were selected to answer broad questions deemed to be of critical importance to EPA's mission. The ROE 2008 incorporates SAB comments on earlier drafts of the ROE dated 2003 and 2007. The findings and recommendations of these previous SAB reviews are available on the SAB Web site at: *http://www.epa.gov/sab* (see reports EPA–SAB–05–004 and EPA–SAB–08–007). EPA expects to modify future editions of the ROE based on long-term recommendations in the SAB review of the draft 2007 ROE. This notice specifically requests nominations for candidates to serve on a new SAB committee that will provide advice to EPA over the next few years on how to: (1) Address previous SAB recommendations to improve future versions of the ROE, and (2) make the ROE more useful to EPA in informing planning and decision making and providing information to the public. The Committee will ultimately review the

next version of the ROE expected to be published in 2012.

Expertise Sought: The SAB Staff Office requests nominations of recognized experts from a wide range of scientific and engineering disciplines with experience and expertise in: designing, implementing, applying and/or communicating indicator information and data at regional and national scales to evaluate the condition of air, water, and/or land environments, human health, and/or ecological condition to inform planning, policy, and decision making. Nominations of experts in various disciplines are requested including: (a) Environmental scientists and engineers with knowledge of the sources, fate, and transport of air pollutants and outdoor and indoor air quality indicators; (b) aquatic biologists, ecologists, hydrologists, chemists, oceanographers and microbiologists with expertise in assessing the condition of surface water, ground water, drinking water, wetlands, coastal waters, and/or recreational waters; (c) environmental scientists, ecologists, soil scientists, and environmental engineers with expertise in the use of indicators (e.g., land cover, land use, wastes on land, chemicals used on land, and contaminated land) to assess the condition of land; (d) health scientists (e.g., in the fields of public health, epidemiology, medicine, and risk assessment) with expertise in assessing human exposure to environmental pollutants, health risks associated with environmental pollutants, and/or indicators for assessing human health condition; e) ecologists with expertise in the use of indicators to assess the ecological effects of exposure to pollutants and the condition of whole ecosystems; (f) statisticians with expertise in analysis of environmental information to determine the status of and trends in environmental condition; and (g) decision scientists, social scientists, communication scientists, and environmental economists with expertise in using and/or communicating environmental indicator information and formulating environmental policy.

How to Submit Nominations: Any interested person or organization may nominate qualified individuals to be considered for appointment on this SAB committee. Candidates may also nominate themselves. Nominations should be submitted in electronic format (which is preferred over hard copy) following the instructions for "Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed" provided on the SAB Web site. The form can be accessed through the "Public Involvement in Advisory Committee" link on the blue navigational bar on the SAB Web site at: *http://www.epa.gov/sab.* To receive full consideration, nominations should include all of the information requested.

EPA's SAB Staff Office requests contact information about: the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vitae; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Dr. Thomas Armitage, DFO, at the contact information provided above in this notice. Non-electronic submissions must follow the same format and contain the same information as the electronic.

The SAB Staff Office will acknowledge receipt of the nomination and inform nominees of the committee for which they have been nominated. From the nominees identified by respondents to this **Federal Register** notice (termed the "Widecast") and other sources, the SAB Staff Office will develop a smaller subset (known as the "Short List") for more detailed consideration. The Short List will be posted on the SAB Web site at: *http://www.epa.govc/sab* and will include, for each candidate, the nominee's name and biosketch. Public comments on the Short List will be accepted for 21 calendar days. During this comment period, the public will be requested to provide information, analysis, or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates for the Committee.

For the SAB, a balanced committee is characterized by inclusion of candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. Public responses to the Short List candidates will be considered in the selection of the Committee, along with information provided by candidates and information gathered by SAB Staff independently concerning the background of each candidate (e.g., financial disclosure information and computer searches to evaluate a nominee's prior involvement with the topic under review). Specific criteria to be used in evaluation of an individual Committee member include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) absence of financial conflicts of interest; (c) scientific credibility and impartiality; (d) availability and willingness to serve; and (e) ability to work constructively and effectively in committees.

Short List candidates will be required to fill-out the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency" (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address at: *http://www.epa.gov/sab/pdf/epaform3110–48.pdf.*

Dated: July 17, 2008.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E8–16832 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8696–1]

State Innovation Grant Program, Preliminary Notice and Request for Input on the Development of a Solicitation for Proposals for 2009 Awards; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: This notice is issued to correct the Preliminary Notice and Request for Input on the Development of a Solicitation for Proposals for 2009 Awards originally published on July 9, 2008, in the **Federal Register**, 73 FR 39298–39301. This notice extends the deadline one week from August 8, 2008, to August 15, 2008, for response from state environmental regulatory agencies; and revises the list of contacts specifically for EPA Regions 6, 8, and 9 found in the *Opportunities for Dialogue*

section. All other information published in the July 9 Notice remains the same.

The U.S. Environmental Protection Agency (EPA or Agency), National Center for Environmental Innovation (NCEI) is giving preliminary notice of its intention to solicit pre-proposals for a 2009 grant program to support innovation by state environmental agencies—the "State Innovation Grant Program." The Agency is also seeking input from state environmental regulatory agencies on the topic areas for the solicitation. In addition, EPA is asking each state environmental regulatory agency to designate a point of contact speaking on behalf of management (in addition to the Commissioner, Director, or Secretary) who will be the point of contact for further communication about the upcoming solicitation. If your point of contact from previous State Innovation Grant solicitations is to be your contact for this year's competition, there is no need to send that information again, as all previously designated points of contact will remain on our notification list for this year's competition. EPA anticipates publication of a Solicitation Announcement of Federal Funding Opportunity on the Federal government's grants opportunities Web site (*http://www.grants.gov*) to announce the availability of the next solicitation within 60 days.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice, please contact EPA at this e-mail address: *innovation_state_grants@epa.gov*; or you may call Sherri Walker at (202) 566–2186.

DATES: State environmental regulatory agencies will have until August 15, 2008, to respond with: Suggestions for specific topics that should be included under the general subject area of "Innovation in Environmental Permitting Programs" (e.g., topics with 1–2 paragraphs description) for the next solicitation; and point-of-contact information for the person within the state environmental regulatory agency (in addition to Commissioner, Director, or Secretary) who will be designated to receive future notices about the State Innovation Grant competition. We will automatically transmit notice of availability of the solicitation to people in state agencies identified for previous solicitations.

ADDRESSES: We encourage e-mail responses. Information should be submitted in writing via e-mail to: *innovation_state_grants@epa.gov*; or fax to "State Innovation Grant Program" at (202) 566–2220. If you have questions about responding to this notice, please contact EPA at this e-mail address or fax number, or you may call Sherri Walker at (202) 566–2186.

EPA will acknowledge all responses it receives to this notice. If you have not received an acknowledgment from EPA within three (3) days of the end of the notice period, please send an e-mail to: *innovation_state_grants@epa.gov* or call Sherri Walker at (202) 566–2186. Failure to do so may result in your information or comments not being received by the deadline. EPA will respond to all questions in writing, and all questions and responses will be posted on the EPA State Innovation Grant Web site at *http://www.epa.gov/innovation/stategrants*. State agencies are advised to monitor this Web site for information posted in response to questions received prior to and during the competition period.

SUPPLEMENTARY INFORMATION:

Background: In April 2002, EPA issued its plan for future innovation efforts, published as Innovating for Better Environmental Results: A Strategy to Guide the Next Generation of Innovation at EPA (EPA 100–R–02–002; *http://www.epa.gov/innovation/pdf/strategy.pdf*). EPA's Innovation Strategy presents a framework for environmental innovation consisting of four major elements:

1. Strengthening EPA's innovation partnership with states and tribes;
2. Focusing on priority environmental issues;
3. Diversifying environmental protection tools and approaches; and
4. Fostering more "innovation-friendly" systems and organizational cultures.

The State Innovation Grant Program strengthens EPA's partnership with the states by supporting state innovation compatible with EPA's Innovation Strategy. EPA wants to encourage states to build on previous experience (theirs and others) to undertake strategic innovation projects that promote larger-scale models with potential for broader use for "next generation" environmental protection that promise better environmental outcomes and other beneficial results. EPA is interested in funding projects that: (i) Go beyond a single facility experiment and provide change that is "systems-oriented"; (ii) provide better results from a program, process, or sector-wide innovation; and (iii) promote integrated (multi-media) environmental management with a high potential for transfer to other states, U.S. territories, and tribes.

Since 2002, EPA has sponsored six State Innovation Grant Program competitions that asked for State project pre-proposals that supported the general theme of innovation in environmental permitting. We interpret this theme broadly to include alternatives to permitting and the establishment of incentives to go beyond compliance with permit requirements. To date, the program has supported projects primarily in three strategic focus areas: Application of the Environmental Results Programs (ERP) model, state performance-based environmental leadership programs similar to the National Environmental Performance Track (PT) Program, and the application of Environmental Management Systems (EMS) and other integration tools in permitting. EPA's focus on a small number of topics within this general subject area effectively concentrates the limited resources available for greater strategic impact.

Thirty-eight awards to States have been made from the six prior competitions and information on those projects can be found on the EPA Web site at *http://www.epa.gov/innovation/stategrants/projects.htm*. These projects received collectively over 7 million dollars in assistance. The assistance agreement awards for these projects were made to State environmental regulatory agencies and most recently to a commission within a state with a re-delegated authority to administer an environmental permitting program. Among the grant projects, including those with pending awards: Eighteen (18) were provided for development of Environmental Results Programs, nine (9) were related to Environmental Management Systems and permitting, nine (9) were to enhance performance-based environmental leadership programs, two (2) were for watershed-based permitting, two (2) were for integrated permitting approaches, and one (1) was for streamlining a storm water permit program using an innovation in information technology, applying geographic information systems (GIS) and a web-based portal to a permit application and screening process. Some of the projects funded fit into more than one category (e.g., combination projects of ERP with PT, or ERP with EMS). For information on prior State Innovation Grant Program solicitations and awards, please see the EPA State Innovation Grants Web site at *http://www.epa.gov/innovation/stategrants*.

Agencies That Are Eligible To Compete for the State Innovation Grant: Historically, we have limited the competition to state agencies with the primary delegations from EPA for permitting programs. We are aware that some state agencies re-delegate their

authorities for permitting programs to regional, county, or municipal agencies. Last year, EPA clarified the eligibility definition in the solicitation to include regional, county, or municipal agencies with re-delegated permitting authority for federal environmental permitting programs. Again this year we will consider these agencies for awards providing that the principal state environmental regulatory agency will be an active member of the project team. Agencies are encouraged to partner with other governmental agencies or non-governmental organizations within the State (or outside of their state) that have complementary environmental mandates or symbiotic interests (e.g., energy, agriculture, natural resources management, transportation, public health).

EPA will accept only one pre-proposal in the competition per state. An exception to that limit is anticipated where, as in previous years, a multi-state or state-tribal proposal will be accepted in addition to an individual state proposal. We believe it likely that we will limit this exception so that a state may appear in no more than one multi-state or state-tribal proposal in addition to its individual proposal. States are also encouraged to partner with other states and American Indian tribes to address cross-boundary issues, to encourage collaborative environmental partnering within industrial sectors or in certain topical areas (e.g., agriculture), and to create networks for peer-mentoring. EPA regrets that because of the limitation in available funding it is not yet able to open this competition to American Indian tribal environmental agencies but we strongly encourage tribal agencies to join with adjacent states in project proposals. EPA is interested in hearing from regional, county, or municipal agencies about their interest, capacity, and the likelihood of commitment from the principal statewide regulatory entity to assist a potential project.

Proposed General Topic Areas for Solicitation: To increase the likelihood of strategic impact with what we anticipate to be limited funds, EPA proposes to continue with the general theme of "innovation in permitting," and additionally to continue with the focus on the three strategic topic areas similar to the last competition: (1) Projects that support the development of state Environmental Results Programs (ERP); (2) projects that implement performance-based environmental leadership programs by states, similar to the National Environmental Performance Track Program particularly including the development and implementation of incentives; (3) projects which involve the application of Environmental Management Systems (EMS), including those that explore the relationship of EMS to permitting (see EPA's Strategy for Determining the Role of EMS in Regulatory Programs at *http://www.epa.gov/ems* or *http://www.epa.gov/ems/docs/EMS_and the_Reg_Structure_41204F.pdf*), or otherwise support integrated or multimedia strategies. Connected to this, we are also interested in the application of lean manufacturing tools and techniques for improvement (*http://www.epa.gov/innovation/lean/*) in environmental performance and energy efficiency. These proposals may involve a linkage to permitting (e.g., reducing emissions to avoid exceeding permit limits).

EPA intends to support state projects that involve innovation in environmental permitting (including alternatives to permitting) related to one of the EPA Innovation Strategy's priority environmental areas, or to other priority areas identified previously by individual states in collaboration with EPA in a formal state-EPA agreement such as a Performance Partnership Agreement (PPA). EPA is interested in projects that focus on priority environmental issues, such as reducing greenhouse gases (e.g., energy efficiency), reducing smog, restoring and maintaining water quality, and reducing the cost of water and wastewater infrastructure.

Request for Input on Solicitation Topics and Priorities: EPA encourages communication from States and other parties about these three thematic areas mentioned here and other areas potentially ripe for innovation. EPA is asking for state environmental regulatory agencies and other interested parties to provide brief (about 1 paragraph) suggestions about additional innovation topics within the subject of innovation in permitting for possible inclusion in the upcoming solicitation. In addition to the three topic areas (ERP, PT, and EMS and integrated approaches), EPA will continue to encourage project proposals that address the four major elements (i.e., strengthening innovation partnerships; focusing on priority environmental issues; diversifying environmental protection tools and approaches; and fostering "innovation-friendly" systems and organizational cultures) and use tools (i.e., incentives, information resources, results-based goals and measures, etc.) highlighted in the Innovation Strategy. EPA may also contemplate projects otherwise related to the general theme of innovation in permitting, in particular as they may address EPA regional and state environmental priorities.

To date, the State Innovation Grant Program has supported the application of ERP for the following sectors:

- Auto body/auto repair/auto salvage sectors,
- Underground storage tanks (UST),
- Dry cleaning operations,
- Printing,
- Animal feedlot operations,
- Injection well management,
- Oil and gas production,
- Food preparation facilities,

As well as a multi-sector application targeted at storm water management.

We are interested in continuing the EMS and permit integration theme, but may consider introduction of greater latitude under this theme such as the integration of EMS into other business systems such as lean manufacturing or six sigma (*http://www.epa.gov/innovation/lean/*). We also anticipate a continued interested in projects that promote the development of state performance track-like projects, perhaps including "on-ramp" approaches for potential environmental leaders that require upfront compliance assistance.

Potential applicants are advised outright that State Innovation Grants will not be awarded for the development or demonstration of new environmental technologies, nor will they be awarded for the development of information systems or data or projects that have as a primary focus the upgrading of information technology systems, unless there is a clear link to innovation in specific permitting programs.

Projects will be much less likely to be funded through this State Innovation Grant if agency resources pertinent to the topic are already available through another EPA program. Project selections and awards will be subject to funding availability. State environmental regulatory agencies and other respondents should send their suggestions to EPA by e-mail or fax as described in the **ADDRESSES** section above.

Request for Input on Diffuse Delegations and Designation of a Primary Point of Contact: One of the principal goals of the State Innovation Grant program is the testing of an integrated (multi-media) innovation with the potential for replication or broader application for other sectors, or in permitting programs in other state or tribal agencies. Because of the limitation of funds we have historically limited the competition to state agencies with a primary delegation from EPA for permitting programs. We have concerns

that opening the competition to regulatory entities at lower levels (e.g., air control boards, water quality management districts, counties or municipalities) may limit the range of results and the potential for transferability of innovative approaches. We recognize, however, that in some instances states have re-delegated programs to regional or local agencies and that those agencies may manage substantial permitting programs. EPA is seeking comment from states that may have re-delegated several authorities to other governing regional or municipal agencies or boards rather than in one centralized state environmental regulatory agency and from the boards and districts on how we might better accommodate those delegations in this program and take advantage of the expertise in those programs while maintaining the strategically important goal of testing innovation for broad application and transferability. EPA is not seeking comments on our widening of eligibility to agencies with re-delegated authority. We are seeking to determine how many states and entities with re-delegated authority may be anticipating submitting a pre-proposal. Also, we are seeking specific feedback on topical input that these groups may want to give us.

EPA asks that each state environmental regulatory agency designate a primary point-of-contact who we will add to the EPA notification list for further announcements about the State Innovation Grant Program. For point of contact information, please provide: Name, title, department and agency, street or post office address, city, state, ZIP code, telephone, fax number, and e-mail address. If your point of contact from previous State Innovation Grant solicitations is to be your contact for this year's competition, there is no need to send that information again, as all previously designated points of contact will remain on our notification list for this year's competition. We are asking that any new name be submitted with the knowledge and approval of the highest levels of management within an Agency (Commissioner, Director, Secretary, or their deputies). Please submit this information to EPA by mail, fax, or e-mail prior to August 15, 2008, in the following manner.

By e-mail to: Innovation_State_Grants@EPA.gov.

By fax to: State Innovation Grant Program; (202) 566–2220.

We encourage e-mail responses. If you have questions about responding to this notice, please contact EPA at this e-mail address or fax number, or you may call Sherri Walker at (202) 566–2186. For point-of-contact information, please provide: Name, title, department and agency, mailing address (street or P.O. Box), city, state, ZIP code, telephone, fax number, and e-mail address. EPA will acknowledge all responses it receives to this notice.

Opportunity for Dialogue: Between now and the initiation of the competition with the release of the solicitation, communication with potential applicants is allowed. This communication may include helping potential applicants determine whether the applicant itself is eligible or if the scope of an applicant's potential project is suitable for funding, as well as responding to general requests for clarification of the notice. To ensure an equal opportunity for all potential applicants, responses to questions that come to us during the period between this pre-announcement and the release of the solicitation along with helpful resource materials will be posted on the State Innovation Grant Web site at *http://www.epa.gov/innovation/stategrants.* States are also invited to communicate with NCEI about ideas for future competition themes by contacting the EPA Headquarters contact listed below. The contacts for the EPA Regions and the EPA HQ National Center for Environmental Innovation are as follows:

Anne Leiby or Josh Secunda, U.S. EPA Region 1, 1 Congress Street, Suite 1100, Boston, MA 02114–2023, (617) 918–1076 or (617) 918–1736, *leiby.anne@epa.gov* or *secunda.josh@epa.gov, States:* CT, MA, ME, NH, RI, VT.

Jennifer Thatcher, U.S. EPA Region 2, 290 Broadway, 26th Floor, New York, NY 10007–1866, (212) 637–3593, *thatcher.jennifer@epa.gov, States & Territories:* NJ, NY, PR, VI.

Michael Dunn, U.S. EPA Region 3, 1650 Arch Street (3EA40), Philadelphia, PA 19103, (215) 814–2712, *dunn.michael@epa.gov, States:* DC, DE, MD, PA, VA, WV.

LaToya Miller, U.S. EPA Region 4, 61 Forsyth Street, SW., Atlanta, GA 30303, (404) 562–9885, *miller.latoya@epa.gov, States:* AL, FL, GA, KY, MS, NC, SC, TN.

Marilou Martin, U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 353–9660, *martin.marilou@epa.gov, States:* IL, IN, MI, MN, OH, WI.

Craig Weeks or David Bond, U.S. EPA Region 6, Fountain Place, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–7505 or (214) 665–6431, *weeks.craig@epa.gov* or *bond.david@epa.gov, States:* AR, LA, NM, OK, TX.

Wendy Lubbe, U.S. EPA Region 7, 901 North 5th Street, Kansas City, KS 66101, (913) 551–7551, *lubbe.wendy@epa.gov, States:* IA, KS, MO, NE.

Jack Hidinger or Anthony Deloach, U.S. EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6387 or (303) 312–6070, *hidinger.jack@epa.gov* or *deloach.anthony@epa.gov, States:* CO, MT, ND, SD, UT, WY.

Kathi Moore or Teddy Ryerson, U.S. EPA Region 9, 75 Hawthorne Street (WTR–1), San Francisco, CA 94105, (415) 972–3271 or (415) 947–8705, *moore.kathi@epa.gov* or *ryerson.teddy@epa.gov, States and Territories:* AS, AZ, CA, GU, HI, NV.

Bill Glasser, U.S. EPA Region 10, 1200 Sixth Avenue (ENF–T), Seattle, WA 98101, (206) 553–7215, *glasser.william@epa.gov, States:* AK, ID, OR, WA.

Headquarters Office: Sherri Walker, U.S. EPA (MC 1807T), National Center for Environmental Innovation, State Innovation Grants Program, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, send an e-mail to *innovation_state_grants@epa.gov*, call (202) 566–2186, or fax (202) 566–2220.

Opportunity for Pre-Competition Briefings and Addressing Questions: In addition, prior to this year's solicitation, we are planning to host a series of informational meetings and opportunities for question and answer (Q&A) sessions via teleconference calls. These conference calls will enable us to offer two-hour streamlined informational sessions to all States prior to our solicitation, and will allow us to answer any questions that the States have prior to the competition, in keeping with Federal requirements that we afford assistance fairly in a competition process. Specific conference call logistics and grant resource information will be provided to each Region as well as being posted on our Web site at *http://www.epa.gov/innovation/stategrants.* Pre-competition briefing summaries and all other resource materials will be posted on the Web site at *http://www.epa.gov/innovation/stategrants.* Through this effort, we are hoping to encourage individual States, State-led teams, or other eligible applicants (e.g., regional, county, or municipal agencies with delegated authority for federal environmental permitting programs) to submit well-developed pre-proposals that effectively describe in particular how their project will achieve measurable environmental results.

Dated: July 16, 2008.

Elizabeth Shaw,

Office Director, National Center for Environmental Innovation.

[FR Doc. E8–16834 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007-1082; FRL–8369–8]

Sulfluramid Registration Review Proposed Decision; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's proposed registration review final decision for the pesticide sulfluramid and opens a public comment period on the proposed registration review decision. Registration review final is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

DATES: Comments must be received on or before September 22, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007-1082, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007-1082. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Rosanna Louie, Special Review and Reregistration Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0037; fax number: (703) 308–8005 e-mail address: *louie.rosanna@epa.gov* or the specific Regulatory contact, as identified in the Table in Unit II.A. for the pesticide of interest.

For general questions on the registration review program, contact Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5056; fax number: (703) 308–8090; e-mail address: *caulkins.peter@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action is the Agency Taking?

This notice opens a 60–day public comment period on the subject proposed registration review final decision. The Agency is proposing a registration review final decision for the pesticide case shown in Table 1 for sulfluramid.

TABLE 1.—REGISTRATION REVIEW DOCKET - PROPOSED FINAL DECISION

Registration Review Case Name and Number	Pesticide Docket ID Number	Chemical Review Manager, Contact Information
Sulfluramid, Case 7411	EPA–HQ–OPP–2007–1082	Rosanna Louie (703) 308–0037 *louie.rosanna@epa.gov*

The docket for registration review of this pesticide case includes earlier documents related to the registration review of the subject case. For example, the review opened with the posting of a Summary Document, containing a Preliminary Work Plan, for public comment. A Final Work Plan was posted to the docket following public comment on the initial docket. The documents in the initial docket described the Agency's rationales for not conducting additional risk assessments for the registration review of the sulfluramid. This proposed registration review final decision continues to be supported by those rationales included in documents in the initial docket. Following public comment, the Agency will issue a final registration review decision for products containing sulfluramid.

The registration review program is being conducted under congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. Section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended in 1996 by the Food Quality Protection Act, required EPA to establish by regulation procedures for reviewing pesticide registrations, originally with a goal of reviewing each pesticide's registration every 15 years to ensure that a pesticide continues to meet the FIFRA standard for registration. The Agency's final rule to implement this program was issued in August 2006 and became effective in October 2006 and appears at 40 CFR 155.40. The Pesticide Registration Improvement Act of 2003 ("PRIA") was amended and extended in September 2007. FIFRA as amended by PRIA in 2007 requires EPA to complete registration review decisions by October 1, 2022 for all pesticides registered as of October 1, 2007.

The registration review final rule provides for a minimum 60–day public comment period for all proposed registration review final decisions. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the proposed decision. All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. These comments will become part of the Agency Docket for sulfluramid. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. The Agency will carefully consider all comments received by the closing date and will provide a Response to Comments Memorandum in the Docket and regulations.gov.

The final registration review decision will explain the effect that any comments have had on the decision. Background on the registration review program is provided at: *http://www.epa.gov/oppsrrd1/registration_review/*. Quick links to earlier documents related to the registration review of this pesticide are provided at: *http://www.epa.gov/oppsrrd1/registration_review/sulfluramid/index.htm*.

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

FIFRA Section 3(g) and 40 CFR Part 155.40 et seq. provide authority for this action.

List of Subjects

Environmental protection, registration review, pesticides, and pests.

Dated: July 16, 2008.

Peter Caulkins,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8–16737 Filed 7–22–08; 8:45 am]

BILLING CODE 6560–50–S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission.

DATE AND TIME: Monday, July 28, 2008, 1 p.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. Obligation of Funds for a Competitive Time-and-Materials Contract for Hardware Maintenance Technical Support; and
3. Modifications to the FY 2007–2012 Strategic Plan.

Closed Session

Agency Adjudication and Determination on Federal Agency Discrimination Complaint Appeals.

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. The remainder of the meeting will be closed. Any matter not discussed or concluded may be carried over to a later meeting. (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. The EEOC provides sign language interpretation at Commission meetings for the hearing impaired. Requests for other reasonable accommodations may be made by using the voice and TTY numbers listed above.

CONTACT PERSON FOR MORE INFORMATION: Stephen Llewellyn, Executive Officer on (202) 663–4070.

Dated: July 21, 2008.

Stephen Llewellyn,

Executive Officer, Executive Secretariat.

[FR Doc. 08–1463 Filed 7–21–08; 1:35 pm]

BILLING CODE 6570–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements (202)–523–5793 or *tradeanalysis@fmc.gov*).

Agreement No.: 011117–046.

Title: United States/Australasia Discussion Agreement.

Parties: A.P. Moller-Maersk A/S; ANL Singapore Pte Ltd.; CMA–CGM; Compagnie Maritime Marfret S.A.; Hamburg-Süd; Hapag-Lloyd AG; and Wallenius Wilhelmsen Logistics AS.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW; Suite 900; Washington, DC 20036.

Synopsis: The amendment updates Appendix B to the agreement.

Agreement No.: 011275–025.

Title: Australia and New Zealand/United States Discussion Agreement.

Parties: A.P. Moller-Maersk A/S; ANL Singapore PTE LTD.; Hamburg-Südamerikanische dampfschifffahrts-Gesellschaft KG; and Hapag-Lloyd AG.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW; Suite 900; Washington, DC 20036.

Synopsis: The amendment would add minimum service levels to be provided under the agreement.

Agreement No.: 011733–025.

Title: Common Ocean Carrier Platform Agreement.

Parties: A.P. Moller-Maersk A/S; CMA CGM; Hamburg-Süd; Hapag-Lloyd AG; Mediterranean Shipping Company S.A.; and United Arab Shipping Company (S.A.G.) as shareholder parties, and Alianca Navegacao e Logistica Ltda.; Compania Sud Americana de Vapores, S.A.; Companhia Libra de Navegacao; COSCO Container Lines Co., Ltd.; Emirates Shipping Lines; Gold Star Line, Ltd.; Hanjin Shipping Co., Ltd.; Hyundai Merchant Marine Co. Ltd; Kawasaki Kisen Kaisha, Ltd.; MISC Berhad; Mitsui O.S.K. lines Ltd.; Nippon Yusen Kaisha; Safmarine Container Lines N.V.; Senator Lines GmbH; Norasia Container Lines Limited; Tasman Orient Line C.V. and Zim Integrated Shipping as non-shareholder parties.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW; Suite 900; Washington, DC 20036.

Synopsis: The amendment adds Gold Star Line, Ltd. as a non-shareholder party to the agreement.

Agreement No.: 011953–005.

Title: Florida Shipowners Group Agreement.

Parties: The member lines of the Caribbean Shipowners Association and the Florida-Bahamas Shipowners and Operators Association.

Filing Party: Wayne R. Rhode, Esq.; Sher & Blackwell, LLP; 1850 M Street, N.W. Suite 900; Washington, DC 20036.

Synopsis: The amendment deletes Interline Connection, NV as a member of the Caribbean Shipowners Association Agreement.

Agreement No.: 011961–003.

Title: The Maritime Credit Agreement.

Parties: Alianca Navegacao e Logistica Ltda. & Cia; A.P. Moller-Maersk A/S; Atlantic Container Line AB; China Shipping Container Lines Co., Ltd.; CMA CGM, S.A.; Companhia Libra de Navegacao; Compania Libra de Navegacion Uruguay S.A.; Compania Sudamericana de Vapores, S.A.; COSCO Container Lines Company Limited; Dole Ocean Cargo Express; Hamburg-Süd; Hoegh Autoliners A/S; Independent Container Line Ltd.; Kawasaki Kisen Kaisha, Ltd.; Norasia Container Lines Limited; Safmarine Container Lines N.V.; Tropical Shipping & Construction Co., Ltd.; United Arab Shipping Company (S.A.G.); Wallenius Wilhelmsen Logistics AS; and Zim Integrated Shipping Services, Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW; Suite 900; Washington, DC 20036.

Synopsis: The amendment deletes Hapag-Lloyd AG as a party to the Agreement.

Agreement No.: 011962–005.

Title: Consolidated Chassis Management Pool Agreement.

Parties: The Ocean Carrier Equipment Management Association and its member lines; the Association's subsidiary Consolidated Chassis Management LLC and its affiliates; China Shipping Container Lines Co., Ltd.; Companhia Libra de Navegacao; Compania Libra de Navegacion Uruguay; Matson Navigation Co.; Mediterranean Shipping Co., S.A.; Midwest Consolidated Chassis Pool LLC; Norasia Container Lines Limited; Westwood Shipping Lines; and Zim Integrated Shipping Services Ltd.

Filing Party: Jeffrey F. Lawrence, Esq.; Sher & Blackwell LLP; 1850 M Street, NW; Suite 900; Washington, DC 20036.

Synopsis: The amendment would add the Gulf Consolidated Chassis Pool to the scope of the agreement and makes clerical corrections in the list of pools under development, established, and/or operated under the agreement.

Agreement No.: 201048–003.

Title: Restated Lease and Operating Agreement between PRPA and DRS.

Parties: Philadelphia Regional Port Authority and Delaware River Stevedores, Inc.

Filing Party: Paul D. Coleman, Esq.; Hoppel, Mayer & Coleman; 1050 Connecticut Avenue, NW Tenth Floor; Washington, DC 20036.

Synopsis: The amendment extends the term of the lease, revises the rent, and sets dockage and wharfage guarantees.

By order of the Federal Maritime Commission.

Dated: July 17, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–16797 Filed 7–22–08; 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. Chapter 409 and 46 CFR 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

Confianca Moving, Inc. dba CWM Logistics, 3533 NW 58th Street, Miami, FL 33142, *Officers:* Jose Tarcisio de Oliveira, Director (Qualifying Individual), Maria Rosa Carsage, President,

Henry's Lead's Inc. Dba Henry's Ocean Freight, 7102 Drew Hill Lane, Chapel Hill, NC 27514, *Officers:* Qiang NMN Fu, President (Qualifying Individual), Lixin Bai, Vice President,

Dsecargonet USA, Inc., 11099 S. La Cienega Blvd., Ste. 262, Los Angeles, CA 90045, *Officers:* Tae W. Park, Secretary (Qualifying Individual), Myung Ki Chai, President,

West Atlantic Cargo Leasing & Services, LLC, 2807 N. Course Drive, Pompano Beach, FL 33069, *Officers:* Rafael E. Sanchez, Jr., Vice President (Qualifying Individual), Gustavo A. Sanchez, President,

Headwin Global Logistics (USA), Inc., 11222 S. La Cienega Blvd., Ste. 148, Inglewood, CA 90304, *Officers:* Joanne Gong, Secretary (Qualifying Individual) Bin Bill Liu, CEO,

Reliable Shipping Inc., 14656 Valley Blvd., City of Industry, CA 91746, *Officer:* Ping Lu, President (Qualifying Individual),

Aeropronto USA Cargo Service Corp., 8272 NW 66th Street, Miami, FL 33166, *Officers:* Persio D. Diaz, President (Qualifying Individual), Carmen P. Diaz, General Manager.

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Alfa Logistics Corp., 6354 NW 99th Ave., Miami, FL 33178, *Officers:* Luz A. Varon, Director (Qualifying Individual), Jorge H. Ariviello, President,

Consolidated Freight & Shipping, Inc., 10025 N.W. 116th Way, Ste. #14, Medley, FL 33178, *Officer:* Thomas Rahn, President (Qualifying Individual),

Zust Bachmeier International, Inc., dba Z Lines dba Zust Bachmeier International, Inc. (ZBI, Inc.), 6201 Rankin Road, Humble, TX 77396, *Officer:* Albert G. Wichterich, President (Qualifying Individual),

Caronex Worldwide, Inc., 2052 Arnold Way, Fullerton, CA 92833, *Officer:* Joonsik Kang, CEO (Qualifying Individual),

Amid Logistics, LLC, 2275 E. Hwy. 100, Bldg. 11H, Bunnell, FL 32110, Dmitrly Deych, Sole Proprietor,

Covenant Global Logistics, Inc., 1803 Fan Tall Ct., Crosby, TX 77532, *Officers:* Mabel G. Gold, Vice President (Qualifying Individual), Ronald E. Gold, President,

UKO Logis, Inc., 879 W. 190th Street, #290, Gardena, CA 90248, *Officer:* Jae Kim, CFO (Qualifying Individual),

Shipex, LLC, 3341 Rauch Street, Houston, TX 77029, *Officer:* Khaldoon A. Barakat, CEO (Qualifying Individual),

UTC Overseas, Inc. dba Airport Clearance Service, Inc., 100 Lighting Way, Secucus, NJ 07094, *Officer:* Robert Schumann, COO (Qualifying Individual),

All Transportdepot, Inc., 4224 Shackleford Road, Suite C, Norcross, GA 30093, *Officers:* Paul Dawa, CFO/ Vice President (Qualifying Individual), Susan Seda, President,

Wheelsky Logistics, Inc., 14515 E. Don Julian Road, City of Industry, CA 91746, *Officers:* Shuai Yuan, Secretary (Qualifying Individual), Hui-Kuan D. Tsai, President,

HTS, Inc. dba Harte-Hanks Logistics, 1525 NW 3rd Street, Deerfield Beach, FL 33442, *Officers:* Jorge E. Andino, V. Pres. Of Transportation, (Qualifying Individual) Robert J. Colucci, President,

First Coast Gateway, Inc., 87164 Kipling Drive, Yulee, FL 32097, *Officer:* Mayra, Guilarte, President (Qualifying Individual),

Continental Services & Carrier, Inc., 5579 NW 72nd Avenue, Miami, FL 33166, *Officer:* Rodolfo Luciani, Vice President (Qualifying Individual),

G.S. Logistics, Inc., 4892 Dove Cir., LaPalma, CA 90623, *Officers:* Kun C. Kim, President, (Qualifying Individual) Hwa Y. Yoon, CFO.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Payless Shipping, Inc., 7721 W. Bellfort Street, #240, Houston, TX 77071, *Officers:* Simon O. Mozie, President (Qualifying Individual), Michuks P. Enwere, Secretary,

Atom Freights and Travels Services, LLC, 2306 Oak Lane, Ste. 10–12, Grand Prairie, TX 75051, *Officers:* Olatubosun T. Raymond, CEO, Lateef T. Omolaoye, General Manager (Qualifying Individuals),

Scrap Freight, Inc., 801 S. Garfield Ave., Ste. 101, Alhambra, CA 91801, *Officer:* Stephen, Long, President (Qualifying Individual),

Integrated Global Logistics, Inc., 850 Chautauqua Ave., Portsmouth, VA 23707, *Officers:* Jenanne L. Alexander, President (Qualifying Individual), Nicholas C. Palmer, Vice President,

Clark Worldwide Transportation, Inc., 121 New York Ave., Trenton, NJ 08638, *Officers:* Philip Friend, Exec. Vice President (Qualifying Individual), John J. Barry, President.

Dated: July 17, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–16795 Filed 7–22–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 7, 2008.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. Jay L. Dunlap, Lincoln, Nebraska, to retain the power to vote shares of, and to acquire additional voting shares of, New Richmond Bancorporation, and thereby indirectly retain the power to vote shares of, and to acquire additional voting shares of RiverHills Bank, both of New Richmond, Ohio.

In connection with this application, Samad Yaltaghian, Rushden, Northants, England, has applied to acquire voting shares of New Richmond Bancorporation, and thereby indirectly acquire voting shares of RiverHills Bank, both of New Richmond, Ohio; and New Richmond Voting Trust, Lincoln, Nebraska, a voting trust to be established by Jay L. Dunlap, Lincoln, Nebraska; Samad Yaltaghian, Rushden,

Northants, England; and Gregory P. Neisen, Cincinnati, Ohio, acting in concert, with Jay L. Dunlap as voting trustee, to control voting shares of New Richmond Bancorporation, and thereby indirectly control voting shares of RiverHills Bank, both of New Richmond, Ohio.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. The Vanco Trusts, the Vannie Cook Trusts, and James William Collins, as trustee, all of McAllen, Texas, to acquire an voting shares of Medina Bankshares, Inc., Hondo, Texas, and indirectly acquire voting shares of D'Hanis State Bank, D'Hanis, Texas.

Board of Governors of the Federal Reserve System, July 18, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–16861 Filed 7–22–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 081 0119]

Pernod Ricard S.A.; Analysis of Agreement Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before August 15, 2008.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "Pernod Ricard, File No. 081 0119," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/ Office of the Secretary, Room 135-H, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled "Confidential," and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form by following the instructions on the web-based form at *http://secure.commentworks.com/ftc-Pernod*. To ensure that the Commission considers an electronic comment, you must file it on that web-based form.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC website, to the extent practicable, at *www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Joseph S. Brownman, FTC Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, (202) 326-2605.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 17, 2008), on the World Wide Web, at (*http://www.ftc.gov/os/2008/07/index.htm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("consent agreement")from Respondent Pernod Ricard S.A. ("Pernod Ricard") in connection with its proposed acquisition of V&S Vin & Sprit AB (Publ)("V&S") from The Kingdom of Sweden. Among other things, the consent agreement requires that Pernod Ricard, currently the distributor of Stolichnaya Vodka, as a condition to acquiring V&S and its Absolut Vodka brand, cease distributing Stolichnaya Vodka. Pernod Ricard obtained the rights to distribute the Stolichnaya Vodka brand from its owner, Spirits International BV ("SPI"), a corporation headquartered in Geneva, Switzerland, and organized and doing business under the laws of The Netherlands. Absolut Vodka and Stolichnaya Vodka are "super premium" vodkas and, for a substantial number of consumers, they are close price substitutes. Total annual United States retail sales of these two brands are about $1.9 billion.

The Commission and Respondent Pernod Ricard also have agreed to entry of an Order To Hold Separate and Maintain Assets ("Hold Separate Order"). The Hold Separate Order requires Pernod Ricard to maintain the competitive viability of assets relating to the distribution of Stolichnaya Vodka during the six-month period that the consent agreement permits it to own Absolut Vodka while also distributing Stolichnaya. The Hold Separate Order further requires that Pernod Ricard refrain from exercising direction or control over the Stolichnaya Vodka distribution business. Pernod Ricard must nevertheless maintain all Stolichnaya Vodka operations in the regular and ordinary course in accordance with past practices. Compliance with the terms of the Hold

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

Separate Order will be supervised by an interim monitor.

The proposed consent agreement will also remedy information exchange concerns in four additional distilled spirits markets: Cognac, domestic cordials, coffee liqueur, and popular gin. The Commission's concerns in these four markets arise because of an ongoing joint venture between V&S and Beam Global Spirits & Wine, Inc. ("Beam Global"), a Fortune Brands, Inc., subsidiary, for the joint management of all of their distilled spirits distribution businesses. After the acquisition, Pernod Ricard will assume the management function role held by V&S for the joint venture brands and have access to competitively sensitive information about Beam Global brands which compete with Pernod Ricard brands that are not in the joint venture. The consent agreement requires Pernod Ricard to set up strict procedures that limit the flow of information to its employees, both within the joint venture as well as within Pernod Ricard itself. Because neither party to the joint venture profits from actions by the joint venture in connection with the sale of products, the Commission does not believe that a structural remedy in the form of a required divestiture of Pernod Ricard's brands that compete with the Beam Global brands in the joint venture is necessary. Total annual United States retail sales in the four markets combined are about $2.4 billion.

II. Respondent Pernod Ricard

Respondent Pernod Ricard is a corporation organized, existing and doing business under and by virtue of the laws of the French Republic, with its office and principal place of business located at 12, place des Etats-Unis, 75783 Paris Cedex 16, France. In the United States, Pernod Ricard operates through a wholly-owned subsidiary corporation, Pernod Ricard USA, Inc., with offices located at 100 Manhattanville Road, Purchase, New York 10577. Pernod Ricard's United States revenues from all distilled spirits products in the year ending June 30, 2007, totaled about $2.5 billion.

Pernod Ricard produces distilled spirits that it distributes, markets, and sells in the United States. Some of its more popular brand lines of distilled spirits are Martell Cognac, Hiram Walker Cordials, and Kahlua Coffee Liqueur. Pernod Ricard also produces, markets, distributes, and sells, Chivas Regal, Ballantine's, The Glenlivet Scotches, Jameson Irish Whiskey, Beefeater Gin, and the line of Wild Turkey Bourbons. Pernod Ricard also markets, distributes, and sells, but does not produce or own, the line of Stolichnaya Vodkas.

III. V&S (the acquired company)

V&S is a corporation wholly-owned by The Kingdom of Sweden, and is organized, existing and doing business under and by virtue of the laws of The Kingdom of Sweden. Its office and principal place of business is located at Formansvagen 19, S-100 74, Stockholm, Sweden. In the United States, V&S operates its distilled spirits business through a wholly-owned subsidiary, The Absolut Spirits Company, Incorporated ("ASCI"). ASCI is a Delaware corporation with its office and principal place of business located at 401 Park Avenue South, New York, New York 10016. V&S produces and sells distilled spirits products from facilities that it owns and operates. The brands of V&S include the lines of Absolut Vodka, Level Vodka, Plymouth Gin, and Cruzan Rum. V&S's United States revenues from all distilled spirits products in 2007 were about $800 million.

IV. The Future Brands Joint Venture

Future Brands LLC ("Future Brands") is the joint venture corporation of ASCI and Beam Global. Future Brands is a Delaware corporation with its office and principal place of business located in the offices of Fortune Brands at 300 Tower Parkway, Lincolnshire, Illinois 60069. Future Brands distributes all of the distilled spirits products of ASCI and Beam Global in the United States. The Future Brands joint venture corporation was created in 2001 and under the terms of that agreement, is scheduled to end in 2012. Future Brands had total revenues, in 2007, of about $1.48 billion.

The brands of Beam Global include: the lines of Courvoisier Cognac; DeKuyper Cordials; Starbucks Coffee Liqueur; Jim Beam, Knob Creek, Bakers, Basil Hayden, and Booker's Bourbon; Laphroig and Teacher's Scotch; and Gilbey's Gin. Beam Global and ASCI sell distilled spirits that fall into different marketing and price point segments.

The principal economic benefit to Beam Global and ASCI of their Future Brands joint venture is cost savings or efficiencies from the joint marketing, selling, and distribution of their products. The economic benefit from the actual sale of the products that are distributed by the Future Brands joint venture are maintained by Beam Global and ASCI, as brand owners, and not by Future Brands.

V. The Transaction

On March 30, 2008, Respondent Pernod Ricard and The Kingdom of Sweden entered into their Share Purchase Agreement Regarding the Shares in V&S. Under the terms of the acquisition agreement, Pernod Ricard will acquire all of the shares of V&S for a sum equal to a combination of euros, dollars, and interest payments totaling approximately $9 billion.

VI. The Complaint and Competitive Effects

A. The Stolichnaya - Absolut Overlap in the "Super Premium" Vodka Segment

The Commission also made public a Complaint that it intends to issue. According to that Complaint, Pernod Ricard, with Stolichnaya Vodka, and V&S, with Absolut Vodka, are direct and significant competitors in the super-premium vodka segment. The Complaint further alleges that Stolichnaya Vodka and Absolut Vodka are vodka brands that are close substitutes for a substantial number of customers of these brands.

The proposed acquisition raises competitive concerns because it would eliminate substantial competition between Pernod Ricard and V&S in connection with the distribution, marketing, and sale of Stolichnaya Vodka and Absolut Vodka. If Pernod Ricard owns Absolut Vodka while also being the distributor of Stolichnaya Vodka, it could profitably raise the price of either Absolut Vodka or Stolichnaya Vodka. Many consumers who would be unwilling to pay a higher price for the brand whose price was increased would switch to the other brand. In its Complaint, the Commission stated it has reason to believe that the proposed transaction would have anticompetitive effects and violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

B. The Pernod Ricard-Beam Global Brand Overlaps and the Future Brands Joint Venture

The Complaint also alleges that the proposed acquisition by Respondent Pernod Ricard of V&S may substantially lessen competition in four additional distilled spirits markets. In these markets—Cognac, domestic cordials, coffee liqueur, and popular gin—Pernod Ricard has brands that compete with the Beam Global brands that are distributed by Future Brands. Before its acquisition of V&S, Pernod Ricard had no business relationship with Future Brands. As a marketer, seller, and distributor of distilled spirits products similar to distilled spirits products, marketed, sold, and distributed by Beam Global and Future Brands, Pernod Ricard had

been a direct and substantial competitor of Beam Global and Future Brands.

After its acquisition of V&S, Pernod Ricard will step into the competitive shoes of V&S (and ASCI) and replace ASCI as a joint venture partner of Beam Global. Pernod Ricard, as a joint venture partner, will have access to competitively sensitive information about Beam Global brands that compete with Pernod Ricard brands that are not in the joint venture, as shown in the following chart:

Market	Pernod Ricard Brands	Beam Global Brands
Cognac	Martell	Courvoisier
Domestic Cordials	Hiram Walker	DeKuyper
Coffee Liqueur	Kahlua and Tia Maria	Starbucks
Popular Gin	Seagram's	Gilbey's

Each of these markets is highly concentrated and difficult to enter. Pernod Ricard and Beam Global are among the two largest suppliers of these spirits in the United States. These companies have spent significant sums of money to create and maintain distinct brand equities.

Beam Global and Pernod Ricard, upon becoming joint venture partners after the acquisition, will share in the management of Future Brands. Under the terms of the joint venture agreement, Pernod Ricard will be required to designate three of its seven member Board of Managers. This will mean that Pernod Ricard employees, in connection with their responsibilities as managers of Future Brands, will have access to competitively sensitive information about all the Beam Global products in the joint venture. These are brands with which Pernod Ricard is now, and after the acquisition will be, in direct and substantial competition. The Commission in its Complaint stated it has reason to believe that if Pernod Ricard obtains competitively sensitive information about the Beam Global brands listed in the table above, the proposed transaction would have anticompetitive effects and would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The principal anticompetitive effect is likely to be the ability of competitors in each of the four markets, including but not limited to Beam Global and Pernod Ricard, to raise prices by facilitating future potential coordinated interaction.

VII. The Consent Agreement

A. The Stolichnaya - Absolut Overlap in the "Super Premium" Vodka Segment

Under the terms of the consent agreement, to remedy the competitive concerns associated with the Stolichnaya Vodka overlap, Pernod Ricard will not be permitted to have an ownership interest in Absolut Vodka and also keep its rights to distribute Stolichnaya Vodka. Pernod Ricard will therefore be required to divest its interest in distributing Stolichnaya Vodka within six (6) months from the date it acquires V&S. That divestiture will revert back to brand owner SPI.

In the event that Pernod Ricard fails to complete the required divestiture within six (6) months, the Commission may appoint a divestiture trustee to sell the Absolut Vodka assets and business to a Commission-approved acquirer. The principal purpose of this alternative Absolut Vodka divestiture requirement is to give Pernod Ricard significant incentives to comply with the Stolichnaya Vodka divestiture requirements of the consent agreement.

There is one exception to the requirement that Pernod Ricard divest the Absolut Vodka assets and business in the event it fails to comply with the Commission-ordered divestiture relating to Stolichnaya Vodka. If Pernod Ricard by court order is prohibited from divesting its distribution rights to Stolichnaya Vodka, instead of divesting the Absolut Vodka assets, Pernod Ricard would have the option of divesting either (a) the future anticipated income stream from its sales of Absolut Vodka, or (b) a stipulated amount of at least 20% of the gross sales revenue of Absolut Vodka. The reason for this exception relates to the ongoing litigation between SPI and others regarding ownership of the Stolichnaya trademark and related rights to sell vodka under that label. That litigation, which upon agreement with the parties pending their settlement discussions, has been stayed by court order. The Commission has no view on the merits of this private litigation but is concerned that a court possibly may require that the competitive status quo of the distribution of Stolichnaya Vodka be maintained beyond the six (6) month period that the consent order would allow Pernod Ricard to own Absolut Vodka and distribute Stolichnaya Vodka. The income stream divestiture option (or the stipulated 20% or more of gross sales revenue) will be for the time period commencing twelve (12) months after Pernod Ricard will have acquired V&S and continue until Pernod Ricard divests its rights to distribute Stolichnaya Vodka. The purpose of the income stream divestiture requirement is to remove potential incentives on the part of Pernod Ricard to impair the marketability of Stolichnaya Vodka, which because of its closeness to Absolut Vodka, will benefit sales of Absolut Vodka. Because a court order preventing Pernod Ricard from divesting its rights to distribute Stolichnaya Vodka would not have caused willful non-compliance with the divestiture requirements of the consent order, the purpose of the alternative divestiture requirements of the order was to prevent interim competitive harm, rather than incentives to divest Stolichnaya Vodka distribution rights. The Commission believes that the sale of the future income stream of Absolut Vodka under the circumstances of a court order preventing Pernod Ricard from divesting Stolichnaya Vodka distribution rights would eliminate significant incentives on the part of Pernod Ricard from impairing the marketability of Stolichnaya Vodka because Pernod Ricard would not benefit from any *increase* in the Absolut Vodka income stream during the period of its joint ownership of Absolut Vodka and distribution of Stolichnaya Vodka, having already sold (at a predetermined price) the future value of *all* income stream benefits.

The consent agreement also requires that Pernod Ricard undertake certain activities to help ensure that the acquirer of the Stolichnaya Vodka assets and distribution business will be able to continue operations in a fully competitive manner. Those requirements include: (a) providing key Stolichnaya Vodka business employees with financial incentives to remain with Pernod Ricard (in order that those employees might then be available for hire by the acquirer); (b) providing lists of key employees to the acquirer; (c) for up to six (6) months, providing such reasonable technical assistance and training as the acquirer may request for the continued distribution of Stolichnaya Vodka; and (d) for up to six (6) months, providing the kinds of back office procedures to the acquirer that Pernod Ricard had already been undertaking for its own purposes.

B. The Pernod Ricard - Fortune Brands Overlaps and the Future Brands Joint Venture

Under the terms of the consent agreement, Pernod Ricard will be prohibited from acquiring any business information of the Future Brands joint venture. To ensure that this will not occur, Pernod Ricard has agreed to the following firewall procedures: (a) the

Pernod Ricard designees to the Future Brands Board of Managers cannot be officers or directors of Pernod Ricard; (b) Pernod shall recommend to the Future Brands board that it implement database protocols limiting Pernod designated board member access to information about Beam Global brands; and (c) Pernod will allow an interim monitor to supervise all of the firewall-related protections and requirements.

C. The Hold Separate Order

Accompanying the consent agreement is a Hold Separate Order. The purpose of this order, the terms of which Pernod Ricard has also agreed to undertake, is to prevent competitive harm pending the required divestiture of the Stolichnaya distribution agreement, and to ensure that the Stolichnaya Vodka assets required to be divested by Pernod Ricard will remain a competitively viable business. Under the terms of this agreement, Pernod Ricard will be required to (a) hold the Stolichnaya Vodka business separate and apart form all other Pernod Ricard business activities; (b) exercise no direction or control over the Stolichnaya Vodka business; (c) maintain operations of the Stolichnaya Vodka business, including preserving business relationships, in accordance with past practice; and (d) provide the Stolichnaya Vodka business with capital and other funds to operate at current levels and maintain the competitiveness of the business. The agreement also provides for the appointment of an interim monitor. Among other things, the monitor will be empowered to ensure that during the period of time that Pernod Ricard will own the Absolut Vodka line and also distribute Stolichnaya Vodka, that the Stolichnaya Vodka business will be separately managed from the other Pernod Ricard businesses.

VIII. The Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed consent agreement and the comments received, and will decide whether it should withdraw from the consent agreement or make final the Decision and Order.

By accepting the consent agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the consent agreement. It is not intended to constitute an official interpretation of the consent agreement, nor is it intended to modify the terms of the orders in any way.

By direction of the Commission.

Donald S. Clark

Secretary

[FR Doc. E8–16871 Filed 7–22–08: 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–08–08BG]

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 404–639–5960 or send comments to Maryam Daneshvar, Ph.D., CDC Acting 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

Survey of NIOSH Recommended Safety and Health Practices for Coal Mines—NEW—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Since its establishment in 1970 by the Occupational Safety and Health Act, the National Institute for Occupational Safety and Health (NIOSH) has been at the forefront of research and innovation on methods to help eliminate workplace injuries, illnesses and exposures. At Mine Safety and Health Research laboratories in Pittsburgh, Pennsylvania and Spokane, Washington, NIOSH employs engineers and scientists with experience and expertise in mine safety and health issues. These laboratories and their researchers have gained an international reputation for innovative solutions to many mining safety and health problems.

Although the NIOSH Mining Program widely disseminates and publicizes research results, recommendations, techniques and products that emerge from the work of these laboratories, the agency has limited knowledge about the extent to which their innovations in mine safety and health have been implemented by individual mine operators. This is particularly true of methods and practices that are not mandated by formal regulations. The overarching goal of the proposed survey of NIOSH Recommended Safety and Health Practices for Coal Mines is to gather data from working coal mines on the adoption and implementation of NIOSH practices to mitigate safety and occupational hazards (e.g., explosions, falls of ground). The information with this survey will be used by NIOSH to evaluate the implementation of safety and health interventions (including best practices and barriers to implementation) in areas such as respirable coal dust control, explosion prevention, roof support, and emergency response planning and training. Survey results will provide NIOSH with knowledge about which recommended practices, tools and methods have been most widely embraced by the industry, which have not been adopted, and why. The survey results will provide needed insight from the perspective of mine operators on the practical barriers that may prevent wider adoption of NIOSH recommendations and practices designed to safeguard mine workers.

In the spring of 2007, NIOSH conducted a pretest of the survey questionnaire with nine underground coal mine operators. The pretest instrument contained 81 questions, including five questions which measured the respondents' impressions of the clarity, burden level and relevance of the survey. The pretest served several important functions,

including gaining feedback on the flow of items and their relevance to the respondents' experience, assessing the effectiveness of the questionnaire instructions, and obtaining recommendations for improving the questions. Data captured in the pretest were used to identify areas for questionnaire improvement and recommendations for maximizing the performance of the full survey.

The proposed survey will be based upon a probability sample of approximately 300 of the 675 underground coal mines in the United States. A stratified random sample of mines will be drawn to ensure representativeness on important dimensions such as mine size and region of the country. Sampling a large proportion of the underground coal mines will ensure low rates of sampling error and increase confidence in the resulting survey estimates. Over-sampling some kinds of mines, such as those operating longwall sections, will be necessary to ensure enough cases are available to conduct meaningful analysis of these mine types.

Allowing mine operators to complete the survey using the method they find convenient is expected to enhance the overall response rate. Therefore, both a Web-based and a print version of the questionnaire will be provided to sampled respondents. Mine operators unable to complete the survey through one of these two methods will be contacted and asked to complete the survey over the telephone. Using these multiple methods of administration, NIOSH expects to achieve an 80% rate of response to the survey. An additional method that will be used to reduce the overall burden on respondents will be to collect certain types of supplementary information (e.g., the mine's dates of operation, annual coal production) on each sampled mine from publicly-available data collected by the Mine Safety and Health Administration (MSHA).

Once the study is completed, NIOSH will provide a copy of the final report to each sampled mining operation, and use the survey data to improve the adoption of important safety and health practices throughout the coal mine industry. NIOSH expects to complete data collection in the spring of 2009. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN TABLE

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Responding eligible coal mine operators	240	1	30/60	120

Dated: July 10, 2008.

Maryam Danneshvar,

Acting Reports Clearance Officer, Office of the Chief Science Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–16862 Filed 7–22–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0362]

Directory of State and Local Officials and State Food Safety Resource Survey Support Project

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Division of Federal-State Relations (DFSR) is announcing the availability of a Sole Source to the Association of Food and Drug Officials (AFDO) to provide funding for a 3-year cooperative agreement award to support a Special Project Cooperative Agreement program. No other applications are solicited. This cooperative agreement is intended to have AFDO update and maintain the FDA Directory of State and Local Officials and to update the AFDO document "State Food Safety Resource Survey (2000)" by providing funding for additional personnel, equipment, and supplies to support activities related to these projects.

DATES: Receipt Date: Applications are due within 30 days after the publication of the funding opportunity in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: *For issues regarding the administrative and financial management aspects of this notice*: Marc Pitts, Division of Acquisition Support and Grants, Food and Drug Administration, 5630 Fishers Lane, Rockville, MD 20857, 301–827–7162, e-mail: *Marc.Pitts@fda.hhs.gov.*

For issues regarding the programmatic or technical aspects of this notice: Jennifer Gabb, Division of Federal-State Relations (HFC–150), Office of Regulatory Affairs, Food and Drug Administration, 5600 Fishers Lane, Rm. 12–07, Rockville, MD 20857, 301–827–2899, e-mail: *jennifer.gabb@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Announcement Type: New Cooperative Agreement (U18)

Request for Applications (RFA) Number: FD–08–011 Sole Source

Catalog of Federal Domestic Assistance Number: 93.103

In 2007 and 2008, the Food and Drug Administration Amendments Act of 2007 (FDAAA), the Food Protection Plan, and the Import Strategic Action Plan addressed FDA's relationship with the States in food protection activities. In addition, the Food Protection Plan lays out new goals specific to protecting the food supply and responding to incidents in a rapid and coordinated manner.

A. Food Protection Plan 2007

In May 2007, the Secretary of Health and Human Services and the Commissioner of Food and Drugs charged FDA with developing a comprehensive and integrated Food Protection Plan to keep the nation's food supply safe from both unintentional and deliberate contamination. Driven by science and modern information technology, the Food Protection Plan aims to identify potential hazards and counter them before they can do harm. A cornerstone of this forward-thinking effort is an increased focus on prevention.

B. Project Emphasis

FDA's integrated approach within the Food Protection Plan encompasses three core elements: Prevention, intervention and response.

Core Element 1: Prevention

The prevention element involves promoting increased corporate responsibility so that food problems do not occur in the first place. By comprehensively reviewing food supply vulnerabilities and developing and implementing risk reduction measures

with industry and other stakeholders, we can best address critical weaknesses.

Core Element 2: Intervention

The intervention element focuses on risk-based inspections, sampling, and surveillance at high-risk points in the food supply chain. These interventions must verify that the preventive measures are being implemented and implemented correctly.

Core Element 3: Response

The response element bolsters FDA's emergency response efforts by allowing for increased speed and efficiency. This element also includes the idea of better communication with other Federal, State, and local government agencies and industry during and after emergencies. Whether contamination is unintentional or deliberate, there is a need to respond quickly and to communicate clearly with consumers and other stakeholders. The communication should emphasize identifying products of concern as well as informing the public of what is safe to consume.

C. Food and Drug Administration Amendments Act of 2007

Under the Food and Drug Administration Amendment Act of 2007 (FDAAA), FDA is required to work with the states to improve food safety. Section 1004 of the FDAAA states:

"(a) IN GENERAL—The Secretary shall work with the States in undertaking activities and programs that assist in improving the safety of food, including fresh and processed produce, so that State food safety programs and activities conducted by the Secretary function in a coordinated and cost-effective manner. With the assistance provided under subsection (b), the Secretary shall encourage States to—

(1) establish, continue, or strengthen State food safety programs, especially with respect to the regulation of retail commercial food establishments; and

(2) establish procedures and requirements for ensuring that processed produce under the jurisdiction of State food safety programs is not unsafe for human consumption."

D. Import Safety Action Plan

The Import Safety Action Plan (ISAP) acknowledges the value of mutual leveraging of State and Federal resources and recommends consideration of cooperative agreements to increase information sharing. Specifically, the ISAP provides the following recommendations:

Federal-State Rapid Response Recommendation 12—Maximize Federal-State Collaboration

The roles of and the resources used by the Federal Government and the States in import safety are complementary. States possess legislative authority and resources to respond to unsafe imported products within their jurisdiction. The Federal Government can take steps to interdict unsafe imported goods at ports of entry. Should an unsafe product enter domestic commerce, federal departments and agencies often work with State authorities to track it down, seize it, notify the public if it has already been purchased by consumers, and impose appropriate penalties on domestic entities who violate U.S. law. Also, both the Federal Government and States may have access to information relevant to protecting consumers that the other does not possess. For example, Federal departments and agencies may have relevant information about the foreign source of the imported product and about the importer. This information can help State officials track down an unsafe imported product within their jurisdiction. On the other hand, State officials may identify an unsafe imported product during transport or at the point of sale, if the product does get into the country, and can tip off Federal officials to prevent future shipments from entering domestic commerce.

Several Federal departments and agencies already collaborate closely with State authorities to protect consumers. For example, FDA has contracts and cooperative agreements with State Governments to share information, conduct joint inspections, and collaborate on laboratory analyses. Greater mutual leveraging of State and Federal resources can further enhance consumer protection.

Recommendation 12.1 states: "Consider cooperative agreements between the federal inspection agencies and their state counterparts for greater information-sharing." Such cooperative agreements would not infringe on the statutory authorities of Federal or State regulators and would encourage a coordinated effort that would result in a more rapid and effective response. Establishing clear procedures and points of contact for information sharing and joint enforcement efforts can further enhance the effectiveness of Federal-State actions to limit exposure and potential harm to consumers if an unsafe imported product enters domestic commerce.

II. Award Information

Mechanism of Support

Support will be in the form of a Sole Source cooperative agreement U18 Mechanism. Substantive involvement by the awarding agency is inherent in the cooperative agreement award. Accordingly, FDA will have substantial involvement in the program activities of the project funded by the cooperative agreement.

III. Eligibility Information

A. Eligible Applicants

ORA is offering this sole source cooperative agreement to AFDO to improve and update the Directory of State and Local Officials (current version is from 2004) to provide information for Rapid Response and information sharing. AFDO will also update the data in the AFDO State Food Safety Resource Survey including recall and foodborne illness investigation information to identify and to support Risk Management and information sharing. Assistance will be provided only to the AFDO. No other applications are solicited.

B. Applicability

AFDO is uniquely qualified for this cooperative agreement. AFDO (*http://www.afdo.org/*) conducted a nationwide survey of State and local food safety programs in 2000 and, with the National Center for Food Protection and Defense, has been an active partner in the FoodSHIELD project (*http://www.afdo.org/afdo/upload/061025-FoodSHIELD%20Brochure.pdf, http://www.foodshield.org/*), during which AFDO has collected contact information of State and local jurisdictions comparable to the FDA Directory of State and Local Officials (*http://www.fda.gov/ora/fed_state/directorytable.htm*). AFDO is the organization qualified for conducting this work because:

- AFDO is the only national organization that represents the State and local food protection regulatory agencies. AFDO's principal purpose is to act as a leader and a resource to State and local regulatory agencies in developing strategies to resolve and promote public health and consumer protection related to the regulation of foods, drugs, medical devices, and consumer products. Regular members are officials of State and local regulatory agencies that administer these programs in conjunction and collaboration with FDA.
- AFDO has always focused on the administration of the nation's food

protection programs. Thus, unlike other organizations, AFDO has a unique perspective on the infrastructure, capacity, strengths, and needs of State and local food protection programs.

• AFDO has successful experience in carrying out national efforts that focus on the needs of State and local regulatory agencies. FDA has used the data from the initial AFDO State Food Safety Resource Survey, AFDO model codes, and training programs such as the Seafood HACCP training program certified through AFDO. AFDO has also developed the AFDO Recall Manual and many other training programs and initiatives with the Centers for Disease Control, the U.S. Department of Agriculture, and others in meat and poultry processing at retail. AFDO also has industry associate members.

C. Award Amount

The total amount of funding available for fiscal years 2008 through 2010 is $250,000. This cooperative agreement will award up to $250,000 in total (direct plus indirect) costs for a 3-year cooperative agreement.

D. Length of Support

The length of support for this project will be 3 years.

E. Cost Sharing or Matching

Cost sharing is not required.

IV. Application and Submission

A. Application Information

Applications must be prepared using the most current SF424 (Research and Related) (also referred to as the "SF424 (R&R)", which is part of the Public Health Service, PHS 5161–1 form. Applications must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number as the universal identifier when applying for Federal grants or cooperative agreements. The DUNS number can be obtained by calling 866–705–5711 or through the Web site at *http://www.dnb.com/us/*. (FDA has verified the Web site addresses throughout this document, but we are not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

Applications must be prepared using the forms found in the SF424 R&R instructions for preparing a nonmodular research grant application. Submit a signed, typewritten original of the paper application, including the checklist, three signed photocopies, and appendix material in one package to: Marc Pitts (see **FOR FURTHER INFORMATION CONTACT**).

If you experience technical difficulties with your online submission, you should contact either Marc Pitts (see **FOR FURTHER INFORMATION CONTACT**), or the Grants.gov Customer Support Center by e-mail at *support@grants.gov* or by phone at 1–800–518–4726.

Information collection requirements requested on Form (SF–424) PHS 5161–1, expiration date of January 31, 2009, have been sent by the PHS to the Office of Management and Budget (OMB) and have been approved and assigned OMB control number OS–4040–0004.

B. Submission Dates and Times

The application receipt date is 30 days after the publication of the funding opportunity in the **Federal Register**. Applications will be accepted from 8 a.m. to 4:30 p.m. e.s.t., Monday through Friday, until the established receipt date. Applications submitted electronically must be received by the close of business on the established receipt date. No addendum material will be accepted after the established receipt date.

C. Intergovernmental Review

The regulations issued under Executive Order 12372, Intergovernmental Review of Federal Programs (45 CFR part 100) apply. Applicants (other than federally recognized tribal governments) should contact the State's Single Point of Contact (SPOC) as early as possible to alert the SPOC to the prospective application(s) and to receive any necessary instructions on the State's review process. A current listing of SPOCs is located at *http//www.whitehouse.gov/omb/grants/spoc.html*. The SPOC should send any State review process recommendations to the FDA administrative contact (see **FOR FURTHER INFORMATION CONTACT**). The due date for the State process recommendations is no later than 60 days after the application receipt date. FDA does not guarantee accommodation or explanation of SPOC comments that are received after the 60-day cutoff.

D. Funding Restrictions

This cooperative agreement is not to fund annual, regional, or State meetings of AFDO, travel for other than project employees, equipment other than consumables or as outlined in the application, or any remodeling or capital improvement to office location or space.

E. Central Contractor Registration

Applicants must register with the Central Contractor Registration (CCR) database. This database is a government-wide warehouse of commercial and financial information for all organizations conducting business with the Federal Government. Registration with CCR is a mandatory requirement and is consistent with the government-wide management reform to create a citizen-centered Web presence and to build e-gov infrastructures in and across agencies to establish a "single face to industry." The preferred method for completing a registration is through the World Wide Web at *http://www.ccr.gov*. This Web site provides a CCR handbook with detailed information on data you will need prior to beginning the online preregistration, as well as steps to walk you through the registration process. You must have a DUNS number to begin your registration. The CCR registration process can also be found under the "Organization Registration" page of Grants.gov at *http://www.grants.gov/applicants/organization_registration.jsp*.

F. Copyright Material

Applicant and applicants' subgrantees and subcontractors must ensure that any projects developed in whole or in part with Federal funds may be made available to other State, territorial, local, and tribal regulatory agencies by FDA or its agents. Any copyrighted or copyrightable works shall be subject to a royalty-free, nonexclusive, and irrevocable license to the Federal Government to reproduce, publish, or otherwise use them, and to authorize others to do so for Federal Government purposes.

Dated: July 15, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–16818 Filed 7–22–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0359]

Food Safety and Security Monitoring Project

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Division of Federal-State Relations (DFSR), is announcing the availability of cooperative agreements for equipment, supplies, personnel, training, and facility upgrades to Food Emergency

Response Laboratory Network (FERN) chemistry laboratories of State, local, and tribal governments. The cooperative agreements are to enable the analyses of foods and food products in the event that redundancy and/or additional laboratory surge capacity is needed by FERN for analyses related to chemical terrorism. These grants are also intended to expand participation in networks to enhance Federal, State, local, and tribal food safety and security efforts.

DATES: Receipt Date: Applications are due within 30 days after the publication of the funding opportunity in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

For issues regarding the administrative and financial management aspects of this notice: Marc Pitts, Division of Acquisition Support and Grants, Food and Drug Administration, 5630 Fishers Lane, Rockville, MD 20857, 301–827–7162, e-mail: *Marc.Pitts@fda.hhs.gov;*

Regarding the programmatic aspects of this notice: Jennifer Gabb, Division of Federal-State Relations, Food and Drug Administration (HFC–150), 5600 Fishers Lane, rm. 12–07, Rockville, MD 20857, 301–827–2899, e-mail: *jennifer.gabb@fda.hhs.gov*; and

For technical aspects of this notice: Dean Turco, Division of Field Science, Food and Drug Administration (HFC–140), 5600 Fishers Lane, rm. 12–41, Rockville, MD 20857, 301–827–4097, e-mail: *dean.turco@fda.gov*.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

Announcement Type: New Competing Cooperative Agreement (U18) under a Limited Competition

Request for Applications (RFA) Number: RFA-FD–08–009

Catalog of Federal Catalog of Federal Domestic Assistance Number: 93.448

ORA is the primary inspection and analysis component of FDA and has approximately 1,600 investigators, inspectors, and analysts who cover the country's approximately 95,000 FDA-regulated businesses. These investigators inspect more that 15,000 facilities per year and ORA laboratories analyze several thousand samples per year. ORA conducts special investigations, conducts food inspection recall audits, performs consumer complaint inspections, and collects samples of regulated products. Increasingly, ORA has been called upon to expand the testing program addressing the increasing threat to food safety and security through intentional chemical terrorism events. Toward these ends, ORA has developed a suite of chemical screening and analysis methodologies that are used to evaluate foods and food products in such situations. However, in the event of a large-scale emergent incident, analytical sample capacity in ORA field laboratories has a finite limit. Information from ongoing relationships with State partners indicates limited redundancy in State food testing laboratories, both in terms of analytical capabilities and analytical sample capacity. Several State food testing laboratories lack the specialized equipment to perform the analyses and/or the specific methodological expertise in the types of analyses performed for screening foods and food products involving chemical terrorism events.

The events of September 11, 2001, reinforced the need to enhance the security of the U.S. food supply. Congress responded by passing the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) (Public Law 107–188), which President George W. Bush signed into law on June 12, 2002. The Bioterrorism Act is divided into the following five titles:

Title I—National Preparedness for Bioterrorism and Other Public Health Emergencies,

Title II—Enhancing Controls on Dangerous Biological Agents and Toxins,

Title III—Protecting Safety and Security of Food and Drug Supply,

Title IV—Drinking Water Security and Safety, and

Title V—Additional Provisions.

Subtitle A of the Bioterrorism Act, Protection of Food Supply, section 312—Surveillance and Information Grants and Authorities, amends part B of Title III of the Public Health Service Act to authorize the Secretary of Health and Human Services (the Secretary) to award grants to States and tribes to expand participation in networks to enhance Federal, State, and local food safety efforts. This may include meeting the costs of establishing and maintaining the food safety surveillance, technical, and laboratory capacity needed for such participation.

Project Emphasis

The goal of ORA's cooperative agreement program is to complement, develop, and improve State, local, and tribal food safety and security testing programs. This will be accomplished through the provision of equipment, supplies, personnel, facility upgrades, training in current food testing methodologies, participation in proficiency testing to establish additional reliable laboratory sample analysis capacity, analysis of surveillance samples, and in cooperation with FDA, participation in method enhancement activities designed to extend analytical capabilities. In the event of a large-scale chemical terrorism event affecting foods or food products, the recipient may be required to perform selected chemical analyses of domestic and imported food samples collected and supplied to the laboratory by FDA or other government agencies through FDA. These samples may consist of, but are not limited to, the following: Vegetables and fruits (fresh and packaged), juices (concentrate and diluted), grains and grain products, seafood and other fish products, milk and other dairy products, infant formula, baby foods, bottled water, condiments, and alcoholic products (beer, wine, scotch).

II. Award Information

Mechanism of Support

All grant application projects that are developed at State, local, and tribal levels must have national implication or application that can enhance Federal food safety and security programs. At the discretion of FDA, successful project formats will be made available to interested Federal, State, local, and tribal government FERN laboratories.

There are four key project areas identified for this effort that must be addressed:

1. The use of gas chromatography/mass spectrometry analysis for the screening and identification of poisons, toxic substances, and unknown compounds in foods;

2. The use of liquid chromatography/mass spectrometry analysis for the screening and identification of poisons, toxic substances, and unknown compounds in foods;

3. The use of inductively coupled plasma/mass spectrometry analysis for the screening and identification of heavy metals and toxic elements in foods; and

4. The use of enzyme-linked immunosorbent assay and other antibody-based analyses for the screening and identification of unknown toxins in foods.

FDA will support the projects covered by this document under the authority of section 312 of the Bioterrorism Act. This program is described in the Catalog of Federal Domestic Assistance under number 93.448.

Support will be in the form of a cooperative agreement. Substantive

involvement by the awarding agency is inherent in the cooperative agreement award. Accordingly, FDA will have substantial involvement in the program activities of the project funded by the cooperative agreement. Substantive involvement includes, but is not limited to, the following: (1) How often samples will be sent, (2) directions on how tests should be executed, (3) onsite monitoring, (4) supply of equipment, (5) FDA training on processes, and (6) enhancement and extension of analytical methodology.

FDA will provide specific procedures and protocols for the four project areas to be used for the analysis of toxic chemicals and toxins in food.

FDA will provide guidance on the specific foods to be collected for analysis by the successful applicant. FDA will purchase and have all needed major equipment for the four project areas delivered to the awardee's laboratory. The equipment purchased will remain the property of FDA until such time as it is released as surplus property.

Only proposed projects designed to address all four project areas will be considered for funding. Applicants may also apply for only facility upgrades, personnel, training, method extension, and surveillance sample analysis if they have the necessary equipment and it will be available for these projects. These grants are not to fund or conduct food inspections for food safety regulatory agencies.

It should be emphasized that in all of the projects, there is a particular desire to promote a continuing, reliable capability and capacity for laboratory sample analyses of foods and food products for the rapid detection and identification of toxic chemicals or toxins. With this in mind, it is desirable that sample analyses will be completed no later than 2 weeks after receipt, and the results will be reported to FERN. The format and reporting media will be established by FERN. Shorter timeframes may be sought for special testing such as proficiency tests or special assignments.

III. Eligibility Information

A. Eligible Applicants

This cooperative agreement program is only available to State, local, and tribal government FERN laboratories that currently are not funded under this cooperative agreement and is authorized by section 312 of the Bioterrorism Act. All grant application projects that are developed at State, local, and tribal levels must have national implication or application that can enhance Federal food safety and security programs. At the discretion of FDA, successful project formats will be made available to interested Federal, State, local, and tribal government FERN laboratories.

B. Cost Sharing or Matching

Cost sharing is not required.

IV. Application and Submission

A. Application Information

In order to apply electronically, the applicant must complete the following steps:

Step 1: Obtain a Dun & Bradstreet Number (DUNS Number)

Same day. Your organization will need to obtain a DUNS Number. If your organization doesn't already have one, go to the Dun & Bradstreet Web site at *http://fedgov.dnb.com/webform*.

Step 2: Register with the Central Contractor Registry (CCR)

Two days or up to 1 to 2 weeks. Ensure that your organization is registered with the CCR at *http://www.ccr.gov*. If your organization is not already registered, an authorizing official of your organization must register. You will not be able to move on to Step 3 until this step is completed.

Step 3: Obtain Username and Password

Same day. Create a username and password with Operational Research Consultants (ORC), the Grants.gov credential service provider. Use your organization's DUNS Number to access the ORC Website at *http://apply07.grants.gov/apply/OrcRegister*.

Step 4: Grants.gov Registration

Same day. Register with Grants.gov at *https://apply07.grants.gov/apply/GrantsgovRegister* to open an account using the username and password you received from ORC.

Step 5: Authorized Organization Representative (AOR) Authorization

Time depends on responsiveness of your E-Business Point of Contact (E-Biz POC). The E-Biz POC at your organization must respond to the registration e-mail from Grants.gov and login at Grants.gov to authorize you as an AOR. Please note that there can be more than one AOR for your organization. In some cases the E-Biz POC is also the AOR for an organization.

Step 6: Track AOR Status

At any time, you can track your AOR status at the Applicant home page of Grants.gov in "Quick Links" by logging in with your username and password (*https://apply07.grants.gov/apply/ApplicantLoginGetID*).

FDA is accepting new applications for this program electronically via Grants.gov. Applicants must apply electronically by visiting the Web site *http://www.grants.gov* and following instructions under "APPLY FOR GRANTS." The required application SF424, which is part of the PHS 5161–1 form, can be completed and submitted online by selecting Step 1: "Download a Grant Application Package," then by entering the funding opportunity number "RFA–FD–08–009." The "Selected Grant Applications For Download" page will provide you with the Additional Resources downloads for Adobe Reader and PureEdge Viewer as well as the download to the "Instructions & Application" hyperlink.

B. Content and Form of Application

1. Content of Application

The SF424 PHS–5161 has several components. Some components are required, others are optional. The forms package associated with this request for application (*http://www.Grants.gov/Apply*) includes all applicable components. If you experience technical difficulties with your online submission you should contact either Marc Pitts (see **FOR FURTHER INFORMATION CONTACT**) or the Grants.gov Customer Support Center by e-mail at *support@grants.gov* or by phone at 1–800–518–4726.

2. Format for Application

All applications must be submitted electronically through Grants.gov. Paper applications will not be accepted. The application must be an SF424–PHS–5161. The narrative portion, excluding appendices, of the application may not exceed 100 pages in length and must be single-spaced in 12-point font. The appendices should also not exceed 100 pages in length (separate from the narrative portion of the application).

Information collection requirements requested on Form (SF–424) PHS 5161–1, expiration date of January 31, 2009, have been sent by the Public Health Service (PHS) to the Office of Management and Budget (OMB) and have been approved and assigned OMB control number OS–4040–0004.

C. Submission Dates and Times

The application receipt date is 30 days after the publication of the funding opportunity in the **Federal Register**. Applications will be accepted from 8 a.m. to 4:30 p.m., Monday through Friday, until the receipt date. Applications submitted electronically must be received by close of business on

the receipt date. No addendum material will be accepted after the receipt date.

D. Intergovernmental Review

The regulations issued under Executive Order 12372, Intergovernmental Review of Department of Health and Human Services Programs and Activities (45 CFR part 100), apply to the Food Safety and Security Monitoring Project. Applicants (other than federally recognized Indian tribal governments) should contact the State's Single Point of Contact (SPOC) as early as possible to alert the SPOC to the prospective application(s) and to receive any necessary instructions on the State's review process. A current listing of SPOCs is included in the application kit or at *http://www.whitehouse.gov/omb/grants/spoc.html*. (FDA has verified the Web site address, but FDA is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.) The SPOC should send any State review process recommendations to the FDA administrative contact (see **FOR FURTHER INFORMATION CONTACT**). The due date for the State process recommendations is no later than 60 days after the application receipt date. FDA does not guarantee accommodation or explaination of SPOC comments that are received after the 60-day cutoff.

E. Funding Restrictions

These grants are not to fund or conduct food inspections for food safety regulatory agencies. They may not be utilized for new building construction, however, remodeling of existing facilities is allowed, provided that remodeling costs do not exceed 25 percent of the grant award amount.

Dated: July 7, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–16820 Filed 7–22–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0038]

Peripheral and Central Nervous System Drugs Advisory Committee; Notice of Postponement of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is postponing the meeting of the Peripheral and Central Nervous Drugs Advisory Committee scheduled for August 6 and 7, 2008. This meeting was announced in the **Federal Register** of July 8, 2008 (73 FR 39017). The postponement is due to difficulties in empanelling the necessary experts due to both scheduling conflicts and conflict-of-interest issues.

FOR FURTHER INFORMATION CONTACT: Diem-Kieu Ngo, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. 301–827–7001, FAX: 301–827–6776, e-mail: *diem.ngo@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512543. Please call the Information Line for up-to-date information on this meeting.

Dated: July 17, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–16814 Filed 7–22–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 General Medical Sciences, Special Emphasis Panel, Drug Docking and Screening Resource.

Date: August 11, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications

Place: National Institutes of Health, Natcher Building, 45 Center Drive 3AN12A, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Mona R. Trempe, PhD., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301-594-3998, *trempemo@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: July 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–16512 Filed 7–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 on Drug Abuse, Special Emphasis Panel, Mechanism for Time-Sensitive Research Opportunities.

Date: August 5, 2008.

Time: 1 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Gerald L. McLaughlin, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Blvd., Bethesda, MD 20892–8401, 301–402–6626, *gm145a@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. 93279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 15, 2008.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–16619 Filed 7–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 on Drug Abuse, Special Emphasis Panel, Resource Core Transdisciplinary Prevention Research Centers.

Date: July 29, 2008.

Time: 10 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Mark Swieter, PhD, Chief, Training and Special Projects Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6101 Executive Boulevard, Suite 220, Bethesda, MD 20892–8401, (301) 435–1389, *ms80x@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: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 15, 2008.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–16620 Filed 7–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 General Medical Sciences, Special Emphasis Panel, Minority Biomedical Research Support in Neurophysics.

Date: August 5–6, 2008.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Office of Scientific Review, Building 45, Room 3AN18, Bethesda, MD 20892. (Virtual Meeting)

Contact Person: Margaret J. Weidman, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18B, Bethesda, MD 20892, 301–594–3663, *weidmanma@nigms.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. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives National Institutes of Health, HHS)

Dated: July 15, 2008.

David Clary,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–16622 Filed 7–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

National Protection and Programs Directorate; Submission for Review: Infrastructure Protection Data Call 1670–NEW

AGENCY: National Protection and Programs Directorate, Infrastructure Protection, DHS.

ACTION: 60-Day Notice and request for comments.

SUMMARY: The Department of Homeland Security (DHS) invites the general public and other federal agencies the opportunity to comment on new information collection request 1670–NEW, Infrastructure Protection Data Call. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), DHS is soliciting comments for this collection.

DATES: Comments are encouraged and will be accepted until September 22, 2008. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to Ribkha Hailu, IP/IICD, Mail Stop 8595, 245 Murray Lane, SW., Building 410, Washington, DC 20528–8595, or e-mail *iicd@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Ribkha Hailu, IP/IICD, Mail Stop 8595, 245 Murray Lane, SW., Building 410, Washington, DC 20528–8595, or e-mail *iicd@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

1. 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;

2. 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;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Analysis

Agency: Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection.

Title: Infrastructure Protection Data Call.

OMB Number: 1670–NEW.

Frequency: Once.

Affected Public: Federal, State, Local, Tribal.

Number of Respondents: 138.

Estimated Time per Respondent: 2 hours.

Total Burden Hours: 276 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintaining): None.

Description: The U.S. Department of Homeland Security (DHS) is the lead coordinator in the national effort to identify and prioritize the country's critical infrastructure and key resources (CIKR). At DHS, this responsibility is managed by the Office of Infrastructure Protection (IP) in the National Protection and Programs Directorate (NPPD). Beginning in FY2006, IP engaged in the annual development of a list of CIKR assets and systems to improve IP's CIKR prioritization efforts; this list is called the Critical Infrastructure List. The Critical Infrastructure List includes assets and systems that, if destroyed, damaged or otherwise compromised, could result in significant consequences on a regional or national scale. This list provides a common basis for DHS and its security partners during the undertaking of CIKR protective planning efforts to keep our Nation safe. Collection of this information is directed and supported by Public Law 110–53 "Implementing Recommendations of the 9/11 Commission Act of 2007," August 3, 2007; and Homeland Security Presidential Directive (HSPD) 7, "Critical Infrastructure Identification, Prioritization, and Protection," December 17, 2003.

Dated: July 17, 2008.

John Campbell,

Acting Chief Information Officer, National Protection and Programs Directorate, Department of Homeland Security.

[FR Doc. E8–16873 Filed 7–22–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1777–DR]

Michigan; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Michigan (FEMA–1777–DR), dated July 14, 2008, and related determinations.

DATES: *Effective Date:* July 14, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 14, 2008, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Michigan resulting from severe storms, tornadoes, and flooding during the period of June 6–13, 2008, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Michigan.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program also will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, W. Michael Moore, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

The following areas of the State of Michigan have been designated as adversely affected by this declared major disaster:

Allegan, Barry, Eaton, Ingham, Lake, Manistee, Mason, Missaukee, Osceola, Ottawa, and Wexford Counties for Public Assistance.

All counties within the State of Michigan are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–16802 Filed 7–22–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1771–DR]

Illinois Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Illinois (FEMA–1771–DR), dated June 24, 2008, and related determinations.

DATES: *Effective Date:* July 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Illinois is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 24, 2008.

Madison, Monroe, Randolph, and St. Clair Counties for Public Assistance.

Lake County for Public Assistance (already designated for Individual Assistance.)

Mercer and Rock Island Counties for Public Assistance (already designated for Individual Assistance and emergency protective measures [Category B], limited to direct Federal assistance, under the Public Assistance program.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–16792 Filed 7–22–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1772–DR]

Minnesota Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Minnesota (FEMA–1772–DR), dated June 25, 2008, and related determinations.

DATES: *Effective Date:* July 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Minnesota is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 25, 2008.

Nobles County for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–16804 Filed 7–22–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1768–DR]

Wisconsin; Amendment No. 12 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Wisconsin (FEMA–1768–DR), dated June 14, 2008, and related determinations.

DATES: *Effective Date:* July 11, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Wisconsin is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 14, 2008.

La Crosse County for Public Assistance (already designated for Individual Assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–16791 Filed 7–22–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2008–N0132; 40136–1265–0000–S3]

Red River National Wildlife Refuge, Caddo, Bossier, DeSoto, Natchitoches, and Red River Parishes, LA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; final comprehensive conservation plan and finding of no significant impact.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Red River National Wildlife Refuge (NWR). In the final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: A copy of the CCP may be obtained by writing to: Red River NWR, 11372 Highway 143, Farmerville, LA 71241. The plan may also be accessed and downloaded from the Service's Web site: *http://southeast.fws.gov/planning.*

FOR FURTHER INFORMATION CONTACT: Mr. George Chandler, Refuge Manager, North Louisiana National Wildlife Refuge Complex; *Telephone:* 318/726–4222; *fax:* 318/726–4667; *e-mail: george_chandler@fws.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Red River NWR. We started this process through a notice in the

Federal Register on March 13, 2006 (71 FR 12710). For more about the process, see that notice.

On October 13, 2000, House Resolution 4318, the Red River National Wildlife Refuge Act, was signed into law (Pub. L. 106–300). This legislation authorized the establishment of the Red River NWR to provide for the restoration and conservation of fish and wildlife habitats in the Red River Valley ecosystem in northwest Louisiana. Red River NWR is a unit of the North Louisiana National Wildlife Refuge Complex, which also includes D'Arbonne, Upper Ouachita, Black Bayou Lake, and Handy Brake Refuges, as well as the Louisiana Wetlands Management District. Each refuge has its own unique issues, requiring separate planning efforts and public involvement.

The Red River NWR, stretching 120 miles along the Red River Valley from Colfax, Louisiana, near its southern boundary to the Arkansas state line, will play an important role regionally in fulfilling the goals of the National Wildlife Refuge System. According to legislation, the refuge shall consist of up to 50,000 acres from the Headquarters Unit and four focus units within a selection area covering 220,000 acres. Currently, the Service has acquired 9,788 acres and has 40,212 acres remaining to purchase. The lands within the five units (e.g., Headquarters, Wardview, Spanish Lake Lowlands, Bayou Pierre, and Lower Cane River focus areas) will be acquired through a combination of fee title purchases from willing sellers and through conservation easements, leases, and/or cooperative agreements from willing landowners. Currently, fee title lands have been purchased within portions of all the focus units except Wardview. Red River NWR's proximity to a major metropolitan center will afford the public the ability to participate in educational opportunities that promote wildlife stewardship.

Currently, the five units of the refuge include 3,742 acres of reforested bottomland hardwood forest; 317 acres of bottomland forest; 261 acres of riparian habitat; 194 acres of cypress swamp; 600 acres of moist soils; 1,125 acres of agricultural fields; 124 acres in a pecan orchard; 64 acres dominated by groundsel-tree (*Baccharis halimifolia*); 217 acres of honey locust; and 153 acres of old field that was grazed and is currently invaded by wild plum and invasive species. In addition, about 443 acres of the refuge consist of oxbow lakes, Red River tributaries, borrow pits, and irrigation ditches. Currently, minimal public use occurs on the refuge besides hunting, fishing, and some wildlife observation.

We announce our decision and the availability of the final CCP and FONSI for Red River NWR in accordance with the National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA).

The CCP will guide us in managing and administering Red River NWR for the next 15 years. Alternative C, as we described in the final CCP, is the foundation for the CCP.

The compatibility determinations for (1) wildlife observation and photography; (2) environmental education and interpretation; (3) big game hunting; (4) small game hunting; (5) migratory bird hunting; (6) fishing; (7) hiking, jogging, and walking; (8) boating; (9) all-terrain vehicles; (10) berry/fruit picking; (11) bicycling; and (12) cooperative farming are also available within the final CCP.

Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Comments

Approximately 150 copies of the Draft CCP/EA were made available for a 30-day public review period as announced in the **Federal Register** on April 14, 2008 (73 FR 20059). Five written comments were received from local citizens and the Louisiana Department of Wildlife and Fisheries.

Selected Alternative

After considering the comments we received, we have selected Alternative C for implementation. The primary focus under Alternative C will be to optimize the biological and visitor use programs. Land acquisition, reforestation, and resource protection at Red River NWR will be intensified from the level now maintained under the No Action Alternative. The refuge will expand the approved acquisition boundary to incorporate 1,413 acres in the Spanish Lake Lowlands Unit; 87 acres in the Headquarters Unit; and 1,938 acres in the Lower Cane Unit. Alternative C will provide a full-time law enforcement officer, an equipment operator, a maintenance worker, a wildlife biologist, an assistant manager, an administrative assistant, and an outdoor recreational specialist. Public use and environmental education will increase. Within three years of the date of the CCP, the refuge will develop a Visitor Services' Plan to be used in expanding public use facilities and opportunities. This step-down management plan will provide overall, long-term guidance and direction in developing and running a larger public use program. Federal funds are now available to construct a refuge headquarters/visitor center at the Headquarters Unit. The new visitor center will include a small auditorium for use in talks, meetings, films, videos, and other audiovisual presentations. Alternative C will also increase opportunities for visitors by adding facilities such as photo blinds, observation sites, and trails.

Within five years of the date of the CCP, we will prepare a Fishing Plan that will outline and expand permissible fishing opportunities within the refuge. The refuge will also construct a fishing pier at the Headquarters Unit. Staff will investigate opportunities for expanding hunting possibilities.

Alternative C is considered to be the most effective for meeting the purposes of the refuge by conserving, restoring, and managing the refuge's habitats and wildlife, while optimizing wildlife-dependent public uses. Alternative C will best achieve national, ecosystem, and refuge-specific goals and objectives and it positively addresses significant issues and concerns expressed by the public.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: May 27, 2008.

Jon Andrew,

Acting Regional Director.

[FR Doc. E8–16822 Filed 7–22–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

Agency Information Collection Activities: Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of a revision of an information collection (1028–0062).

SUMMARY: We (U.S. Geological Survey) have sent an Information Collection Request (ICR) to OMB for review and approval. The ICR, which is summarized below, describes the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on July 31, 2008. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATE: You must submit comments on or before August 22, 2008.

ADDRESSES: Send your comments on this information collection directly to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior via e-mail: *OIRA_DOCKET@omb.eop.gov*; or by fax (202) 395–6566; and identify your submission with #1028–0062.

Please submit a copy of your comments to Phadrea Ponds, Information Collections, U.S. Geological Survey, 2150–C Center Avenue, Fort Collins, CO 80525 (mail); (970) 226–9230 (fax); or *pponds@usgs.gov* (e-mail). Use OMB Control Number 1028–0062 in the subject line.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Scott F. Sibley at (703) 648–4976.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1028–0062

Title: Industrial Minerals Surveys.

Form Number: Various (38 forms).

Type of Request: Revision of a currently approved collection.

Affected Public: Private Sector; State, Local, and Tribal governments.

Respondent Obligation: Voluntary.

Frequency of Collection: Monthly, Quarterly, Semiannually, or Annually. Respondents are canvassed for one frequency period (e.g., monthly respondents are not canvassed annually).

Estimated Number and Description of Respondents: Approximately 15,993 producers and consumers of industrial minerals.

Estimated Number of Responses: 18,339.

Completion Time per Response: We estimate that the public reporting burden averages 15 minutes to 5 hours per response. This includes the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information.

Annual burden hours: 12,639 hours.

Abstract: Respondents supply the U.S. Geological Survey with domestic production and consumption data for nonfuel mineral commodities. This information will be published as chapters in Minerals Yearbooks, monthly/quarterly Mineral Industry Surveys, annual Mineral Commodity Summaries, and special publications, for use by Government agencies, industry, education programs, and the general public.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and implementing regulations (43 CFR part 2), and under regulations at 30 CFR 250.197, "Data and information to be made available to the public or for limited inspection." Responses are voluntary. No questions of a "sensitive" nature are asked. We will release data collected on these forms only in a summary format that is not company-specific.

Comments: To comply with the public consultation process, on April 16, 2008, we published a **Federal Register** notice (73 FR 20707) announcing our intent to submit this information collection to OMB for approval. In that notice we solicited public comments for 60 days, ending on June 16, 2008. We received one comment in response to the notice. In this comment, the Bureau of Economic Analysis (BEA) stated that they support the USGS continuing to collect Industrial Minerals Surveys data because they are an important data source for key components of BEA's economic statistics. The BEA also requested that they be kept informed of any modifications to these forms. We did not make any changes to our information collection requirements as a result of this comment.

We again invite comments concerning this information collection on:

(1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this 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.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

USGS Information Collection Clearance Contact: Phadrea Ponds (970) 226–9445.

Dated: July 17, 2008.

John H. DeYoung, Jr.,

Chief Scientist, Minerals Information Team.

[FR Doc. E8–16821 Filed 7–22–08; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14864–A, F–14864–A2; AK–965–1410–KC–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Nunapiglluraq Corporation. The lands are in the vicinity of Hamilton, Alaska, and are located in:

Seward Meridian, Alaska

T. 32 N., R. 77 W.,
Secs. 6, 7 and 18.
Containing approximately 1,596 acres.
T. 33 N., R. 77 W.,

Secs. 19, 26, 27, 34, and 35;
Containing approximately 2,208 acres.
T. 30 N., R. 78 W.,
Secs. 4 and 9.
Containing approximately 865 acres.
T. 33 N., R. 78 W.,
Secs. 1 and 12.
Containing approximately 1,207 acres.
Aggregating approximately 5,876 acres.

A portion of the subsurface estate in these lands will be conveyed to Calista Corporation when the surface estate is conveyed to Nunapiglluraq Corporation. The remaining lands lie within Clarence Rhode National Wildlife Range, established January 20, 1969. The subsurface estate in the refuge lands will be reserved to the United States at the time of conveyance. Notice of the decision will also be published four times in the Tundra Drums.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until August 22, 2008 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from:

Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION, CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Robert Childers,

Land Law Examiner, Land Transfer Adjudication II.

[FR Doc. E8–16879 Filed 7–22–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14879–A, F–14879–A2; AK–965–1410–KC–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Kotlik Yupik Corporation. The lands are in the vicinity of Kotlik, Alaska, and are located in:

Kateel River Meridian, Alaska

T. 28 S., R. 23 W.,
Secs. 1, 2, 12, and 13;
Secs. 23, 24, 26, and 27;
Secs. 33, 34, and 35.
Containing approximately 6,625 acres.
T. 29 S., R. 23 W.,
Sec. 4.
Containing approximately 562 acres.
T. 26 S., R. 27 W.,
Secs. 18, 19, 30, and 31.
Containing approximately 1,636 acres.
T. 27 S., R. 27 W.,
Secs. 15, 22, and 27.
Containing approximately 1,736 acres.
T. 26 S., R. 28 W.,
Secs. 4 to 11, inclusive;
Secs. 13 to 17, inclusive;
Secs. 22 to 25, inclusive;
Sec. 36.
Containing approximately 7,829 acres.
Aggregating approximately 8,388 acres.

Seward Meridian, Alaska

T. 33 N., R. 73 W.,
Sec. 6.
Containing approximately 329 acres.
T. 34 N., R. 73 W.,
Secs. 31, 32, and 33.
Containing approximately 1,655 acres.
Aggregating approximately 1,984 acres.
Total aggregate of approximately 20,372 acres.

A portion of the subsurface estate in these lands will be conveyed to Calista Corporation when the surface estate is conveyed to Kotlik Yupik Corporation. The remaining lands lie within Clarence Rhode National Wildlife Range, established January 20, 1969. The subsurface estate in the refuge lands will be reserved to the United States at the time of conveyance. Notice of the decision will also be published four times in the Tundra Drums.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until August 22, 2008 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION, CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Robert Childers,

Land Law Examiner, Land Transfer Adjudication II.

[FR Doc. E8–16882 Filed 7–22–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–020–1010–PO]

Notice of Public Meeting, Eastern Montana Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior, Montana, Billings and Miles City Field Offices.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Eastern Montana Resource Advisory Council (RAC), will meet as indicated below.

DATES: The next two regular meetings of the Eastern Montana Resource Advisory Council will be held on August 26, 2008 in Miles City, MT and December 4, 2008 in Billings, MT. The meetings will start at 8 a.m. and adjourn at approximately 3:30 p.m. each day. When determined, the meeting location will be announced in a news release.

FOR FURTHER INFORMATION CONTACT: Mark Jacobsen, Public Affairs Specialist, BLM Miles City Field Office, 111 Garryowen Road, Miles City, Montana, 59301. Telephone: (406) 233–2831.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior through the Bureau of Land Management on a variety of planning and management issues associated with public land management in Montana. At these

meetings, topics will include: Miles City and Billings Field Office manager updates, subcommittee briefings, work sessions and other issues that the council may raise. All meetings are open to the public and the public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations should contact the BLM as provided above.

Dated: July 15, 2008.

M. Elaine Raper,

Field Manager.

[FR Doc. E8–16881 Filed 7–22–08; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

Final Environmental Impact Statement/ Mountain Lakes Fishery Management Plan; North Cascades National Park Service Complex; Chelan, Skagit and Whatcom Counties, WA; Notice of Availability

SUMMARY: Pursuant to § 102(c) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended), the National Park Service in cooperation with the Washington State Department of Fish and Wildlife has prepared a Final Environmental Impact Statement (FEIS) and Mountain Lakes Fishery Management Plan. The FEIS identifies and evaluates proposed plan and three alternatives for management of non-native fish in the natural mountain lakes within North Cascades National Park Service Complex and the Stephen Mather Wilderness. Appropriate mitigation strategies are assessed, and an "environmentally preferred" alternative is also identified. When approved, the Mountain Lakes Fishery Management Plan (Plan) will govern all fishery management actions, including potential removal of self-sustaining populations of non-native fish and fish stocking.

Background: The National Park Service (NPS) manages North Cascades National Park, Lake Chelan National Recreation Area, and Ross Lake National Recreation Area collectively as the North Cascades National Park Service Complex (hereafter referred to as "North Cascades"). The rugged, wilderness landscape of North Cascades contains 245 natural mountain lakes which are naturally fishless due to impassable topographic barriers. Though naturally barren of fish, these lakes contain a rich array of native aquatic life including plankton, aquatic insects, frogs and salamanders. In the late 1800's, settlers began stocking lakes within the present-day boundaries of North Cascades with various species of non-native trout for food and recreation. By the 20th century, fish stocking was routinely undertaken by the U.S. Forest Service, various counties, and individuals. Then in 1933, the state of Washington assumed responsibility for stocking mountain lakes to create and maintain a recreational fishery. After North Cascades was established in 1968, a conflict over fish stocking emerged between the NPS and Washington state. This conflict derived from fundamental policy differences: NPS policies prohibited stocking so as to protect native ecosystems and Wilderness, whereas Washington policies encouraged stocking to enhance recreational opportunities.

Preferred Plan and Alternatives Considered: As the proposed Mountain Lakes Fishery Management Plan, *Alternative B* (agency-preferred alternative) would allow continued stocking of select lakes with a history of fish stocking. To minimize ecological risks, only trout that are native to the watershed or functionally sterile would be stocked at low densities. Self-sustaining populations of trout would be removed from all lakes (where feasible) using various methods including gillnets, electrofishing, spawning habitat exclusion, and antimycin, a potent yet ephemeral pesticide. Management actions would be monitored and evaluated to enable adaptive management and minimize impacts to biological integrity. Implementation of this Alternative would require clarification from Congress regarding fish stocking in North Cascades and the Stephen Mather Wilderness.

The "no action" alternative (*Alternative A*) would continue fishery management according to the terms and conditions of the 1988 Supplemental Agreement with the Washington Department of Fish and Wildlife (WDFW). This agreement provides for continued stocking of select lakes in North Cascades National Park. Implementation of this alternative would require clarification from Congress regarding fish stocking in the North Cascades and Stephen Mather Wilderness.

Alternative C would include continued fish stocking in select lakes in Ross Lake National Recreation Area and Lake Chelan National Recreation Area; stocking would be discontinued in North Cascades National Park. Otherwise, the adaptive management framework for this alternative would be similar to *Alternative B*. Implementation of *Alternative C* would require clarification from Congress regarding continued fish stocking in the Stephen Mather Wilderness.

Alternative D would discontinue fish stocking in all mountain lakes in North Cascades Complex. This alternative would implement a long-term goal of removing, wherever feasible, self-sustaining populations of non-native trout in up to 37 lakes using the removal methods described for *Alternative B*.

Public Involvement: The public scoping phase formally began January 16, 2003, with the NPS publication of a Notice of Intent to prepare an EIS for a high mountain lakes fishery management plan. Extensive local and regional publicity and distribution of public scoping brochures occurred during February–March 2003. In late March 2003, the four public scoping meetings were hosted in the surrounding communities of Sedro-Woolley, Wenatchee, Bellevue and Seattle. The NPS received 248 comments during the public scoping phase; a public scoping report was prepared and posted on the project Web site (see below). The EPA's notice of filing of the Draft EIS was published in the **Federal Register** by the EPA on May 27, 2005; the park's notice of availability was published on May 31, 2005. The 90-day opportunity for public review and comment extended through August 26, 2005. Four public meetings were hosted in surrounding communities during the week of July 25–28, 2005. Ninety individuals and organizations provided 350 substantive comments both for and against continued stocking.

SUPPLEMENTARY INFORMATION: Electronic copies of the final document will be available online at *http://parkplanning.nps.gov/noca*. Bound printed copies will be available for public review at the North Cascades Headquarters Office, 810 State Route 20, Sedro-Woolley, Washington 98284; and at the Seattle, Wenatchee, Chelan and Bellingham public libraries. For further information or to request copies of the document, contact Mr. Roy Zipp, Environmental Protection Specialist, 810 State Route 20, Sedro-Woolley, WA 98284; (360) 854–7313.

Decision Process: Following careful consideration of all public and agency

comments received on the Draft EIS/Plan, the NPS in cooperation with Washington Department of Fish and Wildlife has completed the Final Mountain Lakes Fishery Management Plan/Final Environmental Impact Statement. Not sooner than 30 days after notice of release of the Final EIS is published in the **Federal Register** by the U.S. Environmental Protection Agency, a Record of Decision will be prepared by the NPS. As a delegated EIS, the official responsible for the final decision is the Regional Director, Pacific West Region; subsequently, the official responsible for implementation will be the Superintendent, North Cascades National Park Service Complex.

Dated: March 5, 2008.

Patricia L. Neubacher,

Acting Regional Director, Pacific West Region.

Editorial Note: This document was received in the Office of the Federal Register on July 18, 2008.

[FR Doc. E8–16887 Filed 7–22–08; 8:45 am]

BILLING CODE 4312–HJ–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent To Repatriate Cultural Items: U.S. Department of the Interior, National Park Service, Intermountain Region, Santa Fe, NM

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the U.S. Department of the Interior, National Park Service, Intermountain Region, Santa Fe, NM, that meet the definition of "sacred objects" under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the NAGPRA coordinator, Intermountain Region.

In 1994, the National Park Service assisted the Federal Bureau of Investigation and the United States Fish and Wildlife Service with the investigation of a Migratory Bird Treaty Act violation. The evidence included a collection of Native American objects confiscated from the East-West Trading Post in Santa Fe, NM. Preliminary subject matter expert review of the collection indicated that the objects were historically significant and potentially subject to NAGPRA. The collection was accessioned in 2002 into the Southwest Regional Office collections, now called the Intermountain Region Office. The three cultural items covered in this notice are one bundle with carved bird, shell, and eagle feather; one bundle with eagle feathers; and one carved bird with beads.

Following adjudication of the case, a detailed assessment of the objects was made by Intermountain Region (IMIR) NAGPRA program staff in close collaboration with the IMIR Museum Services program staff and in consultation with representatives of potentially affiliated tribes. During consultation, representatives of the Pueblo of Santa Ana, New Mexico, identified the cultural items as specific ceremonial objects needed by traditional Pueblo of Santa Ana religious leaders for the practice of a traditional Native American religion by their present-day adherents. Oral tradition evidence presented by representatives of the Pueblo of Santa Ana, New Mexico, and the written repatriation request received by the Intermountain Region further articulated the ceremonial significance of the cultural items to the Pueblo of Santa Ana, New Mexico. Based on anthropological information, court case documentation, oral tradition, museum records, consultation evidence, and expert opinion, there is a cultural affiliation between the Pueblo of Santa Ana, New Mexico, and the three sacred objects.

Officials of the Intermountain Region have determined that, pursuant to 25 U.S.C. 3001(3)(C), the three cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Intermountain Region also have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects and the Pueblo of Santa Ana, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred objects should contact Dave Ruppert, NAGPRA Coordinator, NPS Intermountain Region, 12795 West Alameda Parkway, Lakewood, CO 80228, telephone (303) 969–2879, before August 22, 2008. Repatriation of the sacred objects to the Pueblo of Santa Ana, New Mexico may proceed after that date if no additional claimants come forward.

The Intermountain Region is responsible for notifying the Apache Tribe of Oklahoma; Fort Sill Apache Tribe of Oklahoma; Hopi Tribe of Arizona; Jicarilla Apache Nation, New Mexico; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Navajo Nation, Arizona, New Mexico & Utah; Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Santo Domingo, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tonto Apache Tribe of Arizona; Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona; Ysleta Del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: June 24, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–16732 Filed 7–22–08; 8:45 am]

BILLING CODE 4312–50–M

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before July 4, 2008. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written

or faxed comments should be submitted by August 7, 2008.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

North Carolina

Guilford County

Carter, Wilbur and Martha, House, 1012 Country Club Dr., Greensboro, 08000777

Jackson County

Monteith, Elias Brendle, House and Outbuildings, 111 Hometown Place Rd., Dillsboro, 08000778

Madison County

Marshall High School, Blannahassett Island. W. side Bridge St., Marshall, 08000779

Pennsylvania

Adams County

Thomas Brothers Store, 4 S. Main St., Biglerville, 08000780

Allegheny County

Century Building, 130 7th St., Pittsburgh, 08000781

Bucks County

Nakashima, George, House, Studio and Workshop, 1847 and 1858 Aquetong Rd., Solebury, 08000782

Erie County

Hornby School, 10,000 Station Rd., Greenfield, 08000783

Montgomery County

Keefe-Mumbower Mill, NE. corner of Swedesford and Township Line Rds. jct., North Wales, 08000784

Philadelphia County

Woman's Medical College of Pennsylvania, 3300 Henry Ave., Philadelphia, 08000785

Puerto Rico

San Juan Municipality

La Giralda, 651 Jose Marti St., San Juan, 08000786

Wisconsin

Jefferson County

Carcajou Point Site, Address Restricted, Sumner, 08000787

[FR Doc. E8–16806 Filed 7–22–08; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Notice of Public Comment Period for Proposed Modification to Consent Decree Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that, for a period of 30 days, the United States will receive public comments on a proposed Modification to Consent Decree in *United States* v. *Cargill, Incorporated*, (Civil Action No. 05–2037 JMR/FLN), which was lodged with the United States District Court for the District of Minnesota on July 11, 2008.

This proposed Modification applies only to Cargill's Dayton, Ohio, corn mill facility. The Dayton facility is one of 27 ethanol, corn mill and oilseed extraction plants subject to the original Consent Decree which was entered by the Court on March 3, 2006. The settlement resolved claims against the Dayton facility, among others, pursuant to Sections 113(b) and 211(d) of the Clean Air Act ("CAA"), 42 U.S.C. 7413(b) & 7545(d).

This proposed Modification allows for an 18-month extension of the deadline for installing air pollution controls for volatile organic compound ("VOC") emissions at the integrated bran/feed drying process units, while accelerating the installation of nitrous oxide-reducing burners ("low-NO_x burners") on the process boiler. Overall, EPA estimates that the schedule change proposed in the Modification will result in a one-time net emission reduction of 147 tons from estimates based on the original Decree requirements.

The Department of Justice will receive, for thirty (30) days from the date of this publication, comments relating to the Modification. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. In either case, the comments should refer to *United States* v. *Cargill, Inc.*, D.J. Ref. 90–5–2–1–07481/1.

During the public comment period, the Modification may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Modification may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–16756 Filed 7–22–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. L–11407]

Proposed Exemptions Involving; General Motors Corporation and its Wholly-Owned Subsidiaries (Together GM)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption, unless otherwise stated in the Notice of Proposed Exemption, within 60 days from the date of publication of this **Federal Register** Notice. *Comments and requests for a hearing should state:* (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. *Attention:* Application No. L–11407, stated in the Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via E-mail or

FAX. Any such comments or requests should be sent either by E-mail to: *GM-DCVEBA@dol.gov*, or by FAX to (202) 219–0204 by the end of the scheduled comment period. The application for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 30 days of the date of publication in the **Federal Register.** Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemption was requested in an application filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, this notice of proposed exemption is issued solely by the Department.

The application contains representations with regard to the proposed exemption which is summarized below. Interested persons are referred to the application on file with the Department for a complete statement of the facts and representations.

General Motors Corporation and Its Wholly-Owned Subsidiaries (Together, GM) Located in Detroit, MI [Application No. L–11407]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[1]

Section I. Covered Transactions

If the exemption is granted, the restrictions of sections 406(a)(1)(B), 406(a)(1)(D), and 406(b)(1) and (b)(2) of the Act shall not apply, effective December 16, 2005, to: (1) Monthly cash advances to GM by the DC VEBA to reimburse GM for the estimated mitigation of certain health care expenses (the Mitigation) and for the payment of dental expenses incurred by participants in the DC VEBA; and (2) an annual "true up" of the Mitigation payments and dental expenses against the actual expenses incurred, with the result that (a) if GM has been underpaid by the DC VEBA, GM receives the balance outstanding from the DC VEBA with interest, or (b) if the DC VEBA has overpaid GM, GM reimburses the DC VEBA for the amount overpaid, with interest.

Section II. Conditions

This proposed exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following conditions:

(a) A committee (the Committee), acting as a fiduciary independent of GM, has represented and will continue to represent the DC VEBA and its participants and beneficiaries for all purposes with respect to the Mitigation process.

(b) The Committee for the DC VEBA has discharged and will continue to discharge its duties consistent with the terms of the DC VEBA and the DC VEBA Settlement Agreement.

(c) The Committee and actuaries retained by the Committee have reviewed and approved and will continue to review and approve the estimation process involved in the Mitigation, which results in the monthly Mitigation amount paid to GM.

(d) Outside auditors retained by the Committee, along with an administrative company that is partly owned by the DC VEBA, will audit the calculation of the true up to determine whether there are any differences between the estimated Mitigation and actual Mitigation amounts and make such information available to GM.

(e) GM has provided and will continue to provide various reports and records to the Committee concerning the Mitigation and dental care reimbursements, which are and will continue to be subject to review and audit by the Committee.

(f) The terms of the transactions are no less favorable and will continue to be no less favorable to the DC VEBA than the terms negotiated at arm's length under similar circumstances between unrelated third parties.

(g) The interest rate applied to any true up payments is a reasonable rate, as set forth in the DC VEBA Settlement Agreement, and will continue to be a reasonable rate that runs from the beginning of the year being trued up and does and will continue to not present a windfall or detriment to either party.

(h) The DC VEBA has not incurred and will continue not to incur any fees, costs or other charges (other than those described in the DC VEBA and the DC VEBA Settlement Agreement) as a result of the covered transactions described herein.

(i) GM and the Committee have maintained and will continue to maintain for a period of six years from the date of any of the covered transactions, any and all records necessary to enable the persons described in paragraph (j) below to determine whether conditions of this exemption have been and will continue to be met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of GM or the Committee, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than GM or the Committee shall be subject to the civil penalty that may be assessed under section 502(i) of the Act if the records are not maintained, or are not available for examination as required by paragraph (j) below.

(j)(1) Except as provided in section (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (i) above have been or will be unconditionally available at their customary location during normal business hours to:

(A) Any duly authorized employee representative of the Department;

(B) The UAW or any duly authorized representative of the UAW;

(C) GM or any duly authorized representative of GM; and

(D) Any participant or beneficiary of the DC VEBA, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in subparagraphs (1)(B) or (D) of this paragraph (j) is authorized to examine the trade secrets of GM, or commercial or financial information that is privileged or confidential.

[1] Because the Independent Health Care Trust for UAW Retirees of General Motors Corporation (the DC VEBA) is not qualified under section 401 of the Code, there is no jurisdiction under Title II of the Act pursuant to section 4975 of the Code. However, there is jurisdiction under Title I of the Act.

Section III. Definitions

For purposes of this proposed exemption, the term—

(a) "GM" means General Motors Corporation and its wholly owned subsidiaries.

(b) "Affiliate" means:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; or

(3) Any corporation, partnership or other entity of which such other person is an officer, director or partner. (For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(c) "Class Members" mean all persons other than active employees who, as of the ratification date of the GM–UAW Memorandum of Understanding, November 11, 2005 (the Ratification Date) were (1) GM/UAW hourly employees who had retired from GM with eligibility for the General Motors Health Care Program for Hourly Employees (the Original Plan) as in effect prior to the Ratification Date or (2) the spouses, surviving spouses and dependents of GM/UAW hourly employees, who, as of the Ratification Date, were eligible for post-retirement or surviving spouse health care coverage under the Original Plan as a consequence of a GM/UAW hourly employee's retirement from GM or death prior to retirement.

(d) *"Committee" means the seven individuals, consisting of two classes:* (1) the United Auto Workers Class (UAW) with three members, and (2) the Public Class with four members, who act as the named fiduciary and administrator of the DC VEBA.

(e) "Court" or "Michigan District Court" means the United States District Court for the Eastern District of Michigan.

(f) "DC VEBA" means the Independent Health Care Trust for UAW Retirees of General Motors Corporation.

(g) "DC VEBA Settlement Agreement" means the agreement, dated December 16, 2005, which was entered into between GM, the UAW, and Class Representatives, on behalf of a Class of plaintiffs in the *Henry* case (2006 WL 891151 (E.D. Mi. March 31, 2006)), aff'd 2007 WL 2239208, (6th Cir. August 7, 2007).

(h) "Mitigation" means the reduction of retirees' monthly contributions, annual deductibles, and other retirees' out-of-pocket costs to the extent payments from the DC VEBA are made, as directed by the Committee, to GM and/or to providers, insurance carriers and other agreed-upon entities.

(i) "OPEB" means Other Post-Employment Benefits. The OPEB Valuation is an actuarially developed annual valuation of a company's post employment benefit obligations, other than for pension and other retirement income plans. The OPEB Valuation is based on a set of uniform financial reporting standards promulgated by the Financial Accounting Standards Board and embodied in Financial Accounting Standard 106, as revised from time to time. The types of benefits addressed in an OPEB Valuation typically are retiree healthcare (medical, dental, vision, hearing) life insurance, tuition assistance, day care, legal services, and the like.

(j) "Shares" or "Stock" refers to shares of common stock of reorganized GM, par value $.01 per share.

(k) "UAW" means the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or the United Auto Workers, if shortened.

(l) "VEBA" means a voluntary employees' beneficiary association.

Effective Date: If granted, this proposed exemption will be effective as of December 16, 2005.

Summary of Facts and Representations

The Applicant

1. GM is primarily engaged in automotive production and marketing, and financing and insurance operations. GM designs, manufactures, and markets vehicles worldwide, and it has its largest operating presence in North America. As of June 30, 2007, GM had approximately 118,539 active employees in the United States, of whom approximately 81,689 are represented by the UAW and other unions. Approximately 717,432 retirees and dependents in the U.S. receive GM retiree health benefits in whole or in part. GM maintains its headquarters in Detroit, Michigan. As of December 31, 2006, GM had total assets on its consolidated balance sheet of $186.192 billion.

The DC VEBA Settlement Agreement and GM's Negotiations

2. The DC VEBA Settlement Agreement, dated December 16, 2005, was entered into between GM, the UAW, and Class Representatives, on behalf of a Class of plaintiffs (*i.e.*, the Class Members), in the *Henry* case (2006 WL 891151 (E.D. Mi. March 31, 2006)), aff'd 2007 WL 2239208, (6th Cir. August 7, 2007). The case was brought in a declaratory judgment motion to contest whether GM had the right to unilaterally modify hourly retiree welfare benefits under its existing GM retiree plans. The DC VEBA Settlement Agreement was approved by the Michigan District Court in an opinion dated March 31, 2006.

3. Throughout much of 2005, GM and the UAW engaged in extended discussions concerning the impact of rising health care costs on GM's financial condition. During these discussions, GM asserted that it had the right to unilaterally modify and/or terminate the health care benefits applicable to its hourly retirees and that, if no agreement was reached to address GM's health care burden, GM would act unilaterally. The UAW disagreed with GM's position and asserted that the benefits were vested and that GM did not have the right to modify or terminate such benefits.

4. The UAW, the Class Representatives and Class Counsel reviewed GM's current and projected financial condition and, as a result, concluded that, among other things, a significant reduction in GM's retiree health care costs under the existing plans would substantially improve its financial condition. Without such an improvement, the ability of GM to provide health care benefits over the long term to Class Members at or near the level provided by the DC VEBA Settlement Agreement would be placed in doubt. All parties believed that a settlement would be advantageous.

The DC VEBA

5. The DC VEBA was created on December 16, 2005 as a result of the DC VEBA Settlement Agreement. Under its terms, GM is required to make certain contributions—both mandatory and contingent—to the DC VEBA, which is controlled by an independent seven member Committee. In April 2006, GM contributed $1 billion to the DC VEBA. The DC VEBA has been established through a trust agreement between State Street Bank and Trust Company (the Trustee) and GM. The DC VEBA does not replace any existing welfare plans that are sponsored by GM for the retirees. The DC VEBA also intends to qualify as a "voluntary employees' beneficiary association" within the meaning of section 501(c)(9) of the Code. As of August 31, 2007, the DC VEBA had total assets of $1.74 billion. Fidelity Investments operates a call center, administers eligibility requirements, and handles certain other

administrative tasks on behalf of the DC VEBA.

6. The objective of the DC VEBA is to mitigate the financial impact of certain modifications in health care benefits on the Class Members. If GM's financial condition and operating results improve, and as more fully described below, additional contributions to the DC VEBA that relate to appreciation of GM common stock, profit sharing payments and increases in GM's regular quarterly cash dividend will increase the DC VEBA funds available and thereby further lessen the adverse impact of these health care modifications on Class Members.

The Committee

7. The DC VEBA is administered by the Committee, all of whose members are independent of GM. GM has no appointment power, and the Committee functions independently of GM. The Committee acts as the named fiduciary and administrator of the DC VEBA, and appoints the Trustee and all investment managers of the DC VEBA's assets.

The Committee is comprised of seven individuals, consisting of two classes, the "UAW Class" with three members, and the "Public Class" with four members. Robert Naftaly, one of the members of the Public Class, serves as the Chair of the Committee. The Public Class members of the Committee were appointed by the Court when it approved the DC VEBA Settlement Agreement. The UAW Class members were appointed by the UAW.

No member of the Committee may be an affiliate of GM, including a current or former officer, director or salaried employee of GM. No member of the Public Class may be an active employee or retiree of the UAW, nor may any member of the Public Class have any financial or institutional relationship with GM or the Committee that the Committee, in its sole discretion, determines to be material.

8. The members of the UAW Class serve at the discretion of the UAW and may be removed or replaced, and a successor designated, at any time by written notice by the President of the UAW to the members of the Committee. The members of the Public Class serve terms of four years. In the event of a vacancy in the Public Class, whether by expiration of a term, resignation, removal, incapacity, death or otherwise of a Public Class member, the Public Class will elect a new member of the Public Class by majority vote of the continuing Public Class members, excluding such member vacating his or her seat. A Public Class member can be removed by the affirmative vote of any five other members of the Committee at any time. The Committee Chair serves for a term of two years, and may be removed from office. Any successor Committee Chair will be elected by a majority vote of the Committee as a whole then in office.

Mitigation

9. The DC VEBA will provide Mitigation for monthly contributions by retirees to health care, deductibles, out of pocket maximums, and some co-insurance required under GM's existing plans. The initial levels of Mitigation are set forth in the DC VEBA Settlement Agreement, and may be modified later by the Committee in accordance with the terms of the Settlement Agreement and the Trust Agreement for the DC VEBA.

10. The initial Mitigation levels provide for Mitigation of monthly retiree contributions to a maximum of $10 per individual and $21 per family. Initial Mitigation limits deductibles to an annual maximum of $150 per individual subject to an aggregate $300 per family. Initial Mitigation caps out-of-pocket costs at $250 per individual per year and $500 per family per year for in network services, and $500 per individual per year and $1,000 per family per year for out of network benefits. In effect, the Mitigation provides a significant benefit to retired GM participants of the DC VEBA who would otherwise be required to make these payments out of pocket.

Mitigation Process

11. The Mitigation process involves GM initially providing payment for the health care services that the DC VEBA or the participants would otherwise be responsible for paying and then being reimbursed for the cost by the DC VEBA. The process operates as follows:

No later than May 1 of the year prior to the year for which Mitigation is to be provided, the Committee will inform GM of the Mitigation levels for the following year. By September 1 of the prior year, GM will provide a preliminary estimate of the Mitigation amount and the basis for such estimate, along with supporting documentation to the Committee. The Committee then has until October 15 to notify GM that it agrees to the Mitigation level. In January of the following year, GM must provide the Committee with a preliminary estimate of monthly amounts owed by the DC VEBA for the year, which amounts will be paid monthly to GM, unless disputed by the Committee. After the OPEB valuation in January, but no later than February 1 of the Mitigation year, GM must provide a final estimated annual Mitigation amount for the Mitigation year, along with the basis for the estimate and supporting documentation. If this final estimate differs from the preliminary estimate by more than 5%, GM will update the monthly installment amounts.

By September 1 of each Mitigation year, GM will provide the Committee with a report prepared by its actuaries containing the actual annual Mitigation amount paid by GM in the prior year, and the amount of any true up for the prior year.

The prior year actual Mitigation will be developed consistent with the OPEB valuation process, and will represent incurred claims data with actuarially developed completion factors. Actual incurred claims and Mitigation will then be calculated. Any true up amounts owed to either party will be paid by October 1 of the year following the year in which Mitigation took place.

If there is a dispute as to the amount of the true up payment, undisputed amounts will be paid and the parties will enter into a dispute procedure set forth in the DC VEBA Settlement Agreement involving independent parties, including outside auditors retained by the Committee along with an administrative company this is partially owned by the DC VEBA. Such information will be made available to GM. Interest for any late payments or any underpayments will be paid at the OPEB discount rate.[2] The interest rate will run from the beginning of the year being trued up.[3] In addition, GM is required to provide detailed quarterly reports to the Committee concerning the Mitigation process.

The Mitigation process does not apply to dental care expenses. These costs have been handled differently. The DC VEBA Settlement Agreement contemplated that GM would continue to provide 100% of dental care to retirees until December 31, 2006 but that the costs of such dental care after the Effective Date would be paid in the form of monthly reimbursements to GM by the DC VEBA. In this regard, GM invoiced the Committee and the DC VEBA made monthly reimbursements to GM until December 31, 2006, at which time, such reimbursements ceased.

Between June 30, 2006 and September 16, 2007, the DC VEBA made reimbursement payments to GM for both health care and dental expenses of approximately $355,334,463.50 and

[2] The OPEB Discount Rate is a rate used to discount projected future OPEB benefits payment cash flows to determine the present value of the OPEB obligation. The OPEB discount rate is established as of the annual valuation date, pursuant to FASB accounting guidelines.

[3] Because interest is calculated at the beginning of the year, the principal on which the January interest is calculated would be 1/12 of the total true up for the year, for February, it would be 2/12 of the total true up for the year, for March, it would be 3/12 of the total true up for the year, until December, the last month of the year, where the time period fraction would be 12/12. If payment is not made by that date, interest is calculated for each additional month until payment is made based on 2/12 of the total true up amount for the year in question.

$100,258,523.56,[4] respectively. On October 1, 2007, GM made a true up payment to the DC VEBA in the amount of $17,934,072.46, plus $1,126,156.83 in interest (*total:* $19,060,229.29). The DC VEBA has questioned GM's calculations with respect to a small portion of the actual Mitigation and if the DC VEBA prevails, GM will make an additional, small true up payment.

Funding Arrangements for the DC VEBA

12. In addition to the Mitigation process, GM is required to fund the DC VEBA. As noted above, in April 2006, GM contributed $1 billion to the DC VEBA. Also, GM is required to make cash contributions to the DC VEBA based on the increase in the notional value of eight (8) million Shares of GM common stock. This Contribution Obligation is a means of measuring the amount GM must contribute to the DC VEBA. It is not a contract right that has been transferred to the DC VEBA. The contributions are staged over time, as determined by the Committee, and are based on the increase in trading price of a GM Share over the trading price on October 14, 2005 (or $26.75 per Share).

The Contribution Obligation will ultimately be settled only in cash by its termination date in 2011. The Contribution Obligation will not carry voting or dividend rights and it is not transferable. Further, the Contribution Obligation will be adjusted upon the occurrence of certain "dilution events."[5] Finally, the amount of cash payments under the Contribution Obligation will be readily determinable pursuant to a fixed formula. Therefore, no independent valuation will be required. The actual calculation will be made by the Committee.

Administrative Exemptive Relief

13. *GM requests an administrative exemption from the Department with respect to:* (a) Monthly cash advances to GM by the DC VEBA to reimburse GM for the estimated Mitigation of certain health care expenses and for the payment of dental expenses incurred by participants in the DC VEBA; and (b) an annual "true up" of the Mitigation payments and dental expenses. In this regard, if GM has been underpaid by the DC VEBA, it would receive the balance outstanding from the DC VEBA, with interest. Conversely, if the DC VEBA has overpaid GM, GM would reimburse the DC VEBA for the amount overpaid, with interest. GM explains, and the Department concurs with GM's analysis, that the Mitigation and the payments made for dental expenses would violate sections 406(a)(1)(B), 406(a)(1)(D), and 406(b) of the Act because the reimbursements with interest could be deemed to constitute the lending of money or extension of credit between the DC VEBA and GM, a party in interest, in violation of section 406(a)(1)(B) of the Act, or could be viewed as the use by or for the benefit of a party in interest of plan assets in violation of section 406(a)(1)(D). In addition, the covered transactions would result in a prohibited act of self-dealing on the part of GM in violation of section 406(b)(1) and (b)(2) of the Act. If granted, the exemption would be effective as of December 16, 2005.

The Department is not providing exemptive relief herein with respect to the Contribution Obligation because, in the view of the Department, the Contribution Obligation is merely a contractual provision evidenced in the DC VEBA Settlement Agreement which is designed to determine the amount of additional cash contributions that must be made to the DC VEBA.[6]

Rationale for Exemptive Relief

14. Without an administrative exemption, GM states that the DC VEBA would be required to establish a costly administrative scheme to reimburse participants in the DC VEBA. In this regard, GM retirees' would be charged the full costs of the contributions, co-pays and deductibles. These retirees would then have to apply for reimbursement payments, via a claim form, from the DC VEBA.[7]

15. Under the Mitigation process, the hourly medical carriers set up their claim systems to administer claims using the net value (after the DC VEBA offset) for all cost sharing elements of the Modified Plan, as applicable to retirees, and receive payment through the system set up for the Mitigation process.[8]

Thus, there is no need for the DC VEBA to hire claims examiners or customer service representatives, as under the other alternative. The selected approach will reduce the administrative cost of providing reimbursement by the DC VEBA since the DC VEBA will only have to deal with GM to pay its health care reimbursement, instead of dealing directly with hundreds of thousands of retirees. The Mitigation process also makes it much more likely that Mitigation of all appropriate amounts will take place because it reduces the possibility that individual retirees will fail to file for reimbursement, fail to document legitimate health care expenses (due to lost paperwork, untimely filing, lost mail, etc.), or can not mentally or physically follow the administrative steps necessary to receive reimbursement directly from the DC VEBA.

16. Records relating to participants and beneficiaries will be retained by GM, its contractor, or Blue Cross Blue Shield Michigan (BCBSM). GM's contractor will reprocess, on an unmitigated basis, the claims that BCBSM processed on a mitigated basis on behalf of GM, and then GM or its contractor will determine the true up amount. Outside auditors retained by the Committee will audit the calculation and make their findings available to GM. However, all of the records will be maintained at GM, BCBSM or GM's contractor.

Termination of the DC VEBA

17. Ultimately, the DC VEBA will be terminated and its assets transferred to a new VEBA (the New VEBA). However, several steps will occur before this happens. Currently, these steps are

[4] All dental reimbursements made by the DC VEBA to GM during 2007 represent GM's dental costs attributable to the period ending December 31, 2006.

[5] A dilution event is any merger, reorganization, consolidation, exchange offer, asset spin-off, stock split, reverse stock split, extraordinary dividend, or other change in GM's corporate structure on or after the Ratification Date (November 11, 2005) that dilutes any class of GM stock.

[6] The Department further believes that the Contribution obligation is not an "employer security" within the meaning of section 407(d)(1) of the Act. Since it appears that the Contribution Obligation does not result in the acquisition or holding by the DC VEBA of an "employer security," the Department has not proposed separate exemptive relief herein with respect to such obligation.

[7] For example, the DC VEBA would need to have claims examiners ready to receive this claim, review it, request additional information if necessary, and finally pay the retiree the money (probably through a paper check). If the same retiree had additional medical services later in the year, more claims would be sent to the DC VEBA for additional reimbursement. In addition to claim examiners, the DC VEBA would need to have customer service representatives ready to answer questions regarding retiree claim submissions, filing deadlines, missing documentation or lost checks. The financial benefit of the Mitigation would be received by the retiree only if he or she filed a proper claim for reimbursement and would be delayed pending completion of the claim submission process.

[8] For example, assume that a retiree's first medical service of the year had an associated reimbursement amount of $200. Since under the Mitigation process the medical careers have set up a $150 deductible in their claims system, and since the reimbursement associated with this medical service is $50 more than the deductible, GM would pay $50 (ignoring, for purposes of this example, the 10% co-payment applicable after the deductible) for this service, and the retiree would be required to pay the provider the remaining $150 owed. In this example, since the retiree payment of $150 equals the net deductible of $150, the DC VEBA does not owe the retiree anything related to this medical service. Nevertheless, since GM paid the incremental $50 owed for this service, the DC VEBA owes GM the incremental $50.

described in a Memorandum of Understanding on Post-Retirement Medical Care, agreed to by GM and the UAW (MOU, September 26, 2007) as part of recent collective bargaining that culminated in a new, 4-year national labor agreement.[9] The covered group (the Covered Group) under the new retiree health care plan and funded by the New VEBA will consist of (a) all class members from the *Henry* case; (b) all future retirees, as defined in the *Henry* settlement who are retired as of September 14, 2007; (c) all active GM UAW-represented employees who are on the rolls and have attained seniority as of September 14, 2007 and who retire with eligibility for Retiree Medical Benefits pursuant to the eligibility provisions of the 2003 GM–UAW National Agreement; (d) certain Delphi UAW retirees and active employees eligible to receive retiree medical benefits from GM; and (e) certain UAW retirees and active employees of other GM closed or divested operations who are eligible to receive retiree medical benefits from GM; as well as (f) eligible surviving spouses and dependents of those in the Covered Group.

In the negotiations leading to the MOU, GM advised the UAW of its intent to terminate the DC VEBA Settlement Agreement in accordance with its terms in 2011 and exercise its right to terminate or modify retiree health coverage for all UAW retirees and their dependents, and the UAW reasserted its position that post-retirement medical coverage for current UAW retirees is vested and unalterable.

18. The MOU defines the "Implementation Date" (the beginning of coverage and operations) for the New VEBA. It is the later of January 1, 2010, or the date on which any appeals from, or challenges to, an order of the Michigan District Court approving settlement on a class-wide basis applicable to the Covered Group of any litigation arising over the terms of the MOU and the final settlement documentation, have been exhausted or when applicable periods during which such appeal or challenge must be brought have expired; if (a) the Approval Order has not been disapproved or modified, and (b) GM is reasonably satisfied by its discussions with the staff from the U.S. Securities and Exchange Commission that the desired accounting treatment with regard to OPEB will be obtained.

19. With regard to the DC VEBA, the MOU states that the New VEBA Settlement Agreement[10] will provide that the Approval Order will require that: (a) The DC VEBA Committee shall amend the DC VEBA to permit the transfer of its assets to, and the assumption of its liabilities by, the New VEBA; (b) the Committee shall instruct the DC VEBA Trustee to transfer the entire balance of its assets to the New VEBA; and (c) the DC VEBA be terminated after its assets are transferred to the New VEBA. It also states that the Approval Order will provide that on the Implementation Date the New VEBA shall assume all GM responsibilities and liabilities for the provision of retiree medical benefits for the Covered Group for claims incurred on or after the Implementation Date, as well as all responsibilities and liabilities of the DC VEBA on that Date. Thus, GM's obligations under the DC VEBA Settlement Agreement will cease on the Implementation Date (although there may be one or more subsequent true ups). In addition, if the Implementation Date occurs before the date on which the "Third Contribution" is due to be made to the DC VEBA, the MOU provides that GM shall make that contribution to the New VEBA. Finally, the MOU provides that it is subject to satisfaction of several conditions[11] and shall terminate if those conditions are not satisfied by December 31, 2011 (or such later date as GM and the UAW may agree upon).

20. In summary, GM represents that the transactions have satisfied and will continue to satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Committee has represented and will continue to represent the DC VEBA and its participants and beneficiaries for all purposes with respect to the Mitigation.

(b) The Committee for the DC VEBA has discharged and will continue to discharge its duties consistent with the terms of the DC VEBA and the DC VEBA Settlement Agreement.

(c) The Committee and actuaries retained by the Committee have reviewed and approved and will continue to review and approve the estimation process involved in the Mitigation, which results in the monthly Mitigation amount paid to GM.

(d) Outside auditors retained by the Committee, along with an administrative company that is partly owned by the DC VEBA, will audit the calculation of the true up to determine whether there is any difference between the estimated Mitigation and actual Mitigation amounts and make such information available to GM.

(e) GM has provided and will continue to provide various reports and records to the Committee concerning the Mitigation and dental care reimbursements, which are and will continue to be subject to review and audit by the Committee.

(f) The terms of the transactions have been no less favorable and will continue to be no less favorable to the DC VEBA than the terms negotiated at arm's length under similar circumstances between unrelated third parties.

(g) The interest rate applied to any true up payments will be a reasonable rate that runs from the beginning of the year being trued up and does not or will not present a windfall or detriment to either party.

(h) The DC VEBA has not incurred and will continue not to incur any fees, costs or other charges (other than those described in the DC VEBA and the DC VEBA Settlement Agreement) as a result of the transactions.

(i) GM and the Committee have maintained and will continue to maintain for a period of six years from the date of any of the covered transactions, the records necessary to enable certain persons, such as the UAW, DC VEBA participants, GM or any authorized employee or representative of the Department, to determine whether the terms and conditions of this exemption have been met.

Notice To Interested Persons

GM will provide notice of the proposed exemption to interested persons within 30 days of the publication of the notice of proposed exemption in the **Federal Register**. Such notice will be provided to interested persons by first-class mail and will include a copy of the notice of proposed exemption as published in the **Federal Register** as well as a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing. Comments and requests for a hearing with respect to the

[9] Eventually, the terms of the MOU will be embodied in a settlement agreement for the New VEBA (the new VEBA Settlement Agreement).

[10] On October 26, 2007, the UAW and the *Henry* class filed a new class action (E.D. Mich. 2:07–cv–14074–RHC–VMM), in the Michigan District Court challenging GM's assertion that it will be free to terminate retiree health coverage for UAW retirees, at the latest, on and after September 14, 2011. In a Scheduling Order dated November 21, 2007, Judge Cleland scheduled a status call for January 31, 2008, the filing of a motion for provisional class certification by February 11, 2008, and a fairness hearing on a proposed settlement for June 3, 2008.

[11] Chief among these conditions are that: (a) The Approval Order has been issued and the time for an appeal from or a challenge to the Approval Order has expired; and (b) GM is reasonably satisfied that it will obtain favorable accounting treatment on the OPEB issue.

proposed exemption are due within 60 days of the publication of this pendency notice in the **Federal Register**.

If you decide to submit written comments to the Department, your comments should be limited to the transactions described in the exemption proposed by the Department. However, if you have concerns about benefits or any other matter, you should contact the appropriate office at GM for further assistance.

FOR FURTHER INFORMATION CONTACT: Mrs. Blessed Chuksorji-Keefe of the Department by E-mail at *GM-DCVEBA@dol.gov* or at telephone number (202) 693–8553. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 16th day of July, 2008.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department Of Labor.

[FR Doc. E8–16713 Filed 7–22–08; 8:45 am]

BILLING CODE 4510–29–P

NUCLEAR REGULATORY COMMISSION

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia; City of Dalton, GA

[Docket Nos. 50–321 and 50–366]

Notice of Consideration of Issuance of Amendment To Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. DPR–57 and NPF–5 issued to the licensee for operation of the Edwin I. Hatch Nuclear Plant, Unit Nos. 1 and 2, (HNP) located in Appling County, Georgia. The proposed amendment includes two actions, as follows.

First, the proposed amendment would respond to existing license condition 2.C(8), "Design Bases Accident Radiological Consequences Analyses," by revising the licensing and design basis, including the Technical Specifications (TS), for four design basis accidents (DBAs): the loss-of-coolant, main steamline break, control rod drop and fuel handling accidents. The radiological consequences of these DBAs are reanalyzed using an alternative source term (AST) methodology, pursuant to Title 10 of the *Code of Federal Regulations*, Section 50.67, "Accident Source Term," (10 CFR 50.67) and allowing credit in the analyses for the function of certain systems such as the turbine building ventilation system, standby liquid control system, the main steam isolation valve alternate leakage treatment (ALT) path, and residual heat removal drywell spray system. The licensee states that the AST analyses include determination of the on-site radiological doses, specifically the main control room, technical support center and off-site radiological doses resulting from the DBA analyses. The licensee states that the analyses demonstrate that, using AST methodologies, the post-accident onsite and offsite doses remain within regulatory acceptance limits. Notice of this action was previously published in the **Federal Register** on May 6, 2008 (73 FR 25046). This renoticing of this action is provided to include further supplements to the licensee's August 29, 2006 application. that are dated April 1, May 5, June 25 and July 14, 2008, that were submitted subsequent to the **Federal Register** Notice of May 6, 2008. This renotice replaces and supersedes the **Federal Register** Notice of May 6, 2008, in its entirety. The second action would be modification of license condition 2.C(8) to extend the implementation date of May 31, 2010 until May 31, 2012 for HNP unit 1 and until May 31, 2011 for HNP unit 2, as discussed in the licensee's letter of July 2, 2008.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the CODE OF FEDERAL REGULATIONS (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. Based on the following information as provided in the licensee's submittals for the first action identified above, the Nuclear Regulatory Commission (NRC) staff proposes to determine the following with respect to the three criteria above:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Adoption of the AST methodology and allowing credit in the accident analyses for those plant systems affected by implementing AST are not expected to initiate DBAs. The revised accident source term is an input to the radiological consequence analyses. The implementation of the AST and changed TS have been incorporated in the analyses for the limiting DBAs at HNP. The structures, systems, and components affected by the proposed change are mitigative in nature and would be relied upon after an accident has

been initiated. Based on the revised analyses, the proposed changes to the TS (including revised leakage limits) impose certain performance criteria on existing systems that do not increase accident initiation probability. The proposed changes do not involve a revision to the parameters or conditions that could contribute to the initiation of a DBA as discussed in Chapter 15 of the Unit 2 Final Safety Analysis Report. Therefore, the proposed change does not result in an increase in the probability of an accident previously identified. Plant specific AST radiological analyses have been performed and, based on the results of these analyses, the licensee has demonstrated that the dose consequences of the limiting events considered in the analyses are within the regulatory guidance provided by the NRC for use with the AST as provided in 10 CFR 50.67, Regulatory Guide 1.183, Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors (ML003716792) and Standard Review Plan, Section 15.0.1. Therefore, the proposed changes do not result in a significant increase in the consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any previously evaluated?

The use of AST methodology and the implementation of limited changes to structures, systems or components (SSC) to support that methodology, does not alter or involve any design basis accident initiators. No major SSCs are added to or removed from the HNP design. The limited changes in the design of existing SSCs needed to enable crediting their function in currently postulated DBAs and the addition of further TS are intended to enhance the assurance that these SSCs will perform their mitigative function in the event of a DBA. Since the operation of the SSCs will not be significantly changed after the AST implementation, no new failure modes are created by this proposed change. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant decrease in the margin of safety?

The principal changes in the licensing and design bases for this amendment are associated with demonstrating that the radiological consequences of DBAs meet applicable NRC regulatory criteria, as discussed in criterion 1 above. The licensee states that the analyzed events have been carefully selected, and the analyses supporting these changes have been performed using approved methodologies and conservative inputs to ensure that analyzed events are bounding and safety margin has been retained. The licensee also states that the dose consequences of these limiting events are within the acceptance criteria presented in 10 CFR 50.67, Regulatory Guide 1.183, and Standard Review Plan 15.0.1 and that, because the proposed changes continue to result in dose consequences within the applicable regulatory limits, the changes are considered to not result in a significant reduction in the margin of safety.

As required by 10 CFR 50.91(a), for the second issue identified above, the licensee has provided, in its letter dated July 2, 2008, its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

This proposed change will authorize SNC to credit [potassium iodide] KI for an extended period in the DBA radiological consequences analyses to address the impact of [main control room] MCR unfiltered inleakage. This proposed change does not result in any functional or operational change to any systems, structures, or components and has no impact on any assumed initiator of any analyzed accident. Therefore, the proposed change does not result in an increase in the probability of an accident previously evaluated.

This proposed change does not introduce any additional method of mitigating the thyroid dose to MCR occupants in the event of a loss-of-coolant accident (LOCA) since the existing license condition has already introduced this method as part of the licensing basis for an interim period of time. The updated LOCA MCR radiological dose, considering 110 [cubic feet per minute] cfm unfiltered inleakage and crediting KI, continues to meet GDC 19 acceptance limits. In the context of the current licensing basis with MCR unfiltered inleakage considered, LOCA continues to be the limiting event for radiological exposures to the operators in the MCR. Radiological doses to MCR occupants are within the regulatory limits of GDC 19 with MCR unfiltered inleakage up to 1000 cfm without the crediting of KI for the main steam line break accident (MSLB), control rod drop accident (CRDA), and fuel handling accident (FHA). Therefore, the proposed change does not result in a significant increase in the consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any previously evaluated?

This proposed change will authorize SNC to credit KI for an extended period in the DBA radiological consequences analyses to address the impact of MCR unfiltered inleakage. This proposed change does not result in any functional or operational change to any systems, structures, or components. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant decrease in the margin of safety?

This proposed change will authorize SNC to credit KI for an extended period in the DBA radiological consequences analyses to address the impact of MCR unfiltered inleakage. This proposed change does not result in any functional or operational change to any systems, structures, or components. This proposed change extends the use of an additional method of mitigating the thyroid dose to MCR occupants in the event of a LOCA until May 31, 2012. The updated LOCA MCR radiological dose, considering 110 cfm unfiltered inleakage and crediting KI, continues to meet GDC 19 acceptance limits. In the context of the current licensing basis with MCR unfiltered inleakage considered, LOCA continues to be the limiting event for radiological exposures to the operators in the MCR. Radiological doses to MCR occupants are within the regulatory limits of GDC 19 with MCR unfiltered inleakage of up to 1000 cfm without the crediting of KI for the main steam line break accident (MSLB), control rod drop accident (CRDA), and fuel handling accident (FHA). Therefore, the proposed change does not involve a significant decrease in the margin of safety.

The NRC staff finds that, on the basis discussed above, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville

Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person(s) whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted, with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/ requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*. Once a petitioner/ requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must

apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://www.ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their submissions.

For further details with respect to this license amendment application, see the application for amendment dated August 29, 2006, as supplemented November 6, November 27, 2006, January 30, June 22, July 16, August 13, October 18, December 11, 2007, January 24, February 4, February 25 (two letters, nos. 1389 and 0175), February 27, March 13, April 1, May 5, June 25, July 2, and July 14, 2008, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 14th day of July 2008.

For the Nuclear Regulatory Commission.

R. E. Martin,

Senior Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–16908 Filed 7–22–08; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

TIME AND DATE: 5 p.m., Monday, July 28; and 8:30 a.m., Tuesday, July 29, 2008.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW.

STATUS: Closed.

Matters To Be Considered

Monday, July 28 at 5 p.m. (Closed)

1. Financial Update.
2. Strategic Issues.
3. Financial Outlook.
4. Product Pricing.
5. Personnel Matters and Compensation Issues.
6. Governors' Executive Session—Discussion of prior agenda items and Board Governance.

Tuesday, July 29 at 8:30 a.m. (Closed)

1. Continuation of Monday's closed session agenda.

CONTACT PERSON FOR MORE INFORMATION: Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000, Telephone (202) 268–4800.

Julie S. Moore,

Secretary.

[FR Doc. E8–16688 Filed 7–22–08; 8:45 am]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 58190/July 18, 2008]

Securities Exchange Act of 1934; Amendment to Emergency Order Pursuant to Section 12(K)(2) of the Securities Exchange Act of 1934 Taking Temporary Action To Respond to Market Developments

Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934,[1] on July 15, 2008, the Securities and Exchange Commission ("Commission") issued an Emergency Order (the "Order") related to short selling securities of certain specified substantial financial firms.[2] The Order takes effect on July 21, 2008. The Commission delayed the effective date to create the opportunity to address, and to allow sufficient time for market participants to make, adjustments to their operations to implement the enhanced requirements. The anticipated operational accommodations necessary for implementation of the Order are addressed herein.

A. Bona Fide Market Makers

The borrow and arrangement-to-borrow requirement of the Order does not apply to certain bona fide market makers. (The settlement date delivery requirement of the Order applies to these market makers.) The purpose of this accommodation is to permit market makers to facilitate customer orders in a fast-moving market without possible delays associated with complying with the borrow and arrangement-to-borrow requirement of the Order.

It is therefore ordered that, pursuant to our Section 12(k)(2) powers, the

[1] 15 U.S.C. 78*l*(k)(2).

[2] *See* Securities Exchange Act Release No. 58166 (July 15, 2008) at *http://www.sec.gov/rules/other/2008/34-58166.pdf*

following entities are excepted from the requirement of the Order that any person effecting a short sale in the publicly traded securities of substantial financial firms, as identified in Appendix A to the Order ("Appendix A Securities"),[3] using the means or instrumentalities of interstate commerce, must borrow or arrange to borrow the security or otherwise have the security available to borrow in its inventory prior to effecting the short sale: Registered market makers, block positioners, or other market makers obligated to quote in the over-the-counter market, that are selling short as part of bona fide market making and hedging activities related directly to bona fide market making in: (a) Appendix A Securities; (b) derivative securities based on Appendix A Securities, including standardized options; and (c) exchange traded funds of which Appendix A Securities are a component.

B. Documentation

Rule 203(b)(1)(iii) of Regulation SHO requires a broker or dealer to document its compliance with the "locate" requirement contained in Rule 203(b)(1)(i) of the regulation.[4] Brokers and dealers have developed processes and procedures to meet this documentation requirement. Because the borrow or arrangement-to-borrow requirement in the Order constitutes the Commission's "locate" requirement during the effectiveness of the Order, brokers and dealers need not change their processes and procedures used to document compliance.

It is therefore ordered that, pursuant to our Section 12(k)(2) powers, brokers and dealers must document compliance with the borrow and arrangement-to-borrow requirement of the Order and may use the same processes and procedures to document compliance with the Order as used for compliance with Regulation SHO, provided such processes and procedures would comply with Rule 203(b)(1) of Regulation SHO.

[3] Appendix A incorrectly referenced "HSI" as a ticker symbol for HSBC Holdings PLC ADS. This reference to HSI is hereby removed from Appendix A. In addition, the reference to BNP Paribas Securities Corp. is hereby changed to BNP Paribas. *See* Appendix A attached as revised.

[4] Rule 203(b)(1) of Regulation SHO provides: "A broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (1) Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (2) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (3) Documented compliance with this paragraph (b)(1)." 17 CFR 242.203(b)(1).

C. Sales of Restricted Securities

The Order does not apply to short sales of Appendix A Securities effected pursuant to Rule 144 of the Securities Act of 1933.[5] This is consistent with Rule 203(b)(2)(ii) of Regulation SHO and will permit the orderly settlement of such sales without the risk of causing market disruption due to unnecessary purchasing activity to meet the settlement date delivery requirement of the Order. Such sales, however, remain subject to the requirements of Regulation SHO.

It is therefore ordered that, pursuant to our Section 12(k)(2) powers, the Order does not apply to any person that effects a short sale pursuant to Rule 144 of the Securities Act of 1933 (17 CFR 230.144) in an Appendix A Security.

D. Syndicate Offerings

The Order does not apply to short sales by underwriters, or members of a syndicate or group participating in distributions of Appendix A Securities in connection with an over-allotment of securities, or any lay-off sale by such person in connection with a distribution of Appendix A Securities through a rights or a standby underwriting commitment. It is not necessary for the Order to apply to such selling activity because it is addressed in Regulation M under the Securities Exchange Act of 1934,[6] an anti-manipulation rule, and does not raise the same concerns as "naked" short selling in secondary markets.

It is therefore ordered that, pursuant to our Section 12(k)(2) powers, the Order does not apply with regard to any sale by an underwriter, or any member of a syndicate or group participating in the distribution of an Appendix A Security, in connection with an over-allotment of securities, or any lay-off sale by such person in connection with a distribution of Appendix A Securities through a rights or a standby underwriting commitment. In addition, the Order does not apply with respect to a net syndicate short position created in connection with a distribution of an Appendix A Security that is part of a fail to deliver position at a registered clearing agency in Appendix A Securities if action is taken to close out the net syndicate short position no later than the 30th day after commencement of sales in the distribution.

The Commission believes that these amendments are necessary in the public interest and for the protection of investors to maintain fair and orderly securities markets, and to prevent substantial disruption to securities markets.

By the Commission.

Florence E. Harmon,

Acting Secretary.

[5] 17 CFR 230.144.

[6] 17 CFR 242.100 *et seq.*

Appendix A

Company	Ticker symbol(s)
BNP Paribas	BNPQF or BNPQY.
Bank of America Corporation.	BAC.
Barclays PLC	BCS.
Citigroup Inc	C.
Credit Suisse Group	CS.
Daiwa Securities Group Inc.	DSECY.*
Deutsche Bank Group AG.	DB.
Allianz SE	AZ.
Goldman, Sachs Group Inc.	GS.
Royal Bank ADS	RBS.
HSBC Holdings PLC ADS.	HBC.
J. P. Morgan Chase & Co.	JPM.
Lehman Brothers Holdings Inc.	LEH.
Merrill Lynch & Co., Inc.	MER.
Mizuho Financial Group, Inc.	MFG.
Morgan Stanley	MS.
UBS AG	UBS.
Freddie Mac	FRE.
Fannie Mae	FNM.

[FR Doc. E8–16863 Filed 7–22–08; 8:45 am]
BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28331; 812–13513]

PIMCO Funds, et al.; Notice of Application

July 17, 2008.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from rule 12d1–2(a) under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit funds of funds relying on rule 12d1–2 under the Act to invest in certain financial instruments.

APPLICANTS: PIMCO Funds, PIMCO Variable Insurance Trust ("PVIT") (collectively, the "Trusts"), Allianz Global Investors Distributors LLC ("AGID") and Pacific Investment Management Company LLC ("PIMCO").

FILING DATES: The application was filed on March 25, 2008, and amended on

June 26, 2008. 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 Commission's Secretary 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 August 11, 2008, 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 issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o J. Stephen King, Jr., Pacific Investment Management Company LLC, 840 Newport Center Drive, Newport Beach, CA 92660.

FOR FURTHER INFORMATION CONTACT: Steven I. Amchan, Attorney Adviser, at (202) 551–6826, or Marilyn Mann, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 100 F Street, NE., Washington, DC 20549–1520 (telephone (202) 551–5850).

Applicants' Representations

1. PIMCO Funds is organized as a Massachusetts business trust and PVIT is organized as a Delaware statutory trust. The Trusts are registered under the Act as open-end management investment companies. Applicants request the exemption to the extent necessary to permit any existing or future registered open-end management investment company or series thereof advised by PIMCO or an entity controlling, controlled by, or under common control with PIMCO and which invests in other registered open-end management investment companies in reliance on section 12(d)(1)(G) of the Act, and which is also eligible to invest in securities (as defined in section 2(a)(36) of the Act) in reliance on rule 12d1–2 under the Act (together with the Trusts and their series, the "Applicant Funds"), to also invest, to the extent consistent with its investment objective, policies, strategies and limitations, in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act ("Other Investments").

2. AGID provides distribution and marketing services for the Applicant Funds. AGID is organized as a Delaware limited liability company and is an indirect subsidiary of Allianz SE. AGID is a registered broker-dealer under the Securities Exchange Act of 1934, as amended ("Exchange Act"). PIMCO is the Trusts" investment adviser with overall responsibility for the day-to-day investment management of the Trusts and investing the assets of PIMCO Funds and PVIT. PIMCO is organized as a Delaware limited liability company and is an indirect subsidiary of Allianz SE. PIMCO is a registered investment adviser under the Investment Advisers Act of 1940. Allianz SE is a European based, multinational insurance and financial services holding company.

3. Consistent with its fiduciary obligations under the Act, each Applicant Fund's board of trustees will review the advisory fees charged by the Applicant Fund's investment adviser to ensure that they are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Applicant Fund may invest.

Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that no registered investment company ("acquiring company") may acquire securities of another investment company ("acquired company") if such securities represent more than 3% of the acquired company's outstanding voting stock or more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquiring company and acquired company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Exchange Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

3. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered unit investment trust that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government securities, and short-term paper: (1) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (2) securities (other than securities issued by an investment company); and (3) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, "securities" means any security as defined in section 2(a)(36) of the Act.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of the Act, or from any rule under the Act, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

5. Applicants state that the proposed arrangement would comply with the provisions of rule 12d1–2 under the Act, but for the fact that the Applicant Funds may invest a portion of their assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Applicant Funds to invest in Other Investments. Applicants assert that permitting the Applicant Funds to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) were designed to address.

Applicants' Condition

Applicants agree that the order granting the requested relief will be subject to the following condition:

Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2), to the extent that it restricts any Applicant Fund from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16835 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on July 24, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (8), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (7), (8), 9(ii) and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Atkins, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for July 24, 2008 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Adjudicatory matters;

A regulatory matter regarding a financial institution;

A litigation matter; and

Other matters related to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: July 17, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16762 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58172; File No. SR–ODD–2008–03]

Canadian Derivatives Clearing Corporation; Order Approving Accelerated Distribution of an Amended Options Disclosure Document

July 16, 2008.

On July 14, 2008, the Canadian Derivatives Clearing Corporation ("CDCC"), on behalf of the Bourse de Montréal, Inc. ("Bourse de Montréal"), submitted to the Securities and Exchange Commission ("Commission"), pursuant to Rule 9b–1 under the Securities Exchange Act of 1934 ("Act"),[1] five definitive copies of an amended options disclosure document ("ODD") that describes the risks and characteristics of options traded on the Bourse de Montréal.[2] The CDCC has revised the ODD to, among other things, reflect the CDCC's current automatic exercise parameters for equity and bond options, to update the discussion of the treatment of adjustments in the terms of equity options with respect to stock splits, stock dividends or other stock distributions, and to update the discussion of Canadian federal income tax considerations applicable to non-residents.

Rule 9b–1 under the Act provides that an options market must file five preliminary copies of an amended ODD with the Commission at least 30 days prior to the date when definitive copies of the amended ODD are furnished to customers, unless the Commission determines otherwise, having due regard to the adequacy of the information disclosed and the public interest and protection of investors.[3]

The Commission has reviewed the amended ODD and finds, having due regard to the adequacy of the information disclosed, that it is consistent with the protection of investors and in the public interest to allow the distribution of the amended ODD as of the date of this order.[4]

It is therefore ordered, pursuant to Rule 9b–1 under the Act,[5] that the distribution of the revised ODD (SR–ODD–2008–03) as of the date of this is order, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16761 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

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[1] 17 CFR 240.9b–1.

[2] The Commission initially reviewed the ODD in 1984. *See* Securities Exchange Act Release No. 21365 (October 2, 1984), 49 FR 39400 (October 5, 1984) (File No. SR–ODD–84–1). Since then, the Commission has reviewed several amendments to the ODD. *See, e.g.*, Securities Exchange Act Release Nos. 51124 (February 2, 2005), 70 FR 6740 (February 8, 2005) (File No. SR–ODD–2004–03) (amending the ODD to reflect, among other things, the name change from the S&P/TSE 60 Index to the S&P/TSX 60 Index and to add an Annex to the ODD setting forth the holidays and early closings of the Bourse de Montréal); 44333 (May 21, 2001), 66 FR 29193 (May 29, 2001) (File No. SR–ODD–00–04) (amending the ODD to reflect, among other things, changes to the structure of the Canadian equity markets and to provide a discussion of Enhanced Capital Marketing); 37569 (August 14, 1996), 61 FR 43281 (August 21, 1996) (File No. SR–ODD–96–01) (amending the ODD to reflect, among other things, the name change from TCO to CDCC); 29033 (April 1, 1991), 56 FR 14407 (April 9, 1991) (File No. SR–ODD–91–1) (amending the ODD to include, among other things, references to Toronto Stock Exchange 35 Composite Index options); 24480 (May 19, 1987), 52 FR 20179 (May 29, 1987) (File No. SR–ODD–87–2) (amending the ODD to include, among other things, a discussion of Government of Canada Treasury Bill Price Index options); and 22349 (August 21, 1985), 50 FR 34956 (August 28, 1985) (File No. SR–ODD–85–1) (amending the ODD to include, among other things, a discussion of the risks and uses of stock index and bond options).

[3] This provision is intended to permit the Commission either to accelerate or extend the time period in which definitive copies of a disclosure document may be distributed to the public.

[4] Rule 9b–1 under the Act provides that the use of an ODD shall not be permitted unless the options class to which the document relates is the subject of an effective registration statement on Form S–20 under the Securities Act of 1933 or is exempt from such registration. On April 7, 2008, the Commission declared effective the CDCC's most recent Post-Effective Amendment to its Form S–20 registration statement. *See* File No. 002–69458.

[5] 17 CFR 240.9b–1.

[6] 17 CFR 200.30–3(a)(39)(i).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58171; File No. SR–CBOE–2008–31]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change To List and Trade CBOE S&P 500 Three-Month Realized Variance Options and CBOE S&P 500 Three-Month Realized Volatility Options

July 16, 2008.

On May 23, 2008, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") 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 list and trade CBOE S&P 500 three-month realized variance options and CBOE S&P 500 three-month realized volatility options. The proposed rule change was published for comment in the **Federal Register** on June 11, 2008.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

The proposed rule change will permit the Exchange to list and trade cash-settled options having European-style exercise on two statistical measurements of market variability: realized variance and realized volatility of the S&P 500 Index. These statistical measurements are attributes of and based on a broad-based security index (*i.e.*, S&P 500 Index). Three-month realized variance is a measure of the historical variability of the S&P 500 Index, based on actual prices that have been reported, or "realized," historically looking back over a three-month period. The calculation uses daily returns for the three-month period relative to an average (mean) daily price return of zero. Three-month realized volatility is the square root of three-month realized variance. The Exchange also proposed to make technical changes to some of the rules requiring amendment in order to list and trade realized variance and realized volatility options.

Currently, the Exchange lists and trades options on the 30-day implied volatility of the S&P 500 Index (CBOE Volatility Index ("VIX") options).[4] In its proposal, CBOE explained that realized variance and realized volatility options, will enable market participants to trade options that settle to the actual or realized volatility of the S&P 500 Index that has accrued over a three-month time period. CBOE further explained that realized variance and realized volatility options differ from VIX options in that they will allow market participants to take a position on what they anticipate the actual volatility of the S&P 500 Index will be at expiration. The Exchange also noted that realized variance contracts are a popular and successful product in the over-the-counter ("OTC") market and that a listed and standardized market for realized variance and realized volatility options would attract investors who desire to trade options on realized variance and realized volatility but at the same time prefer the certainty and safeguards of a regulated and standardized marketplace.

Calculation of Realized Variance and Realized Volatility

The formula for three-month realized variance and three-month realized volatility uses continuously compounded daily returns for a three-month period assuming a mean daily price return of zero. The calculated realized variance is then annualized assuming 252 business days per year.[5] The exercise-settlement value for CBOE S&P 500 Three-Month Realized Variance options is 10,000 times the three-month realized variance of the S&P 500 Index, and the exercise-settlement value for CBOE S&P 500 Three-Month Realized Volatility options is 100 times the three-month realized volatility of the S&P 500 Index, both of which are calculated using the following standardized formula:

Realized Variance and Realized Volatility Formulas:

$$\text{Realized Variance} = 252 \times \left(\sum_{i=1}^{N_a - 1} R_i^2 / (N_e - 1) \right)$$

$$\text{Realized Volatility} = \sqrt{\text{Realized Variance}} = \sqrt{252 \times \sum_{i=1}^{N_a - 1} R_i^2 / (N_e - 1)}$$

Where:

R_i = ln (P_{i+1}/P_i)—Daily return of the S&P 500 Index from P_i to P_{i+1}.

P_{i+1} = The final value of the S&P 500 Index used to calculate the daily return.

P_i = The initial value of the S&P 500 Index used to calculate the daily return.

N_e = Number of expected S&P 500 Index values needed to calculate daily returns during the three-month period. The total number of daily returns expected during the three-month period is $N_e - 1$.

N_a = The actual number of S&P 500 Index values used to calculate daily returns during the three-month period. Generally, the actual number of S&P 500 Index values will equal the expected number of S&P 500 Index values (represented by Ne). However, if one or more "market disruption events" occurs during the three-month period, the actual number of S&P 500 Index values will be less than the expected number of S&P 500 Index values by an amount equal to the number of market disruption events that occurred during the three-month period. The total number of actual daily returns during the three-month period is $N_a - 1$.

For purposes of calculating the respective exercise-settlement value to which the options will settle, realized variance and realized volatility are calculated from a series of values of the S&P 500 Index beginning with the Special Opening Quotation ("SOQ") of the S&P 500 Index on the first day of the three-month period, and ending with the S&P 500 Index SOQ on the last day of the three-month period.[6] All other

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57913 (June 3, 2008), 73 FR 33128 (June 11, 2008).

[4] The Exchange also calculates the CBOE S&P 500 Three-Month Volatility Index ("VXV"), which measures implied volatility, but the Exchange currently does not list VXV options.

[5] The annualization factor for realized volatility is the square root of 252.

[6] The SOQ is calculated per normal index calculation procedures and uses the opening (first) reported sales price in the primary market of each component stock in the index on the last business

Continued

values in the series are closing values of the S&P 500 Index.

CBOE noted that three-month realized variance and three-month realized volatility will be calculated using actual daily values of the S&P 500 Index, which is a broad-based security index. CBOE added that, by extension, products based on statistical measurements that are derived from S&P 500 Index values should similarly be treated as products based directly on S&P 500 Index values. CBOE represented that, for purposes of its rules, it would treat the indicative values for three-month realized variance and three-month realized volatility as indexes.

CBOE represented that it calculates indicative values for implied and realized variance, and publishes those values daily after the close of trading. The CBOE S&P 500 Implied Variance indicator ("IUG") is a measure of the market's expectation of future variance of the S&P 500 Index that is implied by the daily settlement price of the front-month CBOE S&P 500 Three-Month Variance futures contract.[7] The CBOE S&P 500 Realized Variance indicator ("RUG") is a measure of the realized variance of the S&P 500 Index from the beginning of the three-month period to the current date. IUG and RUG are disseminated through the Options Price Reporting Authority ("OPRA") and are publicly available through most price quote vendors.[8]

Options Trading

Under the proposal, the exercise-settlement value for CBOE S&P 500 Three-Month Realized Variance options will be 10,000 times the three-month realized variance of the S&P 500 Index. Realized variance will be quoted in variance points and fractions and one point will equal $50. The minimum tick size for all series will be 0.10 point ($5.00) and the minimum strike price interval will be $5.00.[9]

The exercise-settlement value for CBOE S&P 500 Three-Month Realized Volatility options will be 100 times the three-month realized volatility of the S&P 500 Index. Realized volatility will be quoted in volatility points and fractions and one point will equal $100. The minimum tick size for series trading below 3.00 will be 0.05 point ($5.00) and the minimum tick for series trading at and above 3.00 will be 0.10 point ($10.00). The minimum strike price interval will be $1.00.

The Exchange proposed to list series at $1 or greater strike price intervals on CBOE S&P 500 Three-Month Realized Volatility options. CBOE noted that traders will likely use the related CBOE S&P 500 Three-Month Variance futures contract price as a proxy for the "current index level," because, according to CBOE, the futures contract price reflects: (i) The realized variance of the S&P 500 Index experienced to date; and (ii) the market's expectation of the future variance of the S&P 500 Index at expiration of the respective contract.[10]

Under the proposal, the CBOE initially will list at least two strike prices above and two strike prices below the square root of the related CBOE S&P 500 Three-Month Variance futures contract price at or about the time a series is opened for trading on the Exchange. As part of this initial listing, the Exchange will list strike prices that are within 5 points from the square root of the related CBOE S&P 500 Three-Month Variance futures contract price on the preceding day.

As for additional series, the Exchange will be permitted to add additional series when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the square root of the related CBOE S&P 500 Three-Month Variance futures contract price moves substantially from the initial exercise price or prices. To the extent that any additional strike prices are listed by the Exchange, such additional strike prices shall be within thirty percent (30%) above or below the square root of the related CBOE S&P 500 Three-Month Variance futures contract price. The Exchange will also be permitted to open additional strike prices that are more than 30% above or below the square root of the related CBOE S&P 500 Three-Month Variance futures contract price, provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market-makers trading for their own account will not be considered when determining customer interest. In addition to the initial listed series, the Exchange proposed to list up to sixty (60) additional series per expiration month for each series in CBOE S&P 500 Three-Month Realized Volatility options. Further, LEAPS on CBOE S&P 500 Three-Month Realized Volatility options will not be listed at intervals less than $1.

The Exchange also proposed a delisting policy with respect to CBOE S&P 500 Three-Month Realized Volatility options. Specifically, the Exchange will, on a monthly basis, review series that are outside a range of five (5) strikes above and five (5) strikes below the square root of the related CBOE S&P 500 Three-Month Variance futures contract price and delist series with no open interest in both the put and the call series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month.

Notwithstanding the proposed delisting policy, CBOE represented that it would grant customer requests to add strikes and/or maintain strikes in CBOE S&P 500 Three-Month Realized Volatility option series.

The Exchange also proposed to add new Interpretation and Policy .11 to Rule 5.5, Series of Option Contracts Open for Trading, which will be an internal cross reference stating that the intervals between strike prices for CBOE S&P 500 Three-Month Realized Volatility options series will be determined in accordance with proposed new Interpretation and Policy .01(g) to Rule 24.9.

Exercise and Settlement

The proposed options will expire on the Saturday following the third Friday of the expiring month. Trading in the expiring contract month will normally cease at 3:15 p.m. Chicago time on the business day preceding the last day of trading (ordinarily the Thursday before expiration Saturday, unless there is an intervening holiday). When the last trading day is moved because of an Exchange holiday (such as when CBOE is closed on the Friday before expiration), the last trading day for expiring options will be Thursday. As

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day (usually a Friday) before the expiration date. If a stock in the index does not open on the day on which the exercise-settlement value is determined, the last reported sales price in the primary market is used to calculate the exercise-settlement value.

[7] CBOE Futures Exchange, LLC ("CFE") currently lists CBOE S&P 500 Three-Month Realized Variance future contracts, which commenced trading on May 18, 2004.

[8] These values can be accessed by typing in the ticker symbol (IUG or RUG) at the following Web page: *http://cfe.cboe.com/DelayedQuote/SSFQuote.aspx*.

[9] *See* Rules 5.5 and 24.9.

[10] The Commission has approved the listing of options and LEAPS in $1 strike intervals, and the use of futures prices in setting those strike intervals, for all other implied volatility products approved for listing and trading on the Exchange. *See* Rule 24.9.01(e)(ii). *See also* Securities Exchange Act Release Nos. 54192 (July 21, 2006), 71 FR 43251 (July 31, 2006) (SR–CBOE–2006–27) ($1 strikes for VIX options); 55425 (March 8, 2007), 72 FR 12238 (March 15, 2007) (SR–CBOE–2006–73) ($1 strikes for RVX options); 56813 (November 19, 2007), 72 FR 66211 (November 27, 2007) (SR–CBOE–2007–52) ($1 strikes for VXD and VXN options and $1 strikes for RVX, VIX, VXD and VXN LEAPS).

described above, the exercise-settlement value will be calculated from a series of values of the S&P 500 Index beginning with the SOQ of the S&P 500 Index on the first day of the three-month period, and ending with the S&P 500 Index SOQ on the last day of the three-month period. All other values in the series are closing values of the S&P 500 Index.

The exercise-settlement amount is equal to the difference between the exercise-settlement value and the exercise price of the option multiplied by $50 for CBOE S&P 500 Three-Month Realized Variance options and multiplied by $100 for CBOE S&P 500 Three-Month Realized Volatility options.

Surveillance

The Exchange represented that it would use the same surveillance procedures currently utilized for each of the Exchange's other index options to monitor trading in CBOE S&P 500 Three-Month Realized Variance options and CBOE S&P 500 Three-Month Realized Volatility options. The Exchange represents that these surveillance procedures are adequate to monitor trading in options on these option products. For surveillance purposes, the Exchange further represented that it would have complete access to information regarding trading activity in the pertinent underlying securities (*i.e.*, S&P 500 Index component securities).

Position Limits

The Exchange did not propose any position limits for CBOE S&P 500 Three-Month Realized Variance options and CBOE S&P 500 Three-Month Realized Volatility options. Because realized variance and realized volatility are calculated using values of the S&P 500 Index, the Exchange argued that the position and exercise limits for these new products should be the same as those for broad-based index options (*e.g.*, SPX, for which there are no position limits). According to CBOE, CBOE S&P 500 Three-Month Realized Variance options and CBOE S&P 500 Three-Month Realized Volatility options will be subject to the same reporting and other requirements triggered for other options dealt in on the Exchange.[11]

Exchange Rules Applicable

As stated above, for purposes of CBOE's rules, the indicative values for three-month realized variance and three-month realized volatility will be treated as indexes. Except as modified by the proposal, the rules in Chapters I through XIX, XXIV, XXIVA, and XXIVB will equally apply to CBOE S&P 500 Three-Month Realized Variance options and CBOE S&P 500 Three-Month Realized Volatility options.

CBOE S&P 500 Three-Month Realized Variance options and CBOE S&P 500 Three-Month Realized Volatility options will be margined as "broad-based index" options, and under CBOE rules, especially, Rule 12.3(c)(5)(A), the margin requirement for a short put or call shall be 100% of the current market value of the contract plus up to 15% of the respective underlying indicative value. Additional margin may be required pursuant to Exchange Rule 12.10.

The Exchange proposed that CBOE S&P 500 Three-Month Realized Variance options and CBOE S&P 500 Three-Month Realized Volatility options be eligible for trading as Flexible Exchange Options as provided for in Chapters XXIVA (Flexible Exchange Options) and XXIVB (FLEX Hybrid Trading System).

Capacity

CBOE represented that it has analyzed its capacity and believes that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing of new series that will result from the introduction of CBOE S&P 500 Three-Month Realized Variance options and CBOE S&P 500 Three-Month Realized Volatility options.

Technical Changes

The Exchange also proposed to make technical changes to Rules 24.4.03, 24.4.04, and 24.5, Exercise Limits by adding "VIX, VXN and VXD" to the rule text.[12] The Exchange proposed to make technical changes to Rules 24A.7(b), 24A.8(a), 24B.7(b), and 24B.8(a), by adding the parenthetical phrase, "including reduced-value option contracts" to the rule text. These FLEX rules already contemplate reduced-value option contracts, and the proposed changes are consistent with the treatment of non-FLEX reduced-value option contracts.[13]

II. Discussion

After careful review, the Commission finds that CBOE's proposal to permit trading in CBOE S&P 500 three-month realized variance options and CBOE S&P 500 three-month realized volatility options is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange,[14] and, in particular, the requirements of Section 6 of the Act [15] and the rules and regulations thereunder. The Commission finds that the CBOE's proposal gives options investors the ability to make an additional investment choice in a manner consistent with the requirements of Section 6(b)(5) of the Act.[16]

The Commission notes that it has previously approved listing and trading of broad-based index options on similar statistical measurements,[17] and that permitting the listing and trading of options on CBOE S&P 500 three-month realized variance options and CBOE S&P 500 three-month realized volatility options will provide investors with an expanded choice of trading and hedging mechanisms. As CBOE has noted, unlike other broad-based options on statistical measurements, realized variance and realized volatility options will allow market participants to take a position on what they anticipate the actual volatility of the S&P 500 Index will be at expiration.

The Commission therefore finds that it is consistent with the Act for the CBOE to apply its rules for trading of broad-based index options, including its rules regarding position limits, exercise limits and margin requirements, to CBOE S&P 500 three-month realized variance options and CBOE S&P 500 three-month realized volatility options

The Commission also finds that CBOE has adequate surveillance procedures in place to monitor for manipulation of the volatility index options. The Exchange states that it will use the same surveillance procedures currently utilized for each of the Exchange's other index options to monitor trading in options on each volatility index. The Exchange represents that these

[11] *See* Rule 4.13, *Reports Related to Position Limits*.

[12] The Exchange inadvertently neglected to request the Commission's approval to add "VIX, VXN and VXD" to the respective rule text when the position limits for these products were eliminated. *See* Securities Exchange Act Release No. 54019 (June 20, 2006), 71 FR 36569 (June 27, 2006) (SR–CBOE–2006–55).

[13] *See* Securities Exchange Act Release No. 56350 (September 4, 2007), 72 FR 51878 (September 11, 2007) (SR–CBOE–2007–79).

[14] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f.

[16] 15 U.S.C. 78f(b)(5).

[17] *See e.g.*, Securities Exchange Act Release No. 55425 (March 8, 2007), 72 FR 12238 (March 15, 2007) (order approving SR–CBOE–2006–73 to list and trade RVX and VXD options); Securities Exchange Act Release No. 49563 (April 14, 2004) 69 FR 21589 (April 21, 2004) (order approving SR–CBOE–2003–40 to list and trade VIX, VXN and VXD options).

surveillance procedures are adequate to monitor the trading of options on this volatility index. For surveillance purposes, the Exchange will have complete access to information regarding trading activity in the pertinent underlying securities.

The Commission also believes the CBOE's trading rules and other product specifications are appropriate, including the minimum tick size and strike price intervals for each product. In addition, the Commission notes that IUG and RUG are disseminated through OPRA.

The Commission also notes CBOE's representation that it possesses the necessary systems capacity to support new series that will result from the introduction CBOE S&P 500 three-month realized variance options and CBOE S&P 500 three-month realized volatility options.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–CBOE–2008–31) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16759 Filed 7–22–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58176; File No. SR–FINRA–2008–021]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto, Relating to the Adoption of NASD Rules 4000 Through 10000 Series and the 12000 Through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook

July 16, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("SEA" or "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 23, 2008, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")), 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 substantially prepared by FINRA. On July 11, 2008, FINRA filed Amendment No. 1 to the proposed rule change. 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

FINRA is proposing to adopt the following NASD rules (which are part of the existing FINRA rulebook)[3] as FINRA rules in the new consolidated FINRA rulebook: the 4000 through 10000 Series and the 12000 through 14000 Series. The text of the proposed rule change is available at FINRA, the Commission's Public Reference Room, and *http://www.finra.org*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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

Background

On July 30, 2007, NASD and NYSE consolidated their member firm regulation operations into a combined organization, FINRA.[4] As part of the transaction, FINRA incorporated into its existing rulebook NYSE rules related to member firm conduct ("Incorporated NYSE Rules"). Thus, the current FINRA rulebook consists of two sets of rules: (1) NASD rules; and (2) the Incorporated NYSE Rules (together referred to as the "Transitional Rulebook").[5] The Incorporated NYSE Rules apply only to Dual Members.[6] The new consolidated rulebook ("Consolidated FINRA Rulebook") will consist only of FINRA rules and will apply to all FINRA members, unless such rules have a more limited application by their terms.

The proposed rule change represents the first phase of the rulebook consolidation process.[7] During this process, FINRA members will be subject to both the Consolidated FINRA Rulebook, as it becomes populated with rules filed with and approved by the Commission, and the Transitional Rulebook. (The NYSE Incorporated Rules in the Transitional Rulebook will continue to apply only to Dual Members.) As the Consolidated FINRA Rulebook expands with SEC-approved final FINRA rules, the Transitional Rulebook will be reduced by the elimination of those rules, or sections thereof, that address the same subject matter of regulation. As a result, when the Consolidated FINRA Rulebook is completed, the Transitional Rulebook will have been eliminated in its entirety.

The proposed rule change would transfer from the Transitional Rulebook to the Consolidated FINRA Rulebook the NASD Rule 4000 through 14000 Series, with the exception of the Rule 11000 Series (Uniform Practice Code). As described in more detail below, the NASD Rule 4000 through 7000 Series generally involve regulatory requirements and fees for quoting, trading, reporting, clearing and comparing over-the-counter transactions. The NASD Rule 8000 Series involves investigations and sanctions. The NASD Rule 9000 Series involves disciplinary procedures. The NASD Rule 10000, 12000, 13000 and 14000 Series involve Dispute Resolution (arbitration and mediation) procedures. The proposed rule change would adopt these rule series in their entirety as FINRA rules as part of the Consolidated FINRA Rulebook, with certain non-material changes.

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[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As further discussed herein, the FINRA rulebook currently consists of the NASD rules and certain incorporated NYSE rules.

[4] *See* Securities Exchange Act Release No. 56145 (July 26, 2007); 72 FR 42169 (August 1, 2007) (Order Approving SR–NASD–2007–023 ("Release No. 34–56145")).

[5] Pursuant to Rule 17d–2 under the Act, 17 CFR 240.17d–2, NASD, NYSE and NYSE Regulation entered into an agreement to reduce regulatory duplication for firms that are members of both FINRA and the NYSE ("Dual Members") by allocating regulatory responsibilities for the Incorporated NYSE Rules to FINRA. FINRA has assumed examination, enforcement and surveillance responsibilities under the agreement relating to compliance by Dual Members to the extent such responsibilities involve member firm regulation. *See* Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (File No. 4–544).

[6] The Incorporated NYSE Rules continue to apply to persons affiliated with Dual Members to the same extent and in the same manner as they did before the consolidation. In applying the Incorporated NYSE Rules to Dual Members and such affiliated persons, FINRA has incorporated the related interpretative positions set forth in the NYSE Rule Interpretations Handbook and NYSE Information Memos.

[7] FINRA issued an *Information Notice* on March 12, 2008 that describes the rulebook consolidation process in greater detail.

The rules proposed to be transferred as part of the proposed rule change would occupy the Rule 6000 through 10000 Series and the Rule 12000 through 14000 Series in the Consolidated FINRA Rulebook as set forth in a Table of Contents attached as Exhibit 2 to the proposed rule change. The proposed rule change would reserve Rule Series 0100 through 5000 for future transfers and amendments to member conduct rules involving, among others, member application processes and associated person registration, transactions with customers, supervision, communications and disclosures, and financial responsibility.

Additionally, and with the exception of the Arbitration Code, the Consolidated FINRA Rulebook will no longer contain Interpretive Materials ("IMs"); rather, the IMs either will become stand alone rules or will be integrated into existing rule text or moved to a "Supplementary Material" section at the end of a rule. The "Supplementary Material" will set forth the same type of legally binding guidance and additional information that IMs provide today and will be filed with the Commission.

Rules To Be Transferred

The proposed rule change would adopt in their entirety the following NASD rules as FINRA rules in the Consolidated FINRA Rulebook, save minor changes, including: Replacing references to NASD or the Association with FINRA; certain renumbering to effectuate a new organizational framework for the rulebook that groups and categorizes rules into more logical and related subject matter areas; and certain conforming changes to rule references, *e.g.*, the Exchange Act, SEA rules, the Securities Act of 1933 ("Securities Act") and Securities Act rules.

Marketplace Rules

The NASD Rule 4000 through 7000 Series (Marketplace Rules) generally set forth the regulatory requirements and fees for quoting, trading, reporting, clearing and comparing, as applicable, over-the-counter transactions in NMS stocks, as defined in SEC Rule 600(b)(47) of Regulation NMS under the Act, OTC Equity Securities[8] and certain eligible debt securities. These rules would occupy the Rule 6000 Series (Quotation and Transaction Reporting Facilities) and Rule 7000 Series (Clearing, Transaction and Order Data Requirements, and Facility Charges) in the Consolidated FINRA Rulebook.

The following rule series to be transferred cover reporting, clearing and comparison, as applicable, of transactions in NMS stocks effected otherwise than on an exchange through FINRA's Trade Reporting Facilities ("TRFs"):[9] the NASD Rule 4000 and 6100 Series (relating to the FINRA/Nasdaq TRF), renumbered as the Rule 6300A and 7200A Series, respectively; the NASD Rule 4000C and 6000C Series (relating to the FINRA/NSX TRF), renumbered as the Rule 6300B and 7200B Series, respectively; and the NASD Rule 4000E and 6000E Series (relating to the FINRA/NYSE TRF), renumbered as the Rule 6300C and 7200C Series, respectively. For the most part, these rule series are identical, with relatively minor differences reflecting distinctions in TRF functionality. Each TRF rule set currently contains two definition sections: NASD Rules 4200 and 4631 (relating to the FINRA/Nasdaq TRF), NASD Rules 4200C and 4631C (relating to the FINRA/NSX TRF) and NASD Rules 4200E and 4631E (relating to the FINRA/NYSE TRF). These definition sections would be combined for each TRF in Rules 6320A, 6320B, and 6320C, respectively, of the Consolidated FINRA Rulebook.

The NASD Rule 4000A and 6100A Series, renumbered as the Rule 6200 and 7100 Series, respectively, cover quoting, reporting, clearing and comparison of transactions in NMS stocks effected otherwise than on an exchange through FINRA's Alternative Display Facility ("ADF"), which is both a trade reporting and quotation display and collection facility.

The NASD Rule 5000 Series relates to trading in NMS stocks effected otherwise than on an exchange and applies uniformly to transactions reported to the TRFs and ADF. This series would be transferred to the Consolidated FINRA Rulebook and renumbered as the Rule 6100 Series and renamed "Quoting and Trading in NMS Stocks," and certain rules relating to the TRFs and ADF would be combined and relocated to the Rule 6100 Series. Specifically, NASD Rules 4633, 4120A, 4633C, and 4633E relating to halts in over-the-counter trading in NMS stocks would be combined to form Rule 6120 (Trading Halts). In addition, NASD IM–4632, IM–4632C, and IM–4632E relating to timely transaction reporting would be combined to form Rule 6181 (Timely Transaction Reporting). Finally, NASD IM–6130, IM–6130C, and IM–6130E relating to the reporting of short sales would be combined to form Rule 6182 (Trade Reporting of Short Sales).

NASD Rule 5000, renumbered as Rule 6110 (Trading Otherwise Than On An Exchange), requires members to report transactions in NMS stocks effected otherwise than on or through a national securities exchange to FINRA. This series also includes rules relating to initial public offering transactions (NASD Rule 5110, renumbered as Rule 6130), members' obligations to provide information to FINRA upon request (NASD Rule 5130, renumbered as Rule 6150), the use of multiple Market Participant Symbols (MPIDs) for TRF participants (NASD Rule 5140 and IM–5140, renumbered as Rule 6160 and Supplementary Material thereunder), and FINRA's authority to provide exemptive relief from certain Regulation NMS-related trade reporting requirements (NASD Rule 5150, renumbered as Rule 6183). In addition, NASD Rule 5120 relating to prohibited trading practices would be renumbered as Rule 6140 and paragraph (i) of that rule would be amended to define "Stop Stock Transaction" and "Stop Stock Price." (Currently, NASD Rule 5120 cross-references those definitions in NASD Rule 4200.) Finally, NASD Rule 4613A(b) and IM–4613A–1 relating to the ADF would be relocated to this series as Rule 6170 (Primary and Additional MPIDs for Alternative Display Facility Participants) and Supplementary Material thereunder.

The NASD Rule 6000 Series comprises a number of more specific rule series, as described herein. As noted above, the NASD Rule 6100 Series covers reporting, clearing and comparison of over-the-counter transactions in NMS stocks through the FINRA/Nasdaq TRF. This rule series also covers reporting, clearing and comparison of transactions in OTC Equity Securities through FINRA's OTC Reporting Facility ("ORF"). A single rule series would no longer apply to these two facilities. Rather, the NASD Rule 6100 Series would be amended, as necessary, to form the Rule 7200A Series, applicable only to the FINRA/Nasdaq TRF (*i.e.*, the references to the ORF, OTC Equity Securities and Direct Participation Program ("DPP") securities would be deleted). The NASD Rule 6100 Series also would be amended, as necessary, to form the Rule 7300 Series, applicable only to the ORF (*i.e.*, the references to the FINRA/Nasdaq TRF and "designated

[8] "OTC Equity Security" is defined in NASD Rule 6610 and generally encompasses those securities not traded on an exchange, including OTC Bulletin Board and Pink Sheets securities.

[9] The three TRFs are: the FINRA/Nasdaq TRF, the FINRA/NSX TRF and the FINRA/NYSE TRF. The relevant formation documents have been amended to change the name of each TRF from "NASD" to "FINRA," where necessary. The proposed rule change would reflect the name changes in the Consolidated FINRA Rulebook.

securities," as well as the provisions relating to the transaction fee transfer mechanism, which is only supported by the FINRA/Nasdaq TRF, would be deleted). Finally, the references to NASD Rule 6410 and the ITS/CAES System would be deleted, as those references inadvertently were not deleted from NASD Rule 6110 as part of a prior rule filing approved by the Commission.[10]

The NASD Rule 6200 Series, renumbered as the Rule 6700 Series, covers the reporting and dissemination, as applicable, of over-the-counter secondary market transactions in eligible debt securities to FINRA's Trade Reporting and Compliance Engine ("TRACE").

The NASD Rule 6500 Series covers the operation and use of FINRA's OTC Bulletin Board ("OTCBB") service, which is an electronic quotation medium for members to display quotations in OTCBB-eligible securities. This series will remain as the Rule 6500 Series in the Consolidated FINRA Rulebook.

The NASD Rule 6600 Series, renumbered as the Rule 6400 Series and renamed "Quoting and Trading in OTC Equity Securities," sets forth the recording and reporting requirements applicable to certain quotations and unpriced indications of interest displayed on inter-dealer quotation systems and the requirements applicable to reporting transactions in OTC Equity Securities to the ORF.

NASD Rule 6620, which sets forth the reporting requirements applicable to transactions in OTC Equity Securities, would be renumbered as Rule 6622 and included in a separate series, the Rule 6600 Series (OTC Reporting Facility). The Rule 6600 Series would comprise all rules applicable to trade reporting to the ORF, including the NASD Rule 6700 and 6900 Series, discussed below. New Rule 6610 would explain that members that report transactions in OTC Equity Securities and DPP securities to the ORF also must comply with the 7300 Series, as well as all other applicable rules and regulations. Additionally, new Rule 6621 would cross-reference the definitions set forth in Rule 6420, which are applicable to trading and quoting in OTC Equity Securities. NASD IM–4632, which is cross-referenced in NASD Rule 6620, would form Rule 6623 (Timely Transaction Reporting), and NASD IM–6130 would form Rule 6624 (Trade Reporting of Short Sales).

The NASD Rule 6700 Series, renumbered as the Rule 6630 Series, covers trade reporting to the ORF of debt and equity transactions in PORTAL securities, which are foreign and domestic securities that are eligible for resale under Securities Act Rule 144A. NASD Rule 6732, renumbered as Rule 6633, would be amended to delete from paragraph (a)(1) the reference to "paragraph (d)." That reference inadvertently was not deleted as part of a prior rule filing approved by the Commission.[11]

The NASD Rule 6900 Series, renumbered as the Rule 6640 Series, covers trade reporting to the ORF of secondary market transactions in DPP securities other than transactions executed on a national securities exchange. The definition of "OTC Reporting Facility" in Rule 6642 would be amended to clarify that the comparison function is not available for DPPs that are not eligible for clearance and settlement through the National Securities Clearing Corporation (which mirrors this term's definition in NASD Rule 6610(k)).

The NASD Rule 6950 Series, renumbered as the Rule 7400 Series, sets forth member obligations to record and report to FINRA's Order Audit Trail System certain information with respect to orders in equity securities listed on the Nasdaq Stock Market and OTC equity securities. NASD Rule 6957 (Effective Date) would be deleted, as all requirements of the Order Audit Trail System are now effective.

The NASD Rule 7000 Series, renumbered as the Rule 7700 Series, covers applicable fees for use of the ORF, OTCBB and TRACE services. The Rule 7000A Series, renumbered as the Rule 7500 Series, covers charges for ADF services and equipment. The following rule series cover fees and market data revenue rebates for trade reporting, clearing and comparison, as applicable, through the TRFs: The NASD Rule 7000B Series, renumbered as the Rule 7600A Series (relating to the FINRA/Nasdaq TRF); the NASD Rule 7000C Series, renumbered as the Rule 7600B Series (relating to the FINRA/NSX TRF); and the NASD Rule 7000E Series, renumbered as the Rule 7600C Series (relating to the FINRA/NYSE TRF).

Investigations and Sanctions Rules

The NASD Rule 8000 Series generally covers investigations and sanctions and would be transferred substantively unchanged to the Consolidated FINRA Rulebook. It comprises several more specific rule series, as described herein. The NASD Rule 8100 Series has a definitional section and requirements regarding the availability of the manual.[12] The NASD Rule 8200 Series permits FINRA to inspect members' books and records and requires members to provide information in connection with FINRA investigations, examinations or proceedings. The NASD Rule 8200 Series also provides for automated submission of certain trading data. The NASD Rule 8300 Series provides FINRA with authority to sanction members and their associated persons for violations of FINRA's rules, federal securities laws, and Municipal Securities Rulemaking Board's rules. NASD IM–8310–1 addresses the effect of a bar or suspension, revocation or cancellation of a person's registration. In addition, NASD IM–8310–2 and IM–8310–3 govern FINRA's release of certain information regarding members and their associated persons through FINRA BrokerCheck, as well as FINRA's release of certain disciplinary complaints, decisions and other information. These IMs would be renumbered in the Consolidated FINRA Rulebook as Rules 8311, 8312 and 8313.

Code of Procedure

The NASD Rule 9000 Series generally provides procedures for initiating and adjudicating various types of actions, including disciplinary, eligibility, expedited, and cease and desist proceedings. The NASD Rule 9100 Series, for instance, sets forth rules of general applicability to disciplinary and other proceedings that FINRA initiates against members and their associated persons. This rule series includes a definitional section, provisions for service, filing and notice of papers, rules relating to the conduct of parties, counsel and adjudicators, and the allowance of motions practice.[13] The

[10] *See* Securities Exchange Act Release No. 54537 (September 28, 2006), 71 FR 59173 (October 6, 2006) (Order Approving File No. SR–NASD–2006–091).

[11] *See* Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (Order Approving File No. SR–NASD–2005–087).

[12] NASD Rule 8110 currently requires that members keep and maintain a copy of the manual in a readily accessible place and make it available to customers upon request. The proposed rule change would further clarify that members may comply with Rule 8110 by maintaining electronic access to the manual and providing customers with such access upon request. *See also* Securities Exchange Act Release No. 39470 (December 19, 1997), 62 FR 67927 (December 30, 1997) (Order Approving File No. SR–NASD–97–81) (seeking to, among other things, simplify NASD Rule 8110 to allow members to maintain an electronic version of the NASD manual as their required copy of the manual).

[13] NASD Rule 9144(b) (Separation of Adjudicators) would be amended to conform to changes made to the FINRA By-Laws as a result of the consolidation transaction to reflect that the Chair of the National Adjudicatory Council will no

NASD Rule 9200 Series delineates specific procedures for disciplinary proceedings. It includes provisions for filing complaints and answers, requesting and holding hearings, settlement procedures and issuing decisions. NASD IM–9216 sets forth violations eligible for disposition under the Minor Rule Violation Plan ("MRVP") and would be renumbered as Rule 9217 in the Consolidated FINRA Rulebook—the only rule to be renumbered in the Rule 9000 Series.[14] The NASD Rule 9300 Series sets forth the procedures for disciplinary matters that are appealed to or called for review by the National Adjudicatory Council or called for review by the Board of Governors. The NASD Rule 9520 Series covers eligibility proceedings.[15] The proposed rule change would delete the NASD Rule 9530 Series—a change that should have been effectuated in a previous rule filing.[16] The NASD Rule 9550 Series sets forth standards and procedures for expedited proceedings, which cover various situations, ranging from members' failing to pay arbitration awards to members' experiencing financial or operations difficulties.[17] The NASD Rule 9600 Series provides procedures for exemptions, while the NASD Rule 9700 Series sets forth procedures for grievances concerning automated systems. The Rule NASD 9800 Series governs temporary cease and desist orders.

FINRA is amending Rules 8313(b)(1) and (c)(1), 9556(a), 9558(a), 9810(a) and 9860, respectively, to change references from "NASD Chairman and CEO" or "President of NASD Regulatory Policy and Oversight" to "FINRA's Chief Executive Officer" to reflect FINRA's new organizational structure. Mary L. Schapiro now serves as FINRA's Chief Executive Officer. The proposed rule change also would permit FINRA's Chief Executive Officer to delegate his or her authority to such other senior officers as he or she may designate. Certain rules previously granted alternative authority to NASD's Senior Executive Vice President for Regulatory Policy and Programs. In light of FINRA's new organizational structure, FINRA believes it appropriate to permit the CEO to delegate his or her authority to other senior officers of FINRA.

Code of Arbitration Procedure

The NASD Rule 10000 Series sets forth the Code of Arbitration Procedure, including rules governing arbitration and mediation matters filed prior to April 16, 2007. This Code continues to be relevant to those matters, until they are closed by award, settlement or otherwise.

The NASD Rule 12000 through 14000 Series contains the revised Code of Arbitration Procedure, which is organized into three sections: the Customer, Industry and Mediation Codes. These three Codes apply to matters filed on or after April 16, 2007. The Rule 12000 Series contains the Code of Arbitration Procedure for Customer Disputes. The Rule 13000 Series contains the Code of Arbitration Procedure for Industry Disputes. The Rule 14000 Series contains the Code of Mediation Procedure.

Rules of General Applicability

FINRA notes that certain rules in the Transitional Rulebook have general application to the entirety of rules that govern FINRA members. For example, NASD Rule 0115 states that all rules apply to both members and their associated persons and that associated persons have the same duties and obligations as the member. And the definitions in NASD Rule 0120 apply to all rules, unless the context otherwise requires. Those rules of general applicability would apply equally to both the Transitional Rulebook and the Consolidated FINRA Rulebook.

Rule References

Because the Consolidated FINRA Rulebook will be populated over the course of multiple rule filings, certain remaining rules in the Transitional Rulebook will refer to NASD rules or Incorporated NYSE Rules that have been transferred to, or otherwise incorporated into, the Consolidated FINRA Rulebook under the proposed rule change or future filings. In those instances, FINRA intends for the reference to NASD rules or Incorporated NYSE Rules to be treated as a reference to the corresponding rules in the Consolidated FINRA Rulebook. Thus, for example, NASD IM–1013–1 states that firms admitted to FINRA membership pursuant to the IM are subject to, among others, the NASD Rule 8000 and 9000 Series. Upon Commission approval and effectiveness of the proposed rule change, those members would remain subject to the 8000 and 9000 Series in the Consolidated FINRA Rulebook.[18] In the event that the referenced NASD Rule has been renumbered in the Consolidated FINRA Rulebook, members need to be cognizant of the rule's new number to ensure they are cross-referencing the correct rule in the Consolidated FINRA Rulebook. FINRA will be preparing a conversion chart that will map the eliminated legacy NASD and Incorporated NYSE Rules to the final FINRA rules.

Similarly, certain rules that would be transferred to the Consolidated FINRA Rulebook under the proposed rule change refer to remaining rules in the Transitional Rulebook. For the time being, the remaining rules in the Transitional Rulebook will be identified as "NASD Rules" or "NYSE Rules," as the case may be, in the Consolidated FINRA Rulebook and references to Consolidated FINRA Rulebook rules will not be qualified. Thus, for example, rules in the Consolidated FINRA Rulebook that refer to NASD Rule 2110 will specifically identify that rule as "NASD" Rule 2110 until such time as that rule is transferred to the Consolidated FINRA Rulebook.

As noted in Item 2 of this filing, FINRA will announce the

longer automatically occupy a seat on the Board of Governors. *See* Release No. 34–56145, *supra* note 4.

[14] NASD IM–9216 also would be amended to reflect that FINRA members may now be subject to a minor rule violation for a violation of a FINRA rule, in addition to addressing violations of the FINRA By-Laws, Schedules to the By-Laws, NASD rules, Incorporated NYSE Rules, SEA Rules and Municipal Securities Rulemaking Board ("MSRB") rules. In this regard, FINRA notes that it is filing a separate rule change addressing the application of the FINRA rules to those members subject to NASD IM–1013 (Membership Waive-In Process for Certain NYSE Member Organizations) (commonly referred to as the "waive-in firms"). The proposed rule change also would reorganize IM–9216 to group by type the provisions and rules specified therein (*i.e.*, By-Law provisions, FINRA rules, NASD rules, SEA rules, MSRB rules and Incorporated NYSE Rules), and to present them in numerical order within each group. The proposed rule change would not add new substantive rules to the MRVP.

[15] NASD Rule 9526(d) (Call for Review) would be amended to conform to changes made to the FINRA By-Laws as a result of the consolidation transaction by eliminating reference to the Non-Industry classification of Governor. *See* Release No. 34–56145, *supra* note 4.

[16] As part of a 2004 rule proposal approved by the Commission, FINRA moved the hearing provisions of the NASD Rule 9530 Series to NASD Rule 9559 and the remaining provisions to NASD Rule 9553. *See* Securities Exchange Act Release No. 49380 (March 9, 2004), 69 FR 12386 (March 16, 2004) (Order Approving File No. SR–NASD–2003–110). However, the corresponding rule text inadvertently was not deleted as part of that filing and remained in the NASD Manual. FINRA is thus proposing to delete the NASD Rule 9530 Series.

[17] As part of the rulebook consolidation process, FINRA is considering changes relating to FINRA's rules governing financial responsibility, including NASD Rules 9557 and 9559, which provide the notice and procedural framework applicable when a member is experiencing financial or operational difficulties. *See Regulatory Notice* 08–23 (May 14, 2008) (Proposed Consolidated FINRA Rules Governing Financial Responsibility). For administrative ease, the proposed rule change transfers NASD Rules 9557 and 9559 without substantive change to the Consolidated FINRA Rulebook. However, FINRA anticipates proposing changes to Rules 9557 and 9559 as part of a future filing governing the financial responsibility rules.

[18] *See also supra* note 14 discussing application of the FINRA rules to the waive-in firms.

implementation date(s) of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[19] which requires, among other things; that EINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest; and Section 15A(b)(5) of the Act,[20] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. The proposed rule change makes non-material changes to rules that have proven effective in meeting statutory mandates.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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

Written comments were neither solicited nor 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 FINRA consents, the Commission will:

A. By order approve such proposed rule change; or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[19] 15 U.S.C. 78*o*–3(b)(6).

[20] 15 U.S.C. 78*o*–3(b)(5).

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–FINRA–2008–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2008–021. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2008–021 and should be submitted on or before August 13, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16826 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58182; File No. SR–NASDAQ–2008–062]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Clarify the Application of Nasdaq Rules When a Listed Company Combines With a non-Nasdaq Entity

July 17, 2008.

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 July 10, 2008, The NASDAQ Stock Market LLC ("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. 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 clarify the application of Nasdaq rules when a listed company combines with a non-Nasdaq entity. Nasdaq will implement the proposed rule upon approval. The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.[3]

* * * * *

4340. Application for Re-Listing by Listed Issuers

(a) [Reverse Mergers] *Business Combinations With non-Nasdaq Entities Resulting in a Change of Control.* An issuer must apply for initial listing in connection with a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing [(for purposes of this rule, such a transaction is referred to as a "Reverse Merger")]. In determining whether a [Reverse Merger] *change of control* has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq shall also consider the nature of the businesses

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://www.complinet.com/nasdaq.*

and the relative size of the Nasdaq issuer and non-Nasdaq entity. The issuer must submit an application for the post-transaction entity with sufficient time to allow Nasdaq to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

(b) Bankruptcy.

No change.

* * * * *

IM–4350–1. Interpretive Material Regarding Future Priced Securities

Summary

No change.

How the Rules Apply

Shareholder Approval

No change.

Voting Rights

No change.

The Bid Price Requirement

No change.

Listing of Additional Shares

No change.

Public Interest Concerns

No change.

[Reverse Merger] *Business Combinations With non-Nasdaq Entities Resulting in a Change of Control*

Rule 4340(a) provides:

An issuer must apply for initial listing in connection with a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing [(for purposes of this rule, such a transaction is referred to as a "Reverse Merger")]. In determining whether a [Reverse Merger] *change of control* has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. Nasdaq shall also consider the nature of the businesses and the relative size of the Nasdaq issuer and non-Nasdaq entity. The issuer must submit an application for the post-transaction entity with sufficient time to allow Nasdaq to complete its review before the transaction is completed. If the issuer's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Determination Letter as set forth in Rule 4804 and begin delisting proceedings pursuant to the Rule 4800 Series.

This provision, which applies regardless of whether the issuer obtains shareholder approval for the transaction, requires issuers to qualify under the initial listing standards in connection with a [Reverse Merger] *combination that results in a change of control.*[4] It is important for issuers to realize that in certain instances, the conversion of a Future Priced Security may implicate this provision. For example, if there is no limit on the number of common shares issuable upon conversion, or if the limit is set high enough, the exercise of conversion rights under a Future Priced Security could result in [a Reverse Merger with] the holders of the Future Priced Securities *obtaining control of the listed company.* In such event, an issuer may be required to re-apply for initial listing and satisfy all initial listing requirements.

Footnotes to IM–4350–1:

[1–3] No change.

[4 This provision is designed to address situations where a company attempts to obtain a "backdoor listing" on Nasdaq by merging with a Nasdaq issuer with minimal assets and/or operations.]

* * * * *

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

Marketplace Rule 4340(a) requires that an issuer must apply for initial listing following a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. This rule was originally adopted in 1993 to address concerns associated with non-Nasdaq entities seeking a "backdoor listing" on Nasdaq through a business combination involving a Nasdaq issuer.[4] In these combinations, a non-Nasdaq entity purchased a Nasdaq issuer in a transaction that resulted in the non-Nasdaq entity obtaining a Nasdaq listing without qualifying for initial listing or being subject to the background checks and scrutiny normally applied to issuers seeking initial listing. The rule was amended in 2001 to define "Reverse Merger" and to provide clarification regarding the factors used by Staff to determine if a transaction should be considered a Reverse Merger.[5] In 2006, Nasdaq amended the rule to clarify the timing of the application of the rule.[6]

While this Rule was originally focused on companies seeking a "backdoor listing" by acquiring a listed shell company, its language is not limited in that regard, and Nasdaq has applied the rule to any transaction where there is a change of control potentially allowing a non-Nasdaq entity to obtain a Nasdaq listing. As such, Nasdaq has applied the rule to mergers involving operating companies in substantially similar businesses and, in appropriate cases, to mergers of "equals," where the companies are approximately the same size.[7] This allows Nasdaq staff to review the post-transaction entity, including any new officers, directors and control persons, before the transaction is consummated, thereby allowing staff to confirm that the post-transaction entity will meet all initial listing criteria and that there are no public interest concerns. Nonetheless, given the use of the term "Reverse Merger" within Rule 4340(a), and the existence of a footnote in IM–4350–1 speaking of "backdoor listings," companies have expressed confusion as to the scope of the rule. As such, Nasdaq proposes to remove these references from Rule 4340(a) and IM–4350–1.[8] As

[4] Securities Exchange Act Release No. 32264 (May 4, 1993), 58 FR 27760 (May 11, 1993) (approving SR–NASD–93–07).

[5] Securities Exchange Act Release No. 44067 (March 13, 2001), 66 FR 15515 (March 19, 2001) (approving SR–NASD–01–01).

[6] Securities Exchange Act Release No. 55052 (January 5, 2007), 72 FR 1569 (January 12, 2007) (approving SR–NASDAQ–2006–047).

[7] *See, e.g.*, Decision 2002/2003–9 of the Nasdaq Listing and Hearing Review Council (December 2002), available at: *http://www.nasdaq.com/about/NLHRCDecisions20022003.pdf.*

[8] Nasdaq has confirmed that the rule would still, of course, apply to "backdoor listings" or "reverse mergers," and that this proposed change is intended to clarify that the rule also applies to a broader category of business combinations that result in a change of control of the issuer. *See* Telephone conversation between Arnold Golub, Associate

Continued

revised, Nasdaq believes the rule will more clearly reflect that a company must satisfy the initial listing requirements whenever it enters into a transaction with a non-Nasdaq entity, resulting in a change of control of the listed company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 6 of the Act,[9] in general and with sections 6(b)(5) of the Act,[10] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change would clarify Nasdaq's listing requirements related to change of control transactions, and thereby provide additional transparency to the rules. This proposed clarification is designed to protect investors and the public interest by allowing Nasdaq to confirm that the post-transaction entity will meet all initial listing criteria and that there are no public interest concerns associated with individuals or entities newly joining the company.

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, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 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–NASDAQ–2008–062 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–062. 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 on official business days between the hours of 10 a.m. and 3 p.m. 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–NASDAQ–2008–062 and should be submitted on or before August 13, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16827 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

General Counsel, Nasdaq, and Sara Gillis, Special Counsel, Division of Trading and Markets, Commission, on July 15, 2008.

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(5).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58183; File No. SR–NASDAQ–2008–035]

Self-Regulatory Organizations; The NASDAQ Stock Market, LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the By-Laws of the NASDAQ OMX Group, Inc. in Connection With the Acquisitions of Boston Stock Exchange, Incorporated and Philadelphia Stock Exchange, Inc.

July 17, 2008.

I. Introduction

On April 21, 2008, The NASDAQ Stock Market, LLC ("Nasdaq") 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 ("NASDAQ OMX By-Law Proposal") to amend the by-laws ("NASDAQ OMX By-Laws") of its parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The NASDAQ OMX By-Law Proposal was published for comment in the **Federal Register** on May 8, 2008.[3] The Commission received no comment letters regarding the NASDAQ OMX By-Law Proposal. On July 3, 2008, Nasdaq filed Amendment No. 1 to the NASDAQ OMX By-Law Proposal.[4] This order approves the NASDAQ OMX By-Law Proposal, as modified by Amendment No. 1.

II. Discussion and Commission Findings

NASDAQ OMX and the Boston Stock Exchange, Incorporated ("BSE"), a national securities exchange, have

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182 (SR–NASDAQ–2008–035) ("NASDAQ OMX By-Law Proposal Notice").

[4] In Amendment No. 1, Nasdaq proposes to correct typographical errors in the proposed amendments to NASDAQ OMX By-Laws Sections 11.3 and 12.5. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment.

entered into an agreement pursuant to which NASDAQ OMX would acquire all of the outstanding membership interests in BSE ("BSE Acquisition").[5] Also, NASDAQ OMX and the Philadelphia Stock Exchange, Inc., ("Phlx"), a national securities exchange, have entered into an agreement pursuant to which NASDAQ OMX would acquire all of the outstanding capital stock of Phlx ("Phlx Acquisition," together with the BSE Acquisition, the "Acquisitions"). Today, the Commission approved proposed rule changes by Phlx in connection with the Phlx Acquisition, that include, among other things, the same amended NASDAQ OMX By-Laws that are the subject of this proposal by Nasdaq.[6]

Following the Acquisitions, Nasdaq would maintain its current registration as a national securities exchange, and would maintain rules, membership rosters, and listings that would be separate and distinct from the rules, membership rosters, and listings of BSE and Phlx.[7] As a result of the Acquisitions, NASDAQ OMX also would acquire BSE's wholly-owned subsidiary, the Boston Stock Exchange Clearing Corporation ("BSECC"), and Phlx's wholly-owned subsidiary, the Stock Clearing Corporation of Philadelphia ("SCCP"), both registered clearing agencies.[8] Following the closing of the Acquisitions, NASDAQ OMX would be the sole owner of five self-regulatory organizations ("SROs"): Nasdaq, BSE, BSECC, Phlx, and SCCP (collectively, "SRO Subsidiaries").

Although NASDAQ OMX is not itself an SRO, its activities with respect to the operations of its SRO Subsidiaries must be consistent with, and must not interfere with, the self-regulatory obligations of the SRO Subsidiaries. Further, certain provisions of NASDAQ OMX's Certificate of Incorporation and By-Laws are rules of an exchange if they are stated policies, practices, or interpretations, as defined in Rule 19b–4 under the Act, of the self-regulatory organization, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder.[9] Accordingly, Nasdaq has filed with the Commission proposed changes to the NASDAQ OMX By-Laws.

The changes to NASDAQ OMX By-Laws filed by Nasdaq would expand the application of certain provisions of NASDAQ OMX's Restated Certificate of Incorporation and NASDAQ OMX's By-Laws to include each of NASDAQ OMX's SRO Subsidiaries. These provisions of NASDAQ OMX's governing documents currently apply only to Nasdaq and are designed to maintain the independence of each SRO Subsidiary's self-regulatory function; enable each SRO Subsidiary to operate in a manner that complies with the federal securities laws; and facilitate the ability of each SRO Subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.

After careful review and for the reasons discussed more fully below, the Commission finds that the NASDAQ OMX By-Law Proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,[11] which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

A. Self-Regulatory Function of the SRO Subsidiaries; Relationship Between NASDAQ OMX and the SRO Subsidiaries; Jurisdiction Over NASDAQ OMX

Although NASDAQ OMX does not itself carry out regulatory functions for Nasdaq and will not carry out regulatory functions for its other SRO Subsidiaries, its activities with respect to the operation of its SRO Subsidiaries, including Nasdaq, must be consistent and not interfere with their respective self-regulatory obligations. The NASDAQ OMX Certificate and the NASDAQ OMX By-Laws include certain provisions, approved by the Commission in the context of Nasdaq's registration as a national securities exchange,[12] that are designed to maintain the independence of Nasdaq's self-regulatory function from NASDAQ OMX, enable Nasdaq to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) and 19(g) of the Act,[13] and facilitate the ability of Nasdaq and the Commission to fulfill their regulatory and oversight obligations under the Act.[14] Nasdaq's proposed rule change would make these provisions applicable to all of NASDAQ OMX's SRO Subsidiaries.[15]

In particular, as amended, the By-Laws of NASDAQ OMX specify that NASDAQ OMX and its officers, directors, employees, and agents irrevocably submit to the jurisdiction of the United States federal courts, the Commission, and each self-regulatory subsidiary of NASDAQ OMX for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of any self-regulatory subsidiary.[16] Further, NASDAQ OMX agreed to provide the Commission with access to its books and records.[17] NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function [18] of each SRO

[5] NASDAQ OMX would not acquire BSE's interest in Boston Options Exchange Group, LLC, the operator of BSE's options trading facility, the Boston Options Exchange ("BOX").

[6] *See* Securities Exchange Act Release No. 58179 (July 17, 2008) (SR–Phlx–2008–31) (order approving proposed changes relating to the acquisition of Phlx by NASDAQ OMX) ("Phlx Order") at sections III.B and III.C.1.

[7] *See* NASDAQ OMX By-Law Proposal Notice, *supra* note 3, at 26183.

[8] *See* NASDAQ OMX By-Laws Proposal Notice, *supra* note 3, at 26182–26183. After the Acquisitions, Phlx would continue to operate SCCP and BSE would continue to operate BSECC. *See* Phlx Order, *supra* note 6, and Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (May 8, 2008) (SR–BSE–2008–23) (notice proposing, among other things, changes to BSE's governing documents and rules in connection with NASDAQ OMX's acquisition of BSE).

[9] 15 U.S.C. 78s(b) and 17 CFR 240.19b–4, respectively.

[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(1).

[12] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) ("Nasdaq Exchange Registration Approval Order") at notes 27–34 and accompanying text.

[13] 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

[14] *See* Sections 11.3 and 12.1–12.5, NASDAQ OMX By-Laws.

[15] Nasdaq proposes to add a definition of "Self-Regulatory Subsidiary" that includes each SRO Subsidiary. Self-Regulatory Subsidiary would mean each of (i) Nasdaq; (ii) upon the closing of their acquisition by NASDAQ OMX, BSE and BSECC; and (iii) upon the closing of their acquisition by NASDAQ OMX, Phlx and SCCP. *See* proposed Article I(o), NASDAQ OMX By-Laws. The proposed rule change would expand the applicability of the Section 11.3 and each section of Article XII of the NASDAQ OMX By-Laws, currently applicable only to Nasdaq, to also include BSE, BSECC, Phlx and SCCP.

[16] *See* proposed Section 12.3, NASDAQ OMX By-Laws.

[17] *See* proposed Section 12.1(c), NASDAQ OMX By-Laws. To the extent that they relate to the activities of Nasdaq, all books, records, premises, officers, directors, and employees of NASDAQ OMX would be deemed to be those of the Nasdaq. *See id.*

[18] This requirement to keep confidential non-public information relating to the self-regulatory function shall not limit the Commission's ability to access and examine such information or limit the ability of directors, officers, or employees of the NASDAQ OMX from disclosing such information to the Commission. *See* proposed Section 12.1(b),

Continued

Subsidiary, including Nasdaq, and not to use such information for any non-regulatory purpose. In addition, the board of directors of NASDAQ OMX ("NASDAQ OMX Board"), as well as NASDAQ OMX's officers, employees, and agents, are required to give due regard to the preservation of the independence of each SRO Subsidiary's, including Nasdaq's, self-regulatory function.[19] Similarly, the NASDAQ OMX Board, when evaluating any issue, would be required to take into account the potential impact on the integrity, continuity, and stability of the SRO Subsidiaries.[20] Finally, the NASDAQ OMX By-Laws require that any changes to the NASDAQ OMX Certificate and By-Laws be submitted to the Board of Directors of each of its SRO Subsidiaries, including Nasdaq, and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.[21]

The Commission believes that the NASDAQ OMX By-Laws, as amended to accommodate the Acquisitions, are designed to continue to facilitate Nasdaq's ability to fulfill its self-regulatory obligations and are, therefore, consistent with the Act. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,[22] which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

The Commission also believes that under Section 20(a) of the Act[23] any person with a controlling interest in NASDAQ OMX would be jointly and severally liable with and to the same extent that NASDAQ OMX is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act[24] creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act[25] authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

B. Exemptions From Voting Limitations

The NASDAQ OMX Certificate imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of Nasdaq and to ensure that Nasdaq and the Commission are able to carry out their regulatory obligations under the Act.[26] Specifically, no person who beneficially owns shares of common stock, preferred stock, or notes of NASDAQ OMX in excess of 5% of the securities generally entitled to vote may vote the shares in excess of 5%.[27] No changes to these limitations are proposed.

The NASDAQ OMX Board may approve exemptions from the 5% voting limitations for any person that is not a broker-dealer, an affiliate of a broker-dealer, or a person subject to a statutory disqualification under Section 3(a)(39) of the Act,[28] so long as the NASDAQ OMX Board also determines that granting such exemption would be consistent with the self-regulatory obligations of Nasdaq.[29] Further, any such exemption from the 5% voting limitations would not be effective until approved by the Commission pursuant to Section 19 of the Act.[30] Nasdaq's proposed rule change reflects an amendment to the NASDAQ OMX By-Laws to require the NASDAQ OMX Board, prior to approving any exemption from the 5% voting limitations, to determine that granting such exemption would be consistent with the self-regulatory obligations of each SRO Subsidiary, including Nasdaq.[31] Therefore, there is no change in the application of this provision to Nasdaq.

The Commission finds that the foregoing change to the NASDAQ OMX By-Laws to reflect NASDAQ OMX's ownership of multiple SRO Subsidiaries is consistent with the Act.

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[32] that the NASDAQ OMX By-Law Proposal (SR–NASDAQ–2008–035), as modified by Amendment No. 1 thereto, be, and hereby is, approved.[33]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16828 Filed 7–22–08; 8:45 am]

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NASDAQ OMX By-Laws. Other holding companies with SRO subsidiaries have undertaken similar commitments. *See, e.g.*, Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979, 71983 (December 19, 2007) (SR–ISE–2007–101) (order approving the acquisition of International Securities Exchange, LLC's parent, International Securities Exchange Holdings, Inc., by Eurex Frankfurt AG).

[19] *See* Section 12.1(a), NASDAQ OMX By-Laws. Also, NASDAQ OMX's officers, directors, agents and employees agree to cooperate with the Commission and each SRO Subsidiary in respect of their respective regulatory responsibilities. *See* proposed Section 12.2, NASDAQ OMX By-Laws.

Further, pursuant to proposed Section 12.4 of the NASDAQ OMX By-Laws, NASDAQ OMX agreed to take such action as is necessary to insure that its officers, directors, employees and agents consent in writing to the applicability of Sections 12.1, 12.2 and 12.3 of the NASDAQ OMX By-Laws with respect to activities related to each SRO Subsidiary.

[20] *See* proposed Section 12.7, NASDAQ OMX By-Laws.

[21] *See* proposed Sections 11.3 and 12.6, NASDAQ OMX By-Laws.

[22] 15 U.S.C. 78f(b)(1).

[23] 15 U.S.C. 78t(a).

[24] 15 U.S.C. 78t(e).

[25] 15 U.S.C. 78u–3.

[26] *See* Nasdaq Exchange Registration Approval Order, *supra* note 12, at 3552.

[27] *See* Article Fourth.C, NASDAQ OMX Certificate.

[28] 15 U.S.C. 78c(a)(39). *See* Article Fourth.C.6, NASDAQ OMX Certificate.

[29] Specifically, the NASDAQ OMX Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, NASDAQ OMX or the other operations of NASDAQ OMX, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. *See* Article Fourth.C.6, NASDAQ OMX Certificate.

[30] *See* Section 12.5, NASDAQ OMX By-Laws.

[31] *See* proposed Section 12.5, NASDAQ OMX By-Laws. These provisions would apply for so long as NASDAQ OMX controls, directly or indirectly, any SRO Subsidiary. *Id. See also supra* note 20 and accompanying text.

[32] 15 U.S.C. 78s(b)(2).

[33] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58184; File No. SR–NYSE–2008–46]

Self-Regulatory Organizations; New York Stock Exchange, LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To Create a New NYSE Market Model, With Certain Components To Operate as a One-Year Pilot That Will Provide Market Participants With Additional Abilities To Post Hidden Liquidity, Phase Out Specialists by Creating a Designated Market Maker, and Enhance the Speed of Execution Through Technological Enhancements

July 17, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 12, 2008, the New York Stock Exchange, LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On July 15, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to establish a new market model ("New Model") to: (i) Provide market participants with additional abilities to post hidden liquidity on Exchange systems; (ii) create a Designated Market Maker ("DMM"), and phase out the NYSE specialist; and (iii) enhance the speed of execution through technological enhancements and a reduction in message traffic between Exchange systems and its DMMs.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

With this rule filing, the Exchange is proposing to transform its market structure and create the premier venue for price discovery, liquidity, competitive quotes and price improvement. The instant proposal is the core filing of a series of rule amendments[3] submitted by the Exchange designed to move its market structure forward in a very dynamic and competitive marketplace. For example, in April 2008, the Exchange expanded to all market participants the ability to enter both displayed and non-displayed (reserve) trading interest in NYSE's Display Book® ("Display Book"). Another important aspect of the New Model will be enhancements to technology that will greatly increase the speed of execution. The key elements of this filing are: (1) The Redefinition of the Role of the Specialist and (2) Priority and Parity.

Historically, the specialist was responsible for execution of all orders coming into the Exchange, conducting auctions on the Floor, and for maintaining an orderly market in assigned securities. To assist in this function, the specialist had an order-by-order advance "look" at activity in the Display Book. When the Exchange implemented its NYSE HYBRID MARKET℠ ("Hybrid Market"),[4] Exchange systems assumed the function of matching and executing orders entered electronically, although the specialist retained a first "look" at incoming orders. The proposed rules redesign the role of the specialist to reflect more accurately the market making function in the Hybrid Market environment by creating a new category of market participant, DMM, and to eliminate the "specialist" category.

In the New Model, DMMs will no longer function (as the specialist did) as the "broker-dealer of record" for every order. The DMM will not "hold" orders. Like specialists today, DMMs will be able to generate orders through a DMM algorithm that interacts directly with the Display Book. However, in the New Model, DMMs will be able to commit additional liquidity in advance to fill incoming orders ("Capital Commitment Schedule" or "CCS"). The CCS will create a liquidity schedule at various price points where the DMM is willing to interact with interest and provide price improvement to orders in the Exchange's system.

The DMM will have affirmative responsibilities to the Exchange's marketplace (including an obligation to provide quotes at the National Best Bid and Offer ("NBBO")). Balancing that equation of increased market-making capabilities against affirmative responsibilities, the DMM will be given more freedom to manage trading risks associated with their responsibilities to the NYSE market.

As part of the redesign of its market, the NYSE proposes to amend the logic related to share distribution among market participants having trading interest at a price point upon execution of incoming orders to create a model that rewards displayed orders that establish the NYSE's best bid or Exchange best offer (collectively "Exchange BBO"[5]). In the proposed New Model, orders or portions thereof that establish priority, as more fully described below, will retain that priority until the portion of the order that established priority is exhausted. Where no one order has established priority, shares will be distributed among all market participants on parity.

In this filing, the Exchange first describes the market model as it currently exists and then describes the rules which implement the New Model and any other required conforming rule amendments.

The NYSE intends to implement these changes in a phased approach during third and fourth quarters of 2008.

Current Exchange Market

(a) Overview and Background

On March 22, 2006, the Commission approved amendments to Exchange rules to establish the Hybrid Market. The Hybrid Market integrates in one marketplace the best of both auction market and electronic trading. The goal of the Hybrid Market was to combine the benefits of specialist and Floor broker expertise with the speed,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* SR–NYSE–2008–45, filed with the Commission on June 11, 2008 (proposal to amend NYSE Rule 98 to redefine Specialist Operations at the NYSE); *see also* e-mail from Deanna G.W. Logan, Associate General Counsel, NYSE to David Liu, Assistant Director, Division of Trading and Markets ("Division"), Commission, dated July 17, 2008 (making clarifying edits) ("July 17th e-mail").

[4] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE–2004–05).

[5] The term "Exchange BBO" refers to the best bid or the best offer on the NYSE. It should not be confused with the defined terms "national best bid" and "national best offer" as defined in Rule 600(b)(42) of Regulation NMS Rule 242.600(b)(42) under the Act.

certainty, and anonymity of electronic execution. It was designed to offer maximum choice to customers in how to execute orders, while preserving traditional trading procedures that historically served to provide stable, liquid, and less volatile markets.

The Exchange continually reviews the operation of its market, changes in the behavior of market participants and the general environment of the securities markets in order to find ways to improve the quality and competitiveness of its market. As a result of this review, the Exchange introduced a number of enhancements to its Hybrid Market aimed at improving the trading experience for market participants.[6]

Today on the Exchange, customers who want execution speed and certainty, with anonymity, can enter a variety of order types into Exchange systems that will result in immediate and automatic executions and/or price improvement for some or all of the order. Alternatively, customers who value Floor broker expertise in the handling of their orders can submit orders for execution in the traditional auction process and/or participate electronically in automatic executions through Floor broker agency interest files ("e-Quotes"). Specialists on the Floor, meanwhile, have been given tools with which to offer additional opportunities for price improvement; these tools include various targeted quoting or trading messages based on the state of the specialist's book and the market, including the ability to match better prices of away market centers. In this way, a customer sending his or her order to the Exchange today benefits from an expanded experience of execution opportunities.

(b) Exchange Systems

All orders entered into Exchange systems are maintained in the Display Book. Autoquote is a part of the Display Book that immediately displays customer limit orders received on the Exchange.[7] Autoquote immediately updates the Exchange BBO when a new order improves the Exchange quote.[8] In addition, Autoquote updates the Exchange BBO when an execution occurs to reflect a new Exchange BBO based on the orders contained in the Display Book. Pursuant to Exchange Rule 60, Autoquote is suspended when: (1) The specialist manually reports a block size transaction that involves orders in the Display Book system; (2) the specialist gaps the quote; [9] or (3) when a Liquidity Replenishment Point ("LRP") is reached.[10] When Autoquote is suspended due to a manual report of a block trade that involves orders in the Display Book,[11] Autoquote resumes when the manual reporting is concluded.[12] When Autoquote is suspended following a gap quote, Autoquote resumes upon the report of a manual transaction or the publication of a non-gapped quotation.[13] When Autoquote is suspended because an LRP has been reached, it resumes in no more than five seconds after the LRP is reached.[14] If the order that triggers the LRP is capable of trading at a price beyond the LRP price, and would not create a locked or crossed market if quoted, then Autoquote resumes upon the report of a manual transaction or the publication of a new quote by the specialist, but in any event in no more than ten seconds.[15] Finally, if the order is capable of trading at a price beyond the LRP price but would create a locked or crossed market if quoted, then Autoquote would resume upon a manual transaction or the publication of a new quote by the specialist.[16]

During the brief moment it takes a specialist to manually report a transaction in a security, Autoquoting of the highest bid/lowest offer is suspended in that stock.[17] In addition, during that same period of time, automatic executions against the interest that is published in the NYSE quote at the Exchange BBO ("displayed") are not available.[18] After the specialist has completed the report of the transaction, Autoquote will resume immediately,[19] and the NYSE quotation will similarly again be available for automatic executions.[20]

Currently all orders, except orders entered in securities that the Exchange has designated as manually traded securities, entered into Exchange systems [21] are eligible for automatic and immediate execution. The maximum order size eligible for automatic execution is one million shares.

The Display Book is the Exchange's order execution system for round lot orders [22] entered on the Exchange by

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[6] *See generally* Securities Exchange Act Release Nos. 56599 (October 2, 2007), 72 FR 57622 (October 10, 2007) (SR–NYSE–2007–93) (amending NYSE Rules 70 and 104 to reduce the requirement that a Floor broker and specialist post 1,000 shares of displayed liquidity at the Exchange best bid or offer in order to use the reserve function); 56711 (October 26, 2007), 72 FR 62504 (November 5, 2007) (SR–NYSE–2007–83) (amendment to NYSE Rule 104.10 to extend the duration of the pilot program applicable to Conditional Transactions as defined in Rule 104.10 to March 31, 2008 and to remove the active securities limitation on Conditional Transactions); 56551 (September 27, 2007), 72 FR 56415 (October 3, 2007) (SR–NYSE–2007–82) (amendments to NYSE Rule 124 to change the way in which the Exchange prices and executes odd-lot order); 56370 (September 6, 2007), 72 FR 52188 (September 12, 2007) (SR–NYSE–2007–81) (amendment to NYSE Rule 104 to remove required price parameters for a specialist to provide price improvement to an incoming order); 56209 (August 6, 2007), 72 FR 45290 (August 13, 2007) (SR–NYSE–2007–65) (amendment to NYSE Rule 79A.30 to remove the requirement to obtain Floor Official approval before trading more than one or two dollars away from the last sale); 56088 (July 18, 2007), 72 FR 40351 (SR–NYSE–2007–63) (July 24, 2007) (amendment to NYSE Rule 92 to permit specialists to trade between the hours of 6 p.m. and 9:15 a.m. in any security in which the specialist is registered, notwithstanding any open customer orders on the Display Book); 55908 (June 14, 2007), 72 FR 34056 (June 20, 2007) (SR–NYSE–2007–54) (amendments to NYSE Rules 54 and 70 to allow member organizations to operate booth premises on the Exchange Floor similar to Upstairs offices); 54820 (November 27, 2006), 71 FR 70824 (December 6, 2006) (SR–NYSE–2006–65) (amendment to clarify certain definitions and systematic processing of certain orders in the HybridMarket); and 54086 (June 30, 2006), 71 FR 38953 (July 10, 2006) (SR–NYSE–2006–24) (amendment to NYSE Rule 104(d)(i) to conform the minimum display requirements for reserve interest for specialists and Floor brokers such that specialists, like Floor brokers, only be required to provide at least 1,000 shares displayed interest at the bid and offer in order to have reserve interest on that side of the quote).

[7] This system was developed to facilitate specialists' compliance with the Commission's Limit Order Display Rule. *See* 17 CFR 242.604.

[8] *See* NYSE Rule 60(e).

[9] A specialist could cause a non-auto-executable quote by gapping the quotation due to an order imbalance in accordance with the policies and procedures of the Exchange. Gap quotes are used to signal an imbalance so as to attract contra-side liquidity in an attempt to mitigate volatility. The size of an imbalance suitable for gapped quoting is at least 10,000 shares or a quantity of stock having a value of $200,000 or more, although depending on the trading characteristics of the security, the appropriate conditions for gapped quoting could be higher. *See* NYSE Information Memo 04–27 (June 9, 2004). When the quotation is gapped, automatic executions and Autoquote would be suspended, and the NYSE quote would be identified as non-firm. Incoming orders and cancellations update the Book electronically. Once a trade occurs or a non-gapped quote is published, Autoquote and automatic execution resume.

[10] LRPs are pre-determined price points that function as "speed bumps" to moderate volatility in a particular security, improve price continuity, and foster market quality by temporarily converting the electronic market to an auction market and permitting new orders, the Crowd, or the specialist, to add liquidity. *See also* NYSE Rules 60(e)(i) and 1000(a)(iv).

[11] *See* NYSE Rule 1000(a)(v).

[12] *See* NYSE Rule 60(e)(ii)(B).

[13] *See* NYSE Rule 60(e)(ii)(A).

[14] *See* NYSE Rule 60(e)(ii)(C).

[15] *See id.*

[16] *See id.*

[17] *See* NYSE Rule 60(e)(i)(B).

[18] *See* NYSE Rule 1000(a)(v).

[19] *See* NYSE Rule 60(e)(ii)(B).

[20] *See* NYSE Rule 1000(b).

[21] There still remain certain securities traded on the Exchange that are not designated to participate in automatic execution pursuant to NYSE Rule.

[22] Currently, odd-lot orders do not enter the Exchange's auction market but are executed systemically by Exchange systems designated solely for odd-lot orders (the "odd-lot System"). The odd-lot System executes all odd-lot orders against the specialist as the contra party. *See* NYSE Rule 124.

participants. Display Book maintains a separate volume category for Floor broker's interest, Off-Floor participant's ("Off-Floor") interest and specialist's interest.

Incoming marketable limit orders and market orders automatically execute to the extent possible at the NBBO and then, if there is insufficient liquidity available at the bid or offer, the remainder of the order will execute automatically against available liquidity at each price point (*i.e.*, below the bid in the case of an order to sell or above the offer in the case of an order to buy) in one continuous transaction ("sweep"). The sweep ends when the order has reached its total cumulative quantity, its limit price or when it hits an intervening LRP. Posted liquidity, reserve liquidity, convert and parity ("CAP") liquidity, and specialist liquidity at each price point are all liquidity available to execute against an order during a sweep.

(c) Market Participants

(1) Specialists

A NYSE specialist is a market professional who manages the two-way auction market trading in the specific securities he or she has been assigned. He or she works for a specialist unit, which is an independent company in the business of trading listed securities. The specialist serves as the "responsible broker or dealer" on the Exchange as that term is defined in Rule 600 of Regulation National Market System ("Reg. NMS").[23] Pursuant to section (a)(2) of Rule 602,[24] when NYSE Rule 60 was adopted, the specialist responsible for each security available for quotation on the Exchange was designated as the responsible broker or dealer.[25] The specialist as designated responsible broker or dealer is responsible, with respect to each reported security, to collect all bids and offers, determine the highest bid and lowest offer and quote and otherwise communicate to the quotation vendors the same along with the quotation size for each security.[26]

In addition to being the responsible broker dealer, NYSE Rule 104 governs specialist dealings in the market. Specialists' transactions for their own account are subject to specific expectations of performance. These include a specialist's affirmative and negative obligations. Pursuant to these obligations, specialists have a duty to ensure that their principal transactions are designed to contribute to the maintenance of price continuity with reasonable depth.

The affirmative obligation requires a registered specialist to maintain adequate minimum capital based on his or her registered securities and use said capital to engage in a course of dealings for his or her own account to assist in the maintenance, so far as practicable, of a fair and orderly market.[27] Thus pursuant to the affirmative obligations, registered dealers on primary exchanges are required to commit the dealer's capital in their registered securities in order to maintain a fair and orderly market.

The negative obligation, which is part of NYSE Rule 104, requires that specialists allow public orders to be executed against each other without undue dealer intervention and that specialists not deal in a manner that is inconsistent with the overall objective of maintaining a fair and orderly market. Specifically, NYSE Rule 104(a) provides:

No specialist shall effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he, his member organization or any other member, allied member, or approved person, (unless an exemption with respect to such approved person is in effect pursuant to Rule 98) in such organization or officer or employee thereof is directly or indirectly interested, unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market, or to act as an odd-lot dealer in such security.

To assist specialists in meeting their obligations, they have the ability to manually and systematically place in a separate file ("specialist interest file" or "s-Quotes") within the Display Book system their dealer interest at prices at or outside the Exchange BBO.[28] Specialists further have the ability to maintain reserve interest on behalf of their dealer accounts at the Exchange BBO, provided that they display at least one round lot at that price on the same side of the market as the reserve.[29] After an execution against a specialist's displayed bid (offer), if the specialist has reserve interest remaining at that bid (offer), the amount of displayed interest is automatically replenished from the specialist's reserve interest, if any, so that at least one round lot of specialist interest is displayed.[30] Specialist interest at the Exchange BBO is included in the Exchange quote; displayable specialist interest away from the Exchange BBO is currently included in NYSE OpenBook® ("OpenBook").[31]

Further, in their capacity as dealer for their assigned securities, specialists maintain systems that use proprietary algorithms, based on predetermined parameters, to electronically participate in the Exchange electronic market ("Specialist Algorithm"). The Specialist Algorithm communicates with the Display Book system via an Exchange-owned external application programming interface ("API"). The Specialist Algorithm is intended to replicate electronically some of the activities specialists are permitted to engage in on the Floor in the auction market, and to facilitate specialists' ability to fulfill their obligations to maintain a fair and orderly market.

The Specialist Algorithm receives information via the API, including information about orders entering NYSE systems, before that information is

[23] *See* 17 CFR 242.600(a)(65)(i), which states that responsible broker or dealer means, "when used with respect to bid or offers communicated on a national securities exchange, any member on such national securities exchange who communicates to another member on such national securities exchange, at the location (or locations) or through the facility or facilities designated by such national securities exchange for trading in an NMS security a bid or offer for such NMS security, as either principal or agent; provided, however, that, in the event two or more members of a national securities exchange have communicated on or through such national securities exchange bid or offers for an NMS security at the same price, each such member shall be considered a responsible broker or dealer for that bid or offer, subject to the rules of priority and precedence then in effect on that national securities exchange; and further provided, that for a bid or offer which is transmitted from one member of a national securities exchange to another member who undertakes to represent such bid or offer on such national securities exchange as agent, only the last member who undertakes to represent such bid or offer as agent shall be considered the responsible broker or dealer for that bid or offer. * * *" *See also* NYSE Rule 60.

[24] *See* 17 CFR 242.602(a)(2).

[25] *See* NYSE Rule 60(a)(2), which provides that the "term 'responsible broker or dealer' shall mean, with respect to any bid or offer for any reported security made available by the Exchange to quotation vendors, the specialist in such reported security, who shall be the responsible broker or dealer to the extent of the quotation size he specifies."

[26] *See* NYSE Rule 60(c) and 17 CFR 242.602(b)(1). Today, these functions are done by the Exchange Autoquote system.

[27] *See* 17 CFR 240.11b–1.

[28] *See* NYSE Rules 104(b)(i) and 104(c)(viii).

[29] *See* NYSE Rule 104(d)(i). When discussed herein, the term "displayable" shall mean that portion of non-marketable interest that would be published as, or as part of, the Exchange BBO. The term "displayed interest" includes that part of an order that is published as, or as part of, the Exchange BBO.

[30] *See* NYSE Rule 104(d)(ii).

[31] OpenBook is a compilation of limit order data for all NYSE traded securities that the Exchange provides to market data vendors, broker-dealers, private network providers, and other entities through a data feed. *See* Securities Exchange Act Release No. 44138 (December 7, 2001), 66 FR 64895 (December 14, 2001) (SR–NYSE–2001–42). *See* also July 17th e-mail, *supra* note 3.

available to other market participants.[32] NYSE systems enforce the proper sequencing of incoming orders and algorithmically-generated messages.[33] The Specialist Algorithm and the specialists on the Floor do not have the ability to affect the arrival of orders at the Display Book system, or the sequence in which orders and algorithmically-generated messages are processed by the Display Book system.[34] The Specialist Algorithm, however, is able to generate certain specified quoting and trading messages based on the information it receives through the API. Once an algorithmic message has been generated, it cannot be stopped, changed, or cancelled on its way to the Display Book system.

The Display Book system does not accept algorithmically-generated messages from the Specialist Algorithm when automatic executions are unavailable, except in certain specified situations.[35] Specifically, when automatic executions are suspended, but Autoquote is active, the Display Book system accepts algorithmically-generated messages from the Specialist Algorithm to generate a bid or offer that improves the Exchange BBO or supplements the size of the existing BBO.[36]

In addition, when Autoquote and automatic executions are suspended, the Display Book system: (1) Processes algorithmically-generated messages to layer specialist interest outside the published Exchange quotation; and (2) permits specialists to manually layer specialist interest at prices within a previously established locking or crossing quotation.[37]

Display Book does not process algorithmically-generated messages from the Specialist Algorithm during the time a block size transaction involving orders in the Display Book system is being manually reported.[38] Algorithmically-generated messages are systemically blocked from creating a locked or crossed market[39] and would have to comply with all Commission and NYSE rules, policies and procedures governing specialist proprietary trading.[40]

In general, specialists can generate two categories of messages: quoting messages and trading messages. *Quoting messages allow the Specialist Algorithm to:* (1) Supplement the size of the existing Exchange BBO; (2) place within the Display Book system specialist reserve interest at the Exchange BBO;[41] (3) layer within the Display Book system specialist interest at varying prices outside the Exchange BBO; (4) establish the Exchange BBO; and (5) withdraw previously established specialist interest at the Exchange BBO.[42] Quoting messages do not interact with the order that preceded it. In addition, specialists are systemically blocked from generating a quoting message that moves their quote away from the inside market only until after the order it is reacting to is processed.

Trading messages allow the specialist to: (1) Provide "additional specialist volume" to partially or completely fill an order at the Exchange BBO or at a sweep price; (2) match better bids and offers published by other market centers where automatic executions are immediately available; (3) provide price improvement to an order, subject to the conditions outlined below; and (4) trade with the Exchange published quotation—that is, "hit bids" or "take offers."[43] Trading messages generated in response to an incoming order do not guarantee that the specialist interacts with that order or that the specialist has priority in trading with that order.[44] Specialist interest may not trade with the order identified by the algorithmic message because the specialist's message did not arrive at the Display Book in time or the specialist has to yield to off-Floor orders in Display Book which cancels the specialist interest.[45] Moreover, even when the specialist sets the NBBO and no off-Floor interest is present, a specialist may still not receive priority because of an intervening Floor clearing event which causes the specialist to lose priority.[46]

The Specialist Algorithm further allows the specialists, on behalf of their dealer accounts, to electronically provide price improvement to all or part of a marketable incoming order provided the specialist is represented in a "meaningful amount"[47] in the bid with respect to price improvement provided to an incoming sell order, or in the offer with respect to price improvement provided to an incoming buy order. Price improvement by the specialist benefits the incoming order and CAP–DI orders[48] entered on the Exchange because marketable CAP–DI orders are systemically converted to allow these orders to participate on parity with the specialist when the specialist is price improving an incoming order.[49]

Specialists' messages to trade with the Exchange published quote must include information that indicates the quote has been publicly disseminated.[50] In addition, to ensure that a specialist's algorithmic message to trade with the Exchange published quotation does not possess any speed advantage in reaching the Display Book system, Exchange systems process such messages in a manner that gives specialists and other market participants a similar opportunity to trade with the Exchange's published quotation, by delaying the processing of this type of trading message from the Specialist Algorithm.[51]

In addition to systemic restraints on the specialist's ability to trade with the published bid and offer, the specialist is required pursuant to NYSE Rule 104 to re-enter liquidity on the opposite side of the market when he or she effects a transaction for their own account to

[32] *The Specialist Algorithm has access to the following information:* (1) Specialist dealer position; (2) quotes; (3) information about orders in the Display Book system such as limit orders, percentage orders ("state of the book"); (4) any publicly available information the specialist firm chooses to supply to the algorithm, such as the Consolidated Quote stream; and (5) incoming orders as they are entering NYSE systems. *The Specialist Algorithm does not have access to:* (1) Information identifying the firms entering orders, customer information, or an order's clearing broker; (2) floor broker agency interest files or aggregate floor broker agency interest available at each price; or (3) order cancellations, except for cancel and replace orders. *See* NYSE Rule 104(c)(ii).

[33] *See* NYSE Rule 104(b)(iii)(A).

[34] *See* NYSE Rule 104(b)(iii)(B).

[35] *See* NYSE Rule 104(c)(vi).

[36] *See* NYSE Rule 104(c)(vi)(i).

[37] *See* NYSE Rule 104(c)(vi)(ii).

[38] *See* NYSE Rule 104(c)(v).

[39] *See* NYSE Rule 104(c)(iv).

[40] *See* NYSE Rule 104(c)(iii).

[41] *See* NYSE Rule 104(d).

[42] *See* NYSE Rule 104(b)(i)(A)–(E).

[43] *See* NYSE Rule 104(b)(i)(F)–(I).

[44] *See* NYSE Rule 104(c)(i)(C).

[45] *See* NYSE Rule 104(c)(i)(D).

[46] A Floor clearing event is any intervening transaction or an update of the NYSE quote.

[47] *See* NYSE Rule 104(e)(ii) which provides that "meaningful amount" shall constitute at least ten round-lots for the 100 most active securities on the Exchange, based on average daily volume, and at least five round-lots for all other securities on the Exchange. A list of the 100 most active securities on the Exchange is disseminated quarterly, or more frequently, as determined by the Exchange. Specialists cannot provide price improvement to an incoming order that is not marketable (*i.e.*, those orders that would establish a new best bid or best offer), and the specialist cannot trade with such an order until the new bid or offer is publicly disseminated.

[48] This type of CAP order provides that the elected or converted portion of the percentage order that is convertible on a destabilizing tick and designated immediate execution or cancel election. *See* NYSE Rules 13 and 123A.30(a).

[49] *See* NYSE Rule 123A.30(a)(iii).

[50] *See* NYSE Rule 104(c)(i)(A).

[51] *See* NYSE Rule 104(b)(iii)(B). Based upon the average transit time from the Common Message Switch ("CMS") system to the Display Book system, the Exchange determines the appropriate amount of time to delay the processing of algorithmic messages to trade with the Exchange published quotation. The delay parameter is adjusted periodically to account for changes to the average transit time resulting from capacity and other upgrades to Exchange systems.

establish or increase a position and reaches across the market to trade as the contra-side to the Exchange published bid or offer ("Conditional Transaction").

Conditional Transactions may have additional re-entry obligations pursuant to the rule. Specifically, pursuant to NYSE Rule 104.10(6)(iii), "appropriate" re-entry means "re-entry on the opposite side of the market at or before the price participation point or the 'PPP.'"[52] Depending on the type of Conditional Transaction, a specialist's obligation to re-enter may be immediate or subject to the same re-entry conditions of Non-Conditional Transactions.[53]

Pursuant to current NYSE Rule 104.10(6)(iv) Conditional Transactions that involve:

(a) A specialist's purchase from the Exchange published offer that is priced above the last differently-priced trade on the Exchange or above the last differently-priced published offer on the Exchange; and

(b) A specialist's sale to the Exchange published bid that is priced below the last differently-priced trade on the Exchange or below the last differently-priced published bid on the Exchange.

(c) Re-entry obligations following transactions defined in subparagraphs (6)(iv)(a) and (6)(iv)(b) above are the same as for Non-Conditional Transactions pursuant to subparagraph (5)(i)(a)(II)(c) above.

NYSE Rule 104.10 (5)(i)(a)(II)(c) provides:

Re-entry Obligation Following Non-Conditional Transactions—The specialist's obligation to maintain a fair and orderly market may require re-entry on the opposite side of the market trend after effecting one or more Non-Conditional Transactions. Such re-entry transactions should be commensurate with the size of the Non-Conditional Transactions and the immediate and anticipated needs of the market.

(2) Floor Brokers

Floor brokers are individuals that execute orders to buy or sell securities on behalf of a customer pursuant to instructions provided by the customer. Sometimes a Floor broker may represent his or her firm's proprietary account.[54]

(A) Floor Broker Interest

Floor brokers are permitted to represent electronically the orders they hold by including these orders in a separate file ("Floor broker agency interest file," also referred to as "e-Quotes℠") within the Display Book system at multiple price points on either side of the market.[55] e-Quotes enable Floor brokers' customer interest to participate in automatic executions at the Exchange BBO and in sweeps. Floor brokers are permitted to place liquidity electronically at or outside the Exchange BBO. Floor brokers are not permitted to enter in the Floor broker agency interest files any interest that restricts the specialist's ability to trade on parity with the Floor broker agency interest file.[56]

Floor broker agency interest placed in the Display Book becomes part of the quotation when the price point is at or becomes the Exchange BBO. All floor broker agency interest files in the Display Book system at the same price and on the same side of the market are on parity. However, an e-Quote that establishes the Exchange BBO is entitled to priority.[57] No Floor broker agency interest placed within files in the Display Book system is entitled to precedence based on size.[58] Floor broker agency interest within the Display Book can be automatically executed pursuant to Exchange Rules 1000–1004.[59]

Floor brokers also maintain non-displayed interest (reserve) at the Exchange BBO provided that a minimum of one round lot[60] of the Floor broker's agency interest is displayed at that price.[61] If an execution at the Exchange BBO does not completely execute the Floor broker's interest at that price, the displayed interest is automatically replenished from the Floor broker's reserve interest, if any, so that at least one round lot is displayed.[62] The Floor broker reserve interest is not included in the NYSE quote. Floor broker agency interest away from the BBO is not displayed in Open Book or other Exchange data distribution channels. In order for Floor brokers' reserve interest not to be visible to the specialists, a Floor broker must designate his or her reserve interest as "Do Not Display" ("DND") interest.

An incoming automatically-executing order will trade first with the displayed bid (offer). Where there is insufficient displayed volume to fill the order, it will trade next with a Reserve Order and Floor broker reserve interest, if any, and then any specialist reserve interest as more fully discussed below.[63]

Floor broker agency interest participates in the opening and closing trades subject to Exchange rules.[64] Specialists are able to see the aggregate number of shares of all Floor broker agency interest files at each price.[65] A Floor broker may exclude all of his or her Floor broker agency interest from the aggregate information available to the specialist.[66]

Floor broker agency interest excluded from the aggregated Floor broker agency interest information available to the specialist participates in automatic and manual executions.[67] Exchange systems

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[52] NSYE Rule 104.10(6)(iii)(a) provides that the PPP identifies the price at or before which a specialist is expected to re-enter the market after effecting a Conditional Transaction. PPPs are only minimum guidelines and compliance with them does not guarantee that a specialist is meeting its obligations.

[53] *NYSE Rule 104.10(6)(iii)(c) requires immediate re-entry following a Conditional Transaction that is:*

(I) A purchase that (1) reaches across the market to trade with an Exchange published offer that is above the last differently priced trade on the Exchange and above the last differently priced published offer on the Exchange, (2) is 10,000 shares or more or has a market value of $200,000 or more, and (3) exceeds 50% of the published offer size.

(II) A sale that (1) reaches across the market to trade with an Exchange published bid that is below the last differently priced trade on the Exchange and below the last differently priced published bid on the Exchange, (2) is 10,000 shares or more or has a market value of $200,000 or more, and (3) exceeds 50% of the published bid size.

(III) Each trade at a separate price in a Sweep is viewed as a transaction with the published bid or offer for the purpose of subparagraphs (6)(iii)(c)(I) and (6)(iii)(c)(II) above.

[54] NYSE Rule 112, entitled "Orders initiated 'Off the Floor'" is one of the Exchange rules codifying the provisions of Section 11(a) of the Act and Commission Rule 11a–1 promulgated thereunder. In substance, these rules provide that no member or member organization, while on "the Floor" of the Exchange, may initiate a transaction in any security admitted to trading on the Exchange for an account in which they have a beneficial interest or over which they are entitled to exercise discretion, unless subject to an exception. The purpose of this rule and the securities laws upon which it is based is to eliminate the advantage at the point of sale that member organizations traditionally have been deemed to have possessed by virtue of their presence on the trading floor and adjacent surroundings. *See also* Exchange Rules 90 and 108.

[55] *See* NYSE Rule 70.20(a)(i).

[56] *See* NYSE Rule 70.20(a)(i) and NYSE Rule 108(a). Parity describes an equal allotment, so far as practicable, of shares among the participants eligible to participate in an execution.

[57] *See* NYSE Rule 70.20(b). Priority describes the entitlement to receive an allotment of shares before other executable interest at the price point for one trade because the bid (offer) established the Exchange BBO. A specialist bid or offer entitled to priority must yield to Off-Floor participant limit orders on the Display Book at the same price. In manual executions, an order may also be entitled to receive an allotment of shares when that order is for a number of shares greater than all other interest eligible to be executed at the price. In those instances, the order has precedence and may be executed before other executable interest at the price point. *See* NYSE Rule 72(d).

[58] *Id.*

[59] *See* NYSE Rule 70.20(c)(i).

[60] Generally, one round lot is 100 shares; however, there are securities on the Exchange that have units of trading of less than 100 shares.

[61] *See* NYSE Rule 70.20(c)(ii).

[62] *See* NYSE Rule 70.20(c)(iii).

[63] *See* NYSE Rule 70.20(c)(iv).

[64] *See* NYSE Rule 70.20(j)(i) and (ii).

[65] *See* NYSE Rule 70.20(g).

[66] *See id.*

[67] *See* NYSE Rule 70.20(h).

include such excluded interest in the aggregated agency interest displayed to the specialist only during the execution of a manual trade. This information is maintained in the template used by a specialist to execute trades in the Display Book. As such, aggregate Floor broker agency interest visible to the specialist will include agency interest designated to be excluded from the aggregate Floor broker agency interest file. Consequently, NYSE Rule 70.20[68] prohibits specialists, trading assistants and anyone acting on their behalf from using the Display Book to access information about Floor broker agency interest excluded from the aggregated agency interest other than in situations where there is a reasonable expectation on the part of such specialist, trading assistant or other person acting on their behalf that a transaction will take place imminently for which such agency interest information is necessary to effect such transaction.[69]

Floor brokers may also provide discretionary instructions for e-Quotes related to price and size (*i.e.*, the number of shares to which the discretionary price instructions apply) ("discretionary e-Quotes" or "d-Quotes"). The discretion is used, as necessary, to initiate or participate in a trade with an incoming order capable of trading at a price within the discretionary range.[70]

Discretionary instructions are applicable only to automatic executions; they cannot be utilized in manual transactions and they are not applicable to opening and closing transactions.[71] Discretionary instructions may be entered for all e-Quotes; however, these instructions are active only when the e-Quote is at or would establish the BBO.[72] Discretionary instructions will be applied only if all d-Quoting prerequisites are met. Otherwise, the d-Quote will be handled as a regular e-Quote, notwithstanding the fact that the Floor broker has designated the e-Quote as a d-Quote.[73] Discretionary instructions apply to displayed and reserve size, including reserve interest that is excluded from the aggregate volume visible to the specialist on the Floor.[74] The specialist on the Floor and the specialist system employing algorithms are both unable to access the discretionary instructions entered by Floor brokers with respect to their d-Quotes.[75]

(B) Price Discretion

Discretionary instructions as to price allow Floor brokers to set a price range[76] within which the Floor broker is willing to initiate or participate in a trade. The price range must be included on any d-Quote. Therefore, if the price discretion is set for only a portion of the d-Quote, the residual will be treated as an e-Quote.[77] Executions of d-Quotes employing price discretion trade first from reserve volume, if any, and then from displayed volume.[78]

(C) Size Discretion

Floor brokers may designate the amount of the e-Quote volume to which price discretion applies.[79] For example, a Floor broker may specify that only 20,000 shares of a 50,000-share e-Quote employ price discretion. The remaining 30,000-shares are handled as a regular e-Quote, *i.e.*, one without discretionary price instructions. This allows for more specific order management.

A Floor broker may set a minimum and/or maximum size limit with respect to the size of the contra-side interest with which it is willing to trade using price discretion.[80] Exchange systems will review NYSE published or quoted contra-side volume only in considering whether the volume is within the d-Quote's discretionary volume range. This prevents the d-Quote from trading with opposite side interest that the Floor broker has judged to be too little or too great in the context of the order or orders he or she is managing. Reserve and other interest at the possible execution price is not considered by Exchange systems.[81] Interest displayed by other market centers at the price at which a d-Quote may trade is not considered when determining whether the minimum volume range is met, unless the Floor broker electronically designates that such away volume should be included in the determination.[82] An increase or reduction in the size associated with a particular price that brings the contra-side volume within a d-Quote's minimum or maximum discretionary size parameter, will trigger an execution of that d-Quote.[83] Once the total amount of a Floor broker's discretionary volume has been executed, the remainder of the e-Quote may not employ price discretion when trading.[84]

(D) Discretionary Executions

The goal of discretionary instructions for e-Quotes is to secure the largest execution for the d-Quote, using the least amount of price discretion. Thus, d-Quotes may often improve the execution price of incoming orders. Conversely, if no discretion is necessary to accomplish a trade, none will be used.[85] d-Quotes automatically execute against an incoming contra-side order if the order's price is within the discretionary price range and meets any size requirements that have been set for the d-Quote.[86]

All d-Quotes from different Floor brokers on the same side of the market with the same price instructions trade on parity after interest entitled to priority is executed.[87] Multiple same-side d-Quotes from different Floor brokers compete for an execution with the most aggressive price range (*e.g.* three cents vs. two cents) establishing the execution price. If the incoming order remains unfilled at that price, executions within the less aggressive price range may occur.[88] d-Quotes also compete with same-side specialist algorithmic trading messages targeting incoming orders. If the price of d-Quotes and specialist trading messages are the same, the d-Quotes and the specialist messages trade on parity.[89]

d-Quotes from Floor brokers on opposite sides of the market may trade with each other. The d-Quote that arrives at the Display Book last will use the most discretion necessary to effect a trade, subject to NYSE rules and Rule 611 of Reg. NMS.[90] d-Quotes may provide price improvement to and trade with an incoming contra-side specialist algorithmic trading message to "hit bid/take offer," just as they can with any other marketable incoming interest.[91]

d-Quotes may initiate sweeps in accordance with and to the extent provided by NYSE Rules, but only to the extent of their price and volume discretion.[92] d-Quotes may participate

[68] *See* NYSE Rule 70.20(h)(ii).

[69] A pattern and practice of specialists' accessing reserve order information without trading may constitute a violation of NYSE Rule 70.20.

[70] *See* NYSE Rule 70.25(a)(i).

[71] *See* NYSE Rule 70.25(a)(iii).

[72] *See* NYSE Rule 70.25(a)(ii).

[73] *See* NYSE Rule 70.25 (a)(iv).

[74] *See* NYSE Rule 70.25(a)(vii).

[75] *See* NYSE Rule 70.25(a)(viii).

[76] *See* NYSE Rule 70.25(b)(i). The minimum price range for a d-Quote is the minimum price variation set forth in NYSE Rule 62.

[77] *See* NYSE Rule 70.25(b)(iii).

[78] *See* NYSE Rule 70.25(b)(iv).

[79] *See* NYSE Rule 70.25(c)(i).

[80] *See* NYSE Rule 70.25(c)(ii).

[81] *See* NYSE Rule 70.25(c)(iii).

[82] *See* NYSE Rule 70.25(c)(iv).

[83] *See* NYSE Rule 70.25(c)(v).

[84] *See* NYSE Rule 70.25(c)(vi).

[85] *See* NYSE Rule 70.25(d)(i).

[86] *See* NYSE Rule 70.25(d)(i)(A)(ii).

[87] *See* NYSE Rule 70.25(d)(i)(A)(iii).

[88] *See* NYSE Rule 70.25(d)(i)(A)(iv).

[89] *See* NYSE Rule 70.25(d)(i)(A)(v).

[90] *See* NYSE Rule 70.25(d)(i)(A)(vi) and 17 CFR 242.611.

[91] *See* NYSE Rule 70.25(d)(i)(A)(viii).

[92] *See* NYSE Rules 1000–1004. *See also* NYSE Rule 70.25(d)(i)(A)(ix).

in sweeps initiated by other orders but, in such cases, their discretionary instructions are not active. d-Quotes will not trade at a price that would trigger an LRP. Thus a sweep involving a d-Quote will always stop at least one cent before an LRP price.[93]

Floor brokers further possess a "pegging function" for e-Quotes and d-Quotes, which allows the Floor broker to keep his or her interest in the quote, even as the quote moves. Pegging is a separate type of discretionary instruction and may occur with e-Quotes and/or with d-Quotes using discretionary price instructions. Pegging e-Quotes and d-Quotes peg only to other non-pegging interest within the pegging range selected by the Floor broker. This functionality is only available when auto-quoting is on. Pegging functionality is reactive and does not establish a new BBO price. It will not generally serve as the BBO price when there is no other interest at that price. Pegging will occur only at prices within the pegging price range designated by the Floor broker.[94] Pegging functionality allows the Floor broker interest to be included in the Exchange BBO as it is systemically updated subject to the price that the Floor broker designated as the lowest or highest price he or she is willing to trade. The Floor broker's interest will move with the Exchange BBO within the designated range and any discretionary instructions associated with that interest will continue to be applied as long as it is within the Floor broker's designated price range. Buy side e-Quotes will peg to the best bid, and sell side e-Quotes will peg to the best offer.

A Floor broker using pegging e-Quotes and d-Quotes may set a minimum and/or maximum size of same-side volume to which his or her e-Quote or d-Quote will peg. Pegging instructions apply to the entire e-Quote/d-Quote volume. An e-Quote may have either or both discretionary trading and pegging instructions. Pegging and discretionary instructions are known only to the Floor broker. Specialists do not have access to a Floor broker's pegging and discretionary instructions.

(E) CAP–DI Order

Pursuant to NYSE Rule 13, Floor brokers are permitted to submit CAP liquidity to the Display Book in order to have customer orders trade along with the market and with the specialist proprietary transactions. The type of CAP order used by the Floor broker is the CAP–DI order. NYSE Rule 123A.30(a) provides that a CAP–DI order is the elected or converted portion of a percentage order that is convertible on a destabilizing tick and designated immediate execution or cancel election. A CAP–DI order may be automatically executed and may participate in a sweep. Marketable CAP–DI orders are automatically converted and trade along with specialist proprietary executions. CAP–DI orders participate in sweeps. Specifically, when an automatically executing order is sweeping the Display Book on the same side as the CAP–DI orders, such CAP–DI orders will be elected at each execution price that is part of the sweep. To the extent that the order sweeping the book has additional volume, the elected same-side CAP–DI orders will not participate in a transaction at the executing price; rather, Exchange Systems will automatically and systemically un-elect the CAP–DI orders in accordance with its terms. If at the last execution price that is part of the sweep, the sweeping order is filled or unable to continue executing, and there is volume remaining on the Display Book or from contra-side elected CAP–DI orders, then the same-side CAP–DI orders may participate in the final transaction. CAP–DI orders on the contra-side of an automatically executing order sweeping the Display Book are also elected at each execution price that is part of the sweep and participate at each of the execution prices if there is volume available on the Display Book or from CAP–DI orders on the same side of the market as the sweeping order.

(3) Off-Floor Participants

Off-Floor participants may submit any valid order type as defined in Exchange Rules. Orders entered on the Exchange by Off-Floor participants are maintained on the Display Book in a separate file from Floor broker agency interest, passively converted CAP orders and specialist interest. These orders are aggregated at each price point and sequenced in time priority of receipt. Off-Floor participants have the ability to submit Reserve Orders pursuant to NYSE Rule 13. Interest represented through Reserve Orders trade according to Exchange rules governing priority and parity.[95] A Reserve Order must include the specific amount of shares that is designated for display when the order is eligible to be quoted (*i.e.*, the "displayable" portion). A Reserve Order must display a minimum of one round lot. Reserve Orders have the ability to automatically replenish the displayable amount of interest at the Exchange BBO when trades reduce or exhaust such displayable interest. This provides Exchange customers the flexibility to replenish liquidity that is in keeping with the market need at the specific time and at that price point. When the displayable size of a Reserve Order is replenished from reserve, the replenished displayable quantity is assigned a time sequence based on the time it is replenished. The remaining original displayed quantity, if any, retains its original time sequence.

As with reserve interest in a Floor broker's agency interest file not designated DND, information on Reserve Orders entered directly into Exchange systems is made available to the specialist only in the aggregate at each price point for the express purpose of the specialist effecting a manual execution. The reserve interest is not distinguished from other interest available to be executed at a specific price point. Rather, Exchange systems display to the specialist the total number of shares available for execution at the price point and include reserve interest in the total number. In this manner such reserve interest is available for trades that take place on the Floor of the Exchange that will not be conducted automatically. Such trades take place at the opening and close of the Exchange, during the trading day in situations involving auction market transactions that are not automatic trades, and in certain specific trading situations, such as trades conducted when a LRP is reached after an automatic execution or in a "gap" quote situation.

Off-Floor participants' interest that is not designated as reserve interest is included in the Exchange quote. Off-Floor participants' interest away from the Exchange BBO not designated as reserve interest is automatically disseminated via OpenBook and other Exchange data distribution channels.

(4) Execution of Bids and Offers

Exchange executions are governed by its rules of priority, parity, and precedence.[96] These rules dictate which order or quote is able to execute against an incoming order and the allotment of shares, if more than one order or quote is at the BBO. Generally, the first bid (offer) at the BBO has priority to execute against the next incoming order.[97] Once

[93] *See* NYSE Rule 70.25(d)(ix)(A).

[94] *See* NYSE Rule 70.26(vii).

[95] Reserve Orders will also be subject to Federal securities regulations, including the order entry requirements of Section 11(a) of the Act.

[96] *See* NYSE Rules 72, 104, and 108.

[97] *See* NYSE Rule 72 I(a). A bid (offer) that establishes the Exchange BBO is entitled to priority at that price for one trade, except a specialist bid

Continued

a trade occurs with the bid (offer) that has priority, other bids (offers) at that price (including any remaining interest from the bid (offer) that had priority) generally trade on parity, meaning they split evenly with the remainder of the incoming order, up to the size of their own order.[98] A specialist must always yield priority to the Off-Floor participant orders entered on the Display Book.[99] The allotment of shares is also dependent on whether execution is at the BBO or if it is outside the BBO.

Under current Exchange rules, the first bid or offer made at a particular price is entitled to priority at that price.[100] Once a trade occurs with a bid or offer that has priority, other bids or offers at that price representing Off-Floor Participant orders (DOT orders) and Floor broker agency interest files (*i.e.*, e-Quotes and d-Quotes) trade on parity. Specialist interest (s-Quotes) yields to DOT orders; once DOT orders are satisfied, s-Quotes trade on parity with e-Quotes and d-Quotes.

For example, assume that immediately following a Floor clearing event, the bid on the Exchange is $20.05 for 1,000 shares, consisting of a DOT order of 300 shares, Floor broker agency interest file (e-Quote) volume of 400 shares representing interest of two Floor brokers for 200 shares each, and specialist interest of 300 shares. This is all displayed interest, *i.e.*, there is no reserve interest involved. There is no priority as all bids were reentered following the Floor clearing event. An incoming market order to sell 400 shares is executed against the DOT bid and the e-Quotes since the specialist interest (s-Quote) must yield to DOT interest. If the incoming order had been for 800 shares, the DOT orders and Floor broker interest would be executed in full and the specialist would receive 100 shares.

The displayable portion of the Reserve Order interest is executed first in accordance with the above rules governing priority and parity. Once all displayable interest, including DOT orders, e-Quotes, d-Quotes and s-Quotes that are quoted at the Exchange BBO has been traded, any remainder of an incoming order is executed against any reserve, *i.e.*, non-displayable interest at the Exchange BBO. Such non-displayable interest trades on parity except that specialist reserve interest at the Exchange BBO yields to all Reserve Orders and CAP orders. Outside the Exchange BBO, e-Quotes and d-Quotes trades with all interest represented by DOT orders, including DOT Reserve Orders, both displayable (*i.e.*, the interest that will be published if such interest becomes the Exchange best bid or offer) and non-displayable, on parity. Reserve interest represented by s-Quotes outside the Exchange BBO yields to reserve interest represented by Reserve Orders and CAP orders. Within DOT orders, interest that would be displayable is allocated on a time priority basis. After displayable DOT order interest is completely executed, any remaining shares are allocated to eligible non-displayable Reserve Order interest in time priority. Interest represented by a Floor broker is allocated equally among the Floor broker's customers without regard to whether that interest was displayable or non-displayable.

To illustrate how this works for a trade at the quote, assume the same scenario as above, but in addition to the displayed interest of 1,000 shares, there is reserve interest for the DOT order of 600 shares, 400 for each Floor broker (total of 800 shares) and 700 shares for the specialist for a total of 2,100 shares in reserve. An incoming order to sell 2,500 shares would be executed as follows: 1,000 shares trade with the displayed bid and is allocated 300 shares to the DOT order, 200 shares to each Floor broker (400 shares total), and 300 shares to the specialist, leaving 1,500 shares to be executed. The 1,500 remaining shares execute against the reserve portion of the DOT Reserve Order (600 shares), and 400 shares of reserve interest for each of the Floor brokers and 100 shares for the specialist.

When the amount of shares contained in an incoming order are greater than the shares at the Exchange BBO and trigger a sweep to execute the order, orders on the Display Book outside the Exchange BBO at each price point trade on parity at each successive price during the sweep. Specialist interest may participate in the sweep at each successive price point provided such interest participates after Off-Floor participant limit orders on the Display Book are satisfied at each successive price point. Specialist interest participating in the sweep trades on parity with any remaining Floor broker agency interest at each successive price point.

A trade outside the quote will occur when the displayed and reserve interest volume at the Exchange BBO is not sufficient to completely fill the incoming contra side order. Assume the bid on the Exchange is $20.05 for 1,000 shares, consisting of a DOT order of 300 shares, Floor broker agency interest file (e-Quote) volume of 400 shares representing interest of two Floor brokers for 200 shares each, and specialist interest of 300 shares. In addition to the displayed interest of 1,000 shares, there is reserve interest for the DOT order of 600 shares, 400 for each Floor broker (total of 800 shares) and 700 shares for the specialist for a total of 2,100 shares in reserve. The incoming order to sell is for 4,800 shares, thus out-sizing the displayed and non-displayed interest at the bid by 1,700 shares. At the next bid price of 20.03, there are 400 shares of a DOT Reserve Order, of which 100 shares are displayable, three Floor brokers using the reserve function bidding for 400 shares each, with 100 shares displayable and 300 shares in reserve and 1,000 shares of specialist interest, 100 shares displayable and 900 shares in reserve. After the execution at the bid price of 20.05, the execution of the remaining 1,700 shares at 20.03 would be as follows: 400 shares each to the DOT Reserve Order and the Floor brokers, since they trade on parity with each other outside the Exchange best bid (offer) for a total of 1,600 shares; 100 shares to the specialist, since the DOT Reserve Order was executed in full.

If there had been additional volume in the DOT Reserve Order of 100 shares, the specialist would not have traded at all.

Proposed New Market Model

(a) Overview and Background

The Exchange believes that in order to adapt to the current equities market environment, its trading model must be modified to allow all participants the ability to compete efficiently consistent with the participant's respective responsibilities to the market.

As the Hybrid Market has evolved, the more electronic market has fundamentally altered the NYSE's traditional trading environment, in which price discovery took place largely and almost exclusively on the Floor of the Exchange in the form of face-to-face interactions among brokers and specialists. As these interactions have diminished, the perceived time and place advantage of the Floor has diminished as well. In particular, information that once was exclusive to the Floor—in particular, the most up-to-

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or offer entitled to priority must yield to limit orders on the Book at the same price.

[98] *See* NYSE Rule 72 III. When bid (offers) are on parity, Exchange rules dictate that in certain circumstances, a particular participant is guaranteed a portion of an order based on the size of its bid (offer), *i.e.*, precedence based on size. *See* NYSE Rule 72 I(c).

[99] *See* NYSE Rule 92.

[100] *See* NYSE Rule 72 I(a) through (g). While a priority bid or offer may be established it is usually broken by a "Floor clearing" event. "Floor clearing" events include a trade or an update of the NYSE quote. After such an event, all bid and offers at the price are on parity.

date quotes, available interest and last sale prices—is now widely available off the Floor through electronic means. At the same time, increasingly fragmented trading in NYSE-listed securities—a byproduct of sophisticated algorithmic trading and Regulation NMS—has lessened the importance to traders of so-called "market color" from the Floor; in an era where no one trading venue can claim dominance of market share and mostly automated trading, specialists and Floor broker no longer glean a heightened sense of the market in a particular security based on the "open outcry" of participants at the point of sale on the Floor or based on the observation over the course of a day or days of the activity at the particular post where a security trades.

Competition from other market centers and growth of alternative trading systems, coupled with increased internalization by broker-dealers, has challenged the dominance of the trading post as the centralized locus of orders in a particular security. Among other things, the rapid dissemination of consolidated quote and trade information and real-time updates of the Exchange limit order book has increased exponentially the amount and accuracy of available information and the speed with which it is disseminated. The immense increase in electronic executions on the Exchange and the general explosion of the use of smart routing engines by market participants of all types, especially "upstairs" traders, also has had a huge impact on the perceived informational advantages once enjoyed by Floor brokers and specialists. Automatic executions and quote updates occur without audible notice and with such rapidity that even those present at the trading post are virtually unable to process the information manually. Indeed, it could be argued that the informational advantage has shifted "upstairs" where orders are now first "shopped" within a firm and then to others before being sent to the Floor for execution and, even then, is likely to be sent in pieces to multiple markets. These trends have also been influenced by the reduction of displayed interest across equity market centers resulting from the reduction of quote increments to pennies and in some instances sub-pennies (for securities that trade below a dollar). Further compounding the trends is the ever increasing proliferation of competing electronic trading venues.

In the face of these challenges, the NYSE is proposing to adopt its New Model, which will provide a more robust trading model on the Floor while preserving the existing framework for trading and some of the key responsibilities of its market participants that make the NYSE unique. In so doing, the Exchange seeks to strike a balance among market participants that retains a role for liquidity providers responsible for maintaining fair and orderly markets, agents on the Floor, and Off-Floor participants. The Exchange believes that the proposed changes will improve market quality in the form of tighter spreads, greater liquidity and opportunities for price improvement.

(b) Changes to Exchange Systems

One of the key changes in the New Model will be enhancing the Exchange's technology. Among other things, the Exchange proposes to enhance its Display Book to incorporate the majority of execution logic and to assume primary responsibility for tracking the liquidity available at each specified price point. In the New Model, incoming orders to buy and sell will continue to be available for automatic quoting and immediate and automatic execution. Unlike today, however, NYSE systems will also automatically review the liquidity available on the Display Book for execution and then access the necessary liquidity to consummate trades. To do this, the Exchange is proposing to replace its specialists with a new participant—the DMM—who will make available a pre-determined pool of liquidity that Exchange systems can access to execute orders. In so doing, the Exchange expects to increase the speed of automatic executions. It is also anticipated that modifications to the Exchange systems will further speed executions by reducing the number of trading messages, which should ultimately reduce latency within Exchange systems.

(c) Updating the Roles of the Various Exchange Market Participants

As it updates its technology to reflect the New Model's mode of trading, the Exchange is also changing the roles of the various market participant groups who use that technology to reflect new patterns of trading and new obligations. The most significant change will be the phasing out of the NYSE's specialist system and the adoption of a designated market maker structure. But in addition, the Exchange is also making changes to the role of, and tools available to, the Floor broker, and is also giving new tools to Off-Floor participants that will enable them to participate in the market more directly. These changes are described in more detail below.

(1) Designated Market Makers

(A) Overview

The Exchange believes that its new market model requires a new market maker [101] with the ability (and affirmative obligation) to contribute liquidity in a security by trading competitively for its dealer account. The Exchange therefore proposes to phase out the existing specialist system and to establish in place of the specialists Designated Market Makers who will be employees of Designated Market Maker Units ("DMM Units").[102]

Although the specialist system has served a central role in equities trading at the NYSE for well over a century, specialist trading is, by nature, well-suited to manual trading, and less suitable for electronic trading. As a result, although specialists were able to provide a strong stabilizing influence when all or most trading was manual, that influence has waned as the markets have evolved toward mostly or fully automatic trading. And while the Exchange continues to believe that there is value to having a designated person assigned to maintain an orderly market in its listed securities, the Exchange nevertheless recognizes that the existing scheme of rules and obligations governing specialists can unduly hamstring them in an electronic market and prevent them from easily fulfilling their appointed role.

To address this new reality, DMM Units will be given tools and opportunities that are not available to specialists currently, but that are more commensurate with trading in electronic markets. At the same time, the Exchange will preserve several aspects of the specialist system that are beneficial to the market and the investing public. For example, like the specialist system, and in contrast to the competitive market maker structure, each NYSE-listed security will be assigned to a single DMM Unit, but unlike the specialist system, each DMM will have a minimum quoting requirement in its assigned securities, and DMM Units who do not meet the minimum quoting requirement will be ineligible to participate in the process to receive additional securities. Through this combination of carrot (exclusivity) and stick (minimum quoting

[101] The term "market maker" shall have the same meaning as that term in section (3)(a)(38) of the Act. *See* e-mail from Deanna G. W. Logan, Associate General Counsel, NYSE to David Liu, Assistant Director, Division, Commission, dated July 16, 2008 (making clarifying edits) ("July 16th e-mail").

[102] As of October 15, 2008, pursuant to proposed Rule 104(f)(iv) DMMs will be designated as "market makers" on the Exchange for purposes of the Act. *See* July 16th e-mail, *supra* note 101.

requirement), the Exchange believes that it can ensure greater depth and liquidity, and consequently, better prices for customers, in its listed securities.

Current NYSE Rule 104 will be amended and renamed 104T as described further below and will be operative and effective until October 14, 2008. Thereafter, the Exchange proposes a new Rule 104 that will be effective October 15, 2008.

(B) DMMs and DMM Units Approved by the Exchange

The Exchange intends to require, in new Rule 103, that member organizations who want to operate a DMM Unit file an application in writing and be approved by the Exchange prior to operating a DMM Unit. Accordingly, the Exchange is proposing to amend NYSE Rule 2 to include definitions of "Designated Market Maker" ("DMM") and "Designated Market Maker Unit." The application and approval requirement would be waived for existing NYSE specialist firms that decide to create a DMM Unit.[103]

In deciding whether to approve an application, the Exchange will consider, among other things, the member organization's market making ability, the capital that the member is willing or able to make available for market making and such other factors as the Exchange deems appropriate.[104]

DMMs employed by DMM Units to work on the Floor of the Exchange will be required to be approved and registered with the Exchange. In order to obtain such approval, applicants will need to submit an application to NYSE Regulation, Inc., which will assess an applicant's regulatory fitness, and successfully complete a qualifications examination prescribed by the Exchange. Once approved and registered as a DMM, such individual may conduct business only on behalf of the DMM Unit in which he or she is employed.

A DMM Unit may also employ individuals who may be called upon to act as a Relief DMM. A Relief DMM may be called upon to act as a DMM in one of its securities for an entire business day.[105] In such instances the Relief DMM is required to have net liquid assets of $150,000.[106] A Relief DMM that is called upon to act as a Relief DMM for less than the entire business day, usually for lunch periods, etc. has no such requirement; however, dealings effected by such Relief DMM while relieving the regular DMM must be made for the account of the regular DMM whom he or she is relieving.[107]

As with existing specialist firms, individuals who are currently employed by specialist member organizations as specialists and relief specialists will be automatically approved and registered as DMMs and Relief DMMs.[108]

In addition, pursuant to proposed NYSE Rule104(j), a Floor Governor will have the ability to designate an individual to be a Temporary DMM. In the event of an emergency, such as the absence of the DMM, or when the volume of business in the particular stock or stocks is so great that it cannot be handled by the DMMs without assistance, a Floor Governor may authorize a member of the Exchange who is not registered as a DMM in such stock or stocks, to act as Temporary DMM for that day only.

A Temporary DMM that substitutes for a DMM when no DMM is present, is expected to assume the obligations and responsibilities of a DMM for the maintenance of the market.

A member who acts as a temporary DMM by such authority is required to file a report showing (a) the name of the stock or stocks in which he or she so acted, (b) the name of the regular DMM, (c) the time of day when he or she so acted, and (d) the name of the Floor Governor who authorized the arrangement with Division of Market Surveillance of NYSE Regulation, Inc., at the end of the day.

Pursuant to proposed NYSE Rule 104(j), a Floor Governor will not give such authority for the purpose of permitting a member not registered as DMM habitually to relieve another DMM at lunch periods, etc.

(C) DMMs Not Responsible Broker-Dealer for All Orders

The Exchange proposes to amend the provision in Exchange rules that makes specialists the "responsible broker-dealer" for purposes of Limit Order Display and other obligations under both the Act and regulations promulgated thereunder.

Under NYSE Rule 60, specialists are currently solely responsible for quoting the highest bids and lowest offers on the Exchange for all reported securities. This rule is appropriate in a manual trading environment, where the specialist post was the primary locus for trading in securities and where the specialist oversaw the reporting of all executions.

Because of automation, the rule makes less sense today. Among other things, market participants who are not specialists post their interest electronically in the form of DOT orders and/or e-Quotes (broker agency interest files), and Exchange systems process and publish that interest automatically. When there is an execution against the published quote, Exchange systems report the execution, and allocate the executed shares to the various participants automatically. In a manual market, the specialist was solely responsible for quoting the highest bids and lowest offers on the Exchange for all reported securities. The Exchange's quote today now includes the Floor broker's agency interest, specialist interest and electronically entered interest of off-Floor Participants. More importantly, all interest in Exchange systems and included in the quote is identifiable by the Exchange's systems.

Given this change from how interest was processed in a manual environment, the notion that the specialist (or the new DMM) is the sole responsible broker-dealer is obsolete, but not harmlessly so. In particular, because various obligations either attach or do not attach based on whether a participant is designated as the responsible broker-dealer, designating the specialist (or DMM) as the "responsible broker dealer" can lead to unintentionally placing an obligation on a nominal participant while relieving the logically responsible participant of that same obligation.

To address these limitations, the NYSE is proposing to amend NYSE Rule 60 to reflect that the member or member organization entering a bid or offer in a security is the "responsible broker-dealer" to the extent of such bid or offer.[109] The Exchange also proposes to eliminate the phrase "on the Floor" which refers to a "responsible broker or dealer" for the purposes of meeting obligations under Reg. NMS, since the Exchange believes all broker-dealer members and member organizations

[103] *See* Proposed NYSE Rule 103(b)(ii).

[104] *See* Proposed NYSE Rule 103(a).

[105] *See* Proposed NYSE Rule 103(f).

[106] *See* Proposed NYSE Rules 104T.24 and 103.21.

[107] *Id.*

[108] *See* Proposed NYSE Rules 103(c)(ii) and (f)(iii).

[109] *See* 17 CFR 240.11Ac1–1. For ease of reference, relevant text of Section 11A(c)(1) of the Act and Rule 11Ac1–1 thereunder was included as part of the rule text preceding NYSE Rule 60. Similarly, the text of Section 11(a)(1) of the Act and Rules 11a–1 through 11a2–2 was also included as text preceding Exchange Rule 90. Insofar as it is not the general practice of the Exchange to include federal securities laws and rules in its rule book, the Exchange proposes to delete them from its rule book. Moreover, since the federal securities laws and rules are now readily available through any number of sources, the Exchange has determined that it is no longer necessary to include the aforementioned text as part of NYSE Rule 60 and NYSE Rule 90.

bear these responsibilities. In addition, the Exchange proposes to amend the rule to reflect that the Exchange rather than the specialist or DMM disseminates quotations to vendors.

The Exchange also proposes to remove subsection (a)(iv) from Exchange Rule 1001, which provides that "the specialist shall be the contra party to any automatic execution where interest reflected in the published quotation against which the automatically executing order was executed is no longer available." This rule was adopted to address an anomaly of the Exchange's systems that no longer exists. Specifically, at the time the rule was adopted, Exchange systems were programmed such that where the identity of the interest for an automatically executing order was unknown, the specialist would automatically be assigned as the contra party for that trade, even where interest from other market participants was reflected in the published quotation. Since the Exchange systems are now capable of accurately identifying each participant whose interest is reflected in the published quote and who should be held responsible to be the contra party for the automatically executing order, the Exchange believes it is no longer necessary that the market maker in the security shoulder the burden of being the contra party to un-reconciled executions. Similarly, NYSE Rule 123B(b)(2)(B) is proposed for deletion reflecting the fact that reports of executions are handled by Exchange systems and are no longer sent by specialists, and will not be sent by DMMs.

(D) DMMs Retain the Specialists' Affirmative Obligation

As noted above, although the Exchange does not intend to impose undue obligations on DMMs as responsible broker-dealers, the Exchange intends to preserve the requirement that a DMM has an affirmative obligation to the quality of the markets in securities assigned to it. The function of a member acting as a DMM on the Floor of the Exchange includes the maintenance, in so far as reasonably practicable, of a fair and orderly market on the Exchange in the stocks in which he or she is so acting.[110] The maintenance of a fair and orderly market implies the maintenance of price continuity with reasonable depth, to the extent possible consistent with the ability of participants to use reserve orders, and the minimizing of the effects of temporary disparity between supply and demand.[111] In connection with the maintenance of a fair and orderly market, it is commonly desirable that a member acting as DMM engage to a reasonable degree under existing circumstances in dealings for the DMM's own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated.[112]

In addition, DMM Units will be required to maintain adequate minimum capital[113] based on its registered securities, and will be required to use their capital to engage in a course of dealings for their own accounts to assist in the maintenance, so far as practicable, of a fair and orderly market. Transactions on the Exchange by a DMM for the DMM Unit's account are to be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock.[114] To support this requirement, the Exchange will continue to provide depth guidelines[115] for each security.

DMMs will further be required to maintain displayed bids and offers at the NBBO for a certain percentage of the trading day in assigned securities. Specifically, with respect to maintaining a continuous two-sided quote with reasonable size, DMMs must maintain a bid or offer at the National Best Bid and National Best Offer ("inside") for securities in which the DMM is registered at a prescribed level based on the average daily volume of the security.[116] Securities that have a consolidated average daily volume of less than one million shares per calendar month are defined as Less Active Securities and securities that have a consolidated average daily volume of equal to or greater than one million shares per calendar month are defined as More Active Securities.[117]

For Less Active Securities, a DMM Unit must maintain a bid or an offer at the NBBO for at least 10% of the trading day during a calendar month. For More Active Securities, a DMM Unit must maintain a bid or an offer at the NBBO for at least 5% or more of the trading day during a calendar month. DMM Units will be expected to satisfy the quoting requirement for both volume categories in their assigned securities.

Time at the inside is calculated as the average of the percentage of time the DMM has a bid or offer at the inside. For example, if a DMM maintains a quote at the National Best Bid for 6% of the trading day and a quote at the National Best Offer for 4% of the trading day, then the average of these times is 5%. *The Exchange will determine whether a DMM Unit has met its quoting requirements on a month-by-month basis by calculating:*

(1) The "Daily NBB Quoting Percentage" by determining the percentage of time a DMM Unit has at least one round lot of displayed interest in an Exchange bid at the National Best Bid during each Trading Day for a calendar month;

(2) the "Daily NBO Quoting Percentage" by determining the percentage of time a DMM unit has at least one round lot of displayed interest in an Exchange offer at the National Best Offer during each Trading Day for a calendar month;

(3) the "Average Daily NBBO Quoting Percentage" for each Trading Day by summing the "Daily NBB Quoting Percentage" and the "Daily NBO Quoting Percentage" then dividing such sum by two;

(4) the "Monthly Average NBBO Quoting Percentage" for each security by summing the security's "Average Daily NBBO Quoting Percentages" for each Trading Day in a calendar month then dividing the resulting sum by the total number of Trading Days in such calendar month; and

(5) for the total Less Active Securities (More Active Securities) assigned to a DMM unit, the Exchange will determine the "Aggregate Monthly Average NBBO Quoting Percentage" by summing the Monthly Average NBBO Quoting Percentages for each Less Active Security (More Active Security) assigned to a DMM unit, then dividing such sum by the total number of Less Active Securities (More Active Securities) assigned to such DMM Unit.

Below is an example of a quoting requirement calculation. For purposes of this example, it is assumed that DMM Unit 1 has two assigned securities, A

[110] *See* Proposed NYSE Rule 104(f)(ii).

[111] *Id.*

[112] *Id.*

[113] Capital requirements are identical to the current capital requirements computed in accordance with Rule 15c3–1 and current NYSE Rule 104. In this filing the Exchange seeks to move the placement of these requirements into proposed NYSE Rule 103.

[114] *See* Proposed NYSE Rule 104(g)(i).

[115] Currently, the Exchange provides each security with a daily depth guideline and depth sequence size that reflects its individual trading characteristics including intra-day price volatility. Depth sequence sizes over which depth is calculated and the depth guidelines against which the calculated depth movements are compared are dynamically updated each day for each symbol based on the symbol's recent trading characteristics. These characteristics include: Its previous NYSE closing price; its NYSE adjusted volume; and its intra-day consolidated high/low range. Systemic calculations of these values occur each day and are used in the creation of a formulaic individualized depth guideline and depth sequence size that is unique for each security. The Exchange proposes to provide DMMs with the same information pursuant to proposed NYSE Rule 104(f)(iii).

[116] The Exchange intends to formally file with the Commission a proposal to modify the method by which the Exchange allocates and reallocates securities to specialist units; *see* July 17th e-mail, *supra* note 3.

[117] *See* Proposed NYSE Rule 104(a)(1)(A).

and B, and that there were 5 trading days in the selected calendar month.

The Average Daily NBBO for a DMM Unit is calculated for each security by summing the daily NBB and NBO of each security for that day and dividing that number by two:

Trading days	NBB	NBO	Calculation average daily NBBO for DMM Unit 1	Average daily NBBO
			Security A	
T1	4%	6%	4% + 6% = 10% divided by 2 = 5%	5%
T2	3%	5%	3% + 5% = 8% divided by 2 = 4%	4%
T3	4%	4%	4% + 4% = 8% divided by 2 = 4%	4%
T4	6%	8%	6% + 8% = 14% divided by 2 = 7%	7%
T5	5%	5%	5% + 5% = 10% divided by 2 = 5%	5%
			Security B	
T1	5%	7%	5% + 7% = 12% divided by 2 = 6%	6%
T2	4%	6%	4% + 6% = 10% divided by 2 = 5%	5%
T3	6%	8%	6% + 8% = 14% divided by 2 = 7%	7%
T4	7%	9%	7% + 9% = 16% divided by 2 = 8%	8%
T5	9%	9%	9% + 9% = 18% divided by 2 = 9%	9%

The monthly average NBBO quoting percentage for a DMM Unit for each security is then calculated by summing the security's average Daily NBBO Quoting Percentages for all the Trading Days of the calendar month and then dividing the resulting total by the number of Trading Days in the calendar month (in this instance 5).

Average daily NBBO					Calculation monthly average NBBO for DMM Unit 1	Monthly Average NBBO
T1	T2	T3	T4	T5		
					Security A	
5%	4%	4%	7%	5%	5% + 4% + 4% + 7% + 5% = 25% divided by 5 = 5%	5%
					Security B	
6%	5%	7%	8%	9%	6% + 5% + 7% + 8% + 9% = 35% divided by 5 = 7%	7%

The Aggregate Monthly Average NBBO Quoting Percentage for a DMM Unit is determined by summing the Monthly Average NBBO for each security and then dividing such sum by the total number of securities.

Aggregate Monthly Average for Specialist Unit 1
Monthly Average NBBO Security A + Monthly Average NBBO Security B divided by 2 5% + 7% = 12% divided by 2 = 6% Aggregate Monthly Average

Reserve or other hidden orders entered by the DMM will not be included in the inside quote calculations.[118]

The Exchange further proposes that DMMs retain the re-entry requirements currently imposed on specialists contained in NYSE Rule104. As such, DMMs effecting Neutral, Non-Conditional and Conditional transactions will still be required to re-enter liquidity on the opposite side of the market depending on the type of transaction executed by the DMM.[119]

(E) DMMs Will Not See Public Customer Order Information Before Other Market Participants

In a significant departure from the existing specialist system, DMMs will be required to meet all of the above requirements without the benefit of access to order by order information. The Exchange proposes to gradually decrease the orders provided to the DMM over time as the Exchange completes the required modifications to technology.[120] Upon completion of the modifications to Exchange technology, the DMM will no longer receive any order by order information. The decrease in the flow of order information to the specialists will begin in July 2008, with the DMM no longer receiving order by order information by October 15, 2008.

The DMM Unit's system employing algorithms will have access to information with respect to orders entered on the Exchange, Floor Broker agency interest files or reserve interest, to the extent such information is made publicly available. DMM unit algorithms will receive the same information with respect to orders

[118] *See* July 17th e-mail, *supra* note 3.

[119] *See supra* notes 52 and 53. DMMs will be subject to the same requirements currently imposed on specialists pursuant to proposed NYSE Rule 104(g)(i)(A). Currently Conditional Transactions operate as a separate pilot, through this filing the Exchange seeks to incorporate those provisions into the New Model pilot through proposed NYSE Rule 104(g)(i)(A); *see* July 17th e-mail, *supra* note 3.

[120] The Exchange will propose in a separate filing to the Commission to reduce the order by order information sent to the DMM prior to the implementation of the changes sought herein. Pursuant to the proposal to be filed, the specialist's system employing algorithms will only have access to orders entering NYSE systems that are market orders or are limit orders that are priced at the current NYSE quote, in between the current NYSE quote or are at a price that goes through the opposite sid of the current NYSE quote.

entered on the Exchange, Floor Broker agency interest files or reserve interest as is disseminated to the public by the Exchange and shall receive such information no sooner than it is available to other market participants.

Although the DMM will no longer receive order by order information, there will continue to be certain times when human interaction is essential to market quality and maintaining a fair and orderly market. Specifically, the Exchange contemplates human interaction during opening and re-opening transactions, closing transactions, block transactions, gap quote situations and when trading reaches LRPs that would lock or cross the market, and thus requires a market maker.[121] DMMs will be responsible for choosing the price[122] and the executions of the orders at that price during those specific situations.

(F) DMMs Will Not Retain the Specialists' Negative Obligation

Given that after October 15, 2008, DMMs will not have access to information on an order by order basis the Exchange further proposes that DMMs not be subject to the negative obligation that currently applies to specialists. The U.S. equities markets have entered a uniquely competitive phase that involves many players—upstairs liquidity providers, multiple OTC dealers, crossing networks and Alternative Trading Systems, and even other national and regional exchanges, which compete through Unlisted Trading Privileges ("UTP") and dual listings. Generally, the Exchange favors this kind of robust competition, which is exactly the type of competitive landscape that Congress envisioned when it overhauled financial market regulation in 1975 and gave the Commission the flexibility to define dealer obligations.[123] However, at the same time, the Exchange believes strongly that the changing market environment requires participants and regulators to re-examine and discard outmoded ways of thinking about trading and the markets. In particular, as the market has evolved, the Exchange has consistently argued that these changes in the marketplace warrant changes in the scope of the dealer obligation. The increased use of computer application and communication technology makes it difficult, if not impossible for any one market participant to have a time-and-place advantage over any other market participants. At the same time, the fragmentation of liquidity among multiple markets—and the algorithmic tools available to process and manage order flow across multiple markets—often means that the direction and extent of movements in Exchange-listed securities is influenced not by the market maker in the primary market, but by the increases in the average daily trading volume off the Floor, and by trading decisions made away from the Floor.

The transformation of the equities markets in the United States have led the Exchange to conclude that the so-called negative obligation no longer makes sense, and should finally be eliminated entirely. It is an outmoded vestige of trading in a wholly different market environment and is unnecessary. Among other things, the negative obligation arose as a check on specialists, who were, as noted above, at the center of substantially all of the activity in a given security. In that environment, it made sense to require the specialist not to trade for his or her own account unless reasonably necessary to maintain depth of market or continuity of prices. By contrast, a hallmark of modern markets has been the increased dissemination of market information. The result has been a radical increase in market transparency, which gives all market participants, both on and off the Floor, a greater ability to see and react to market changes.

Given the market environment and the elimination of the control of order information by the proposed DMM, the Exchange believes that the imposition of a negative obligation on DMMs is unnecessary. Accordingly, the Exchange is proposing that beginning October 15, 2008, DMMs no longer be deemed to be the agent for orders on the Display Book.

Given that there would no longer be an agency function for the DMM, the Exchange is further proposing to rescind NYSE Rule 92(d)(6) (specialist after hours trading when there are unexecuted orders on the Display Book) as being inconsistent with the proposed responsibilities of the DMM. Moreover, the provisions of NYSE Rule 92 no longer apply to the DMM in general as DMMs will not be members that have knowledge of unexecuted customer orders.[124]

The Exchange further proposes to rescind NYSE Rule 92.15 because DMM algorithms will no longer receive order by order information before the order is posted to the Display Book and therefore will be incapable of generating quoting or trading messages based on knowledge of an incoming order. As such this provision of NYSE Rule 92 is unnecessary as it relates to DMM trading. The Exchange notes that the DMM algorithm will receive "Book State" information, which is the same information that is available to other market participants that subscribe to NYSE market data feeds, and shows aggregated displayed interest at various price points.

Notwithstanding that DMMs will not be agents for orders in Display Book, DMMs will continue to facilitate manual transactions on the Exchange. When DMMs are facilitating manual transactions, Exchange systems will provide DMMs the total volume of all orders eligible to participate (*i.e.*, not including Non-displayed Reserve Orders and aggregated Floor broker agency interest designated DND) in the transaction. Those orders will be aggregated by the Exchange system and

[121] *See* Proposed NYSE Rule 104(a)(2)–(5).

[122] In an opening and reopening trade, Display Book will verify that all interest that must be executed in the opening or reopening can be executed at the price chosen by the DMM. If all the interest that must be executed in the transaction cannot be executed at that price, the Display Book will block the execution. In addition, when executing blocks (10,000 shares or more or value of $200,000 or more), trading out of a gap quote situation or an LRP that locks or crossed the market, the Display Book may adjust the execution price if there is enough interest on the Display Book to complete the transaction at a better price.

[123] In 1975, Congress eliminated the negative obligation clause from Section 11(b) in connection with the 1975 amendments to the Act. *See* Securities Acts Amendments of 1975 ("1975 Amendments"), Public Law No. 94–29, 89 Stat. 97. At that time Congress gave the Commission the flexibility to define dealer obligations for both exchange members and over-the-counter market makers. In making the changes, Congress noted that changes in the marketplace might warrant changes in the scope of the dealer obligation:

> It might well be that with active competition among market makers and the elimination of trading advantages specialists now enjoy, such a restriction on specialists' dealings would become unnecessary. Because trading patterns and market making behavior in the context of a national market system cannot now be predicted, it appears appropriate to expand the Commission's rulemaking authority in this area so that the Commission may define responsibilities and restrict activities of specialists in response to changing market conditions S. Rep. No. 94–75, at 100 (1975).

[124] It is for this reason that the Exchange further proposes to delete NYSE Rule 104.10(5)(c)(II)(ii) and 104.10(5)(c)(II)(iii) that restrict the specialist's ability to effect principal purchases of a specialty security in another market center based on the concept of the specialist as a "holder" of orders. The Exchange further proposes to delete the last sentence of NYSE Rule 127(d)(3) because it too restricts trading based on the premise that the specialist is the "holder" of orders. DMMs will no longer serve this function and thus the Exchange proposes to delete the sentence from NYSE Rule 127(d)(3) that reads as follows:

> As provided in Rule 92, the specialist may not retain any stock for his or her own account obtained at a price at which he or she holds executable, but unfilled, orders.

shown to DMMs as available interest eligible to participate in the manual execution. With this tool, DMMs will have the necessary information to appropriately price the opening (re-opening) transaction, the closing transaction and trade out of GAP quote and LRP locking and crossing the market situations. DMMs will not have access to such information on an order by order basis as Exchange specialists do today.

(G) DMMs Interest for Quoting and Trading

Although DMMs will no longer be restricted by a negative obligation, DMMs will be responsible to commit capital in order to add liquidity to the market when there is little or no liquidity, bridging the gap between supply/demand by purchasing when no one else is buying or selling when no one else is selling as part of their responsibility to maintain a fair and orderly market.

To assist DMMs in meeting their market making responsibilities, DMMs will be permitted to maintain systems that employ algorithms to make trading and quoting decisions ("DMM Interest") on behalf of each DMM.

DMM Interest will be permitted to: (i) Supplement the size of the existing Exchange BBO; (ii) maintain displayed and non-displayed DMM Interest, as described more fully below; (iii) layer interest at varying prices outside the Exchange BBO; (iv) partially or completely fill an order at the Exchange BBO or at a sweep price; (v) trade at and through the Exchange BBO; (vi) trade in a sweep transaction; (vii) provide price improvement; and (viii) match better bids and offers published by other market centers where automatic executions are immediately available.

Exchange systems will prevent DMM Interest from executing against itself, *i.e.*, executing wash trades. The Display Book will ignore any DMM Interest on the opposite side of the arriving marketable DMM Interest and exclude such DMM Interest from the trade. Further, to prevent the excluded DMM Interest from rebidding through the last sale, Exchange systems will cancel the DMM Interest that was excluded in the execution.

DMM Interest will be capable of trading at and through the Exchange BBO in a sweep trade. In those instances where arriving DMM Interest will be priced and sized such that it is able to trade at and then through the Exchange BBO and the *only* interest represented in the Exchange BBO is DMM Interest, the arriving DMM Interest is incapable of trading because that would constitute a wash sale. In those instances, Exchange systems will once again exclude the DMM Interest at the Exchange BBO and proceed to sweep the Display Book at prices through the excluded DMM Interest. Exchange systems will then cancel the DMM Interest that was excluded and re-quote the new best interest.

(H) DMMs Capital Commitment Schedule

In addition to DMM Interest, DMMs will be permitted to transmit to the Display Book additional liquidity that the DMM is committed to provide at specific price points. This liquidity, known as the DMM Capital Commitment Schedule ("CCS"), will provide the Display Book with the amount of shares that the DMM is willing to trade at price points outside, at and inside the Exchange BBO. CCS is separate and distinct from the DMM Interest. DMM algorithms will be enabled to send the Exchange this schedule of additional non-displayed trading interest. The Exchange anticipates that this will create increased opportunities for price improvement on the Exchange.

CCS interest can be accessed by the Exchange's systems in two ways, depending on whether an incoming order is between the spread, or at the NYSE BBO. When an order is entered, the Exchange's system will review all the liquidity available on the Display Book including CCS interest and will determine the price at which the full size of the order can be satisfied (the "completion price"). Exchange systems determine the completion price by calculating the unfilled volume of the contra side order (*i.e.*, the volume of the contra side order that exceeds the volume available to execute against it that is then present in the Exchange bid or offer) and reviewing the additional displayed and non-displayed interest available in the Display Book, which may be at more than one price point, including the CCS interest submitted by the DMM unit that is available at the completion price if the CCS interest were to participate at the completion price, and any protected bids or offers on markets other than the Exchange ("away interest") to determine the price at which the remaining volume of the contra side order can be executed in full.

Exchange systems will then review the amount of liquidity offered by the CCS to determine if the number of shares provided via the DMM's CCS at the completion price is less than the number of CCS shares provided at the next different price that has interest that is one minimum price variation ("MPV") (as that term is defined in Exchange Rule 62 [125]) or more higher (in the case of an order to sell) or at the next different price that has interest that is one MPV or more lower (in the case of an order to buy) (hereinafter collectively referred to as "better price"). If the volume of CCS interest that would be accessed is the same at the completion price and the better price, the CCS interest will participate at the completion price with CCS interest yielding to any other interest in Exchange systems at the completion price.

If the number of shares that would be allocated to the DMM CCS interest at the better price is more than the number of shares that would be allocated to the DMM's CCS interest at the completion price, then the order will be executed at the better price with CCS interest yielding to any other interest in Exchange systems at the better price. Any remaining balance of the incoming order will be executed at the completion price against displayable and non-displayable interest pursuant to NYSE Rule 72.

A DMM's CCS interest may only participate once in the execution of an incoming order. As such, CCS interest that may exist at the completion price is ineligible to trade with any remaining balance of the incoming order if the DMM's CCS interest was included in the execution of any portion of such order at the better price.

Any DMM interest included in the displayed quantity and non-displayed quantity will be executed pursuant to NYSE Rule 72.

For example, an order to sell 100,000 at the market is entered into Exchange systems. The bid price is $50.02. The Display Book has the following available interest:

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[125] Pursuant to NYSE Rule 62, the minimum price variation is currently one cent ($0.01) except that with respect to equity securities trading on the Exchange at a price of $100,000 or greater, the minimum price variation shall be ten cents ($0.10).

Price	Displayable interest	Reserve interest [126]	CCS
$50.02	5,000	10,000	10,000
$50.01	5,000	20,000	15,000
$49.99	10,000	10,000	25,000
$49.98	5,000	20,000	15,000

The system has determined that the completion price based on the available liquidity [127] will be $49.98. At the completion price of $49.98 the DMM's CCS interest is 15,000 shares; however, at the better price of $49.99 the DMM's CCS interest is 25,000 shares. Exchange systems will therefore, execute 15,000 shares of the sell order at the bid price of $50.02, representing the 5,000 shares available from displayable interest and 10,000 shares available from reserve interest. The displayable and reserve interest totaling 25,000 will be executed the price of $50.01. At the price of $49.99 Exchange systems will execute the 20,000 shares of the displayable and reserve interest and the 25,000 shares of CCS interest. The remaining 15,000 will be executed at the completion price of $49.98, representing 5,000 shares from the displayable interest and 10,000 shares from the reserve interest. In allowing CCS to participate in this manner, the incoming buy order receives price improvement on 25,000 shares of its order by executing that amount at the better price of $49.99.

In the event the number of shares to be allocated to the DMM's CCS Interest at the better price is less than the number of shares to be allocated to the DMM's CCS Interest at the completion price, then the DMM CCS Interest will participate at the completion price with CCS interest yielding to any other interest in Exchange systems at the completion price. For example, an order to sell 100,000 shares at the market is entered into Exchange systems. The bid price is $50.02. The available liquidity on the Display Book however, is now as follows:

Price	Displayable interest	Reserve interest [128]	CCS
$50.02	5,000	10,000	10,000
$50.01	5,000	10,000	15,000
$49.99	10,000	10,000	15,000
$49.98	5,000	20,000	25,000

In this example, the CCS Interest will be executed at the completion price of $49.98 because it is greater than the CCS interest available at $49.99. Exchange systems will execute 15,000 shares of the order at the bid price of $50.02 (5,000 shares displayable interest and 10,000 shares reserve interest). An additional 15,000 shares will be executed at $50.01 (5,000 shares displayable interest and 10,000 shares reserve interest). The 20,000 shares of displayable and reserve interest will be executed at $49.99. The remaining portion of the sell order (50,000 shares) will be executed against the 50,000 shares (5,000 shares displayable interest, 20,000 shares reserve interest and 25,000 CCS interest) available at the price of $49.98. In this case, the CCS model allows the incoming sell order to be filled at the price of $49.98 through the available CCS interest at that price, whereas, without CCS interest, part of the order would have received a price inferior to $49.98.

A DMM's CCS interest inside the Exchange BBO will be accessed by Exchange systems to provide price improvement to incoming orders and to match better-priced bids and offers if available on away market centers. DMMs will not be required to be represented in the bid or the offer in order to provide price improvement interest.

Pursuant to proposed NYSE Rule 1000(e), CCS interest may trade inside the Exchange BBO with interest arriving in the Exchange market that: (i) Will be eligible to trade at or through the Exchange BBO; (ii) will be eligible to trade at the price of interest in Exchange systems representing non displayable reserve interest of Reserve Orders and Floor broker agency interest files reserve interest ("hidden interest"); or (iii) will be eligible to route to away market interest for execution if the total volume of CCS interest, plus d-Quote interest in Floor broker agency interest files, plus any interest represented by hidden interest would be sufficient to fully complete the arriving interest at a price inside the Exchange BBO. The Display Book will determine the price point inside the Exchange BBO at which the maximum volume of CCS interest will trade, taking into account the volume, if any, available from d-Quotes and hidden interest. The arriving interest will then be executed at that price, with all interest (CCS, d-Quote, non-displayed reserve interest) trading on parity.[129] Any reserve interest of the DMM that is also eligible to trade at the price inside the Exchange BBO at which the CCS interest will participate will be aggregated with the DMM's CCS interest at that price when the trade execution is allocated.[130] In this manner, an incoming order may be executed at

[126] These quantities assume there is no DMM interest represented in the aggregate reserve quantity available on the Display Book. If there were such DMM interest, that interest would be able to trade irrespective of where the DMM's CCS interest trades. The example further assumes that there is no better priced interest at another market center. In the event there is interest available at other market centers that is a "protected quotation" as provided in Reg. NMS, Exchange systems will ship orders to satisfy the Exchange's obligations with respect to such protected quotations. *See generally*, Rule 611 of Reg. NMS.

[127] The available liquidity is determined by adding the sum of 15,000 shares of displayed and non-displayed interest at the price point of $50.02, the sum of the 25,000 shares of displayed and non-displayed interest at the price point of $50.01, the sum of the 20,000 shares of displayed and non-displayed at the price point of $49.99 and the sum of the 25,000 shares of displayed and non-displayed at the price point of $49.98 and the CCS interest at $49.98 for a total of 100,000 shares.

[128] These quantities assume there is no DMM interest represented in the aggregate reserve quantity available on the Display Book. If there were such DMM interest, that interest would be able to trade irrespective of where the DMM's CCS interest trades.

[129] An explanation of how the parity allocation of executions will be accomplished is provided in the text of subsection (d)(2) of Proposed New Market Model Section.

[130] *See* July 16th e-mail, *supra* note 101.

multiple price points in between the quote against d-quotes, Non-Displayed Reserve interest of all participants and CCS interest. However, CCS interest may only participate once if more than one execution is required to fill the order.

(2) *Floor Brokers*

Along with rules addressed to DMMs, the Exchange is proposing changes to existing rules that apply to Floor brokers.

(A) Elimination of Percentage Orders

The Exchange proposes to amend NYSE Rule 13 and to delete NYSE Rules 70.25(d)(i)(A), 123A.30 and 1000(d)(2)(D) to rescind percentage orders as an acceptable order type on the Exchange. As a result of these proposed amendments, Floor brokers will no longer be permitted to enter CAP–DI orders. In place of this order type, the Exchange intends to provide Floor brokers access to algorithmic technology that will replicate the trading strategy achieved by the use of CAP–DI orders through the Floor broker's handheld electronic device.

The Exchange believes that this change is necessary to improve the efficiency of the Display Book. The current processing of CAP–DI orders impedes the efficiency of the Display Book for a number of reasons. Among other things, CAP–DI orders require the system to monitor and calculate many variables including when the CAP–DI order is eligible for conversion and execution; for each individual execution the system must calculate the number of shares the CAP–DI order is entitled to act dynamically update the remaining quantity of the order until the CAP–DI order is executed in full. Moreover, because CAP–DI orders are now executed in tandem with executions for the specialist account the system is also required to monitor and calculate this information for additional executions.

In addition, system efficiency is affected by the fact that CAP–DI orders may be passively converted. The process of passively converting CAP–DI orders impedes the specialist's ability to function efficiently in an automated market because the specialist must manually complete the passive conversion. The increase in the speed of trading and the delay inherent in requiring the DMM to manually passively convert CAP–DI orders is inconsistent with the Exchange's proposed more electronic model.

(B) d-Quote Trading with Non-Marketable IOC Orders and at the Open and Close

The Exchange further proposes to amend NYSE Rule 70 to enhance the functionality of the Floor broker d-Quote to increase the liquidity available for executions on the Exchange. Specifically, the Exchange proposes to allow d-Quotes to partially or completely fill a non-marketable immediate or cancel order ("IOC") which includes NYSE IOC, Reg. NMS IOC and an Inter-market Sweep Order ("ISO")[131] that are within the d-Quotes discretionary range.[132]

In allowing the d-Quote to interact with a non-marketable IOC, the Exchange seeks to provide the IOC an opportunity to receive a partial or complete execution. In instances where the d-Quote only partially completes the order, the remaining portion of the non-marketable IOC will be automatically and immediately cancelled.

To further increase the liquidity available at the opening and closing transaction, the Exchange additionally proposes to amend NYSE Rule 70.25(a)(ii) to allow d-Quotes to be active in the opening and closing transactions which will allow a d-Quote to execute up to its maximum amount of discretion.

(C) Floor Broker Interest Published to OpenBook

The Exchange proposes to have Floor broker interest not designated DND published to OpenBook system at every price point. The displayable portions of Floor broker interest designated DND will only be included in OpenBook when such interest is at the Exchange BBO. Floor broker agency interest employing Non-Displayed Reserve functionality, as described further below, will not be included in OpenBook. The Exchange believes that including this interest in OpenBook will benefit customers by providing its customers with a fuller view of the liquidity available on the Exchange.

(d) Changes to NYSE Order Types and Order Processing

(1) Additional Undisplayed Liquidity

Floor brokers, Off-Floor participants and DMMs will continue to have the ability to maintain reserve liquidity on the Exchange; however, the NYSE proposes to modify each participant's ability to provide reserve interest. As a threshold matter, the Exchange intends to amend NYSE Rule 13 to refer to all undisplayed Off-Floor interest as "Reserve Orders." Within that broad category, the Exchange proposes to create two types of reserve interest, "Minimum Display" and "Non-Displayed Reserve."[133]

(A) Minimum Display Orders

"Minimum Display Order" would require that a portion of the shares in the order, a minimum of one round lot, be designated for display and the Exchange would provide Floor brokers and DMMs with equivalent functionality (collectively "Minimum Display Interest"). Each time a Minimum Display Reserve Order is replenished from reserve interest, a new time-stamp is created for the replenished portion of that Minimum Display Reserve Order, while the remaining reserve interest retains the time-stamp of its original entry.

Minimum Display Interest will participate in manual executions. Exchange systems will include all Minimum Display interest in the aggregate order information available for execution at a price point when the DMM facilitates a manual transaction. The Minimum Display Interest will not be identifiable but will be included, where eligible, in any resulting execution.

The Exchange further proposes that the aggregate interest of Minimum Display Interest be included in the aggregate interest available to be seen by the DMM in order to provide information about orders available in Exchange systems for response to a Floor broker's market probe request pursuant to NYSE Rule 115.

Currently, during a manual execution, Floor broker DND reserve interest that has a displayed quantity and Reserve Orders pursuant to NYSE Rule 13 are included in the aggregated order information displayed to the specialist only during manual executions (*e.g.*, the opening and closing trade on the Exchange, resuming trades after a LRP is reached, or during a gap quote situation). Pursuant to Exchange Rule 70.20(h),[134] access to the Display Book

[131] *See* NYSE Rule 13. By their definition, these order types are never quoted but must be automatically executed. Any remaining unfilled portion is immediately and automatically cancelled. Non-marketable IOC orders are immediately and automatically cancelled.

[132] *See* Proposed NYSE Rule 70.25(d)(ix).

[133] Through this filing, the Exchange proposes to make permanent NYSE Rule 13 governing Reserve Orders. The Exchange further proposes conforming amendments in proposed NYSE Rules 70(e) and 104 to provide Floor brokers and DMMs with equivalent functionality.

[134] NYSE Rule 70.20(h)(ii) provides, "Specialists, trading assistant and anyone acting on their behalf are prohibited from using the Display Book system to access information about Floor broker agency interest excluded from the aggregated agency

system for information on reserve interest is only for the purpose of effecting transactions that are reasonably imminent. The Exchange proposes to amend NYSE Rules 13, 70.20 and 115 to include as eligible information a DMM may provide, all Minimum Display Order Interest in response to a Floor broker's market probe request. Specifically, the Exchange proposes to amend NYSE Rules 13 and 115 to specifically state that the aggregate interest of the proposed "Minimum Display Order" will be included in the information disseminated pursuant to NYSE Rule 115.

Pursuant to NYSE Rule 115(iii) a specialist may provide information about orders contained in the Display Book, referred to also as a market probe, "* * * to provide information about buying or selling interest in the market, including aggregated buying or selling interest contained in Floor broker agency interest files other than interest the broker has chosen to exclude from the aggregated buying and selling interest in response to an inquiry from a member conducting a market probe in the normal course of business."

The Exchange further proposes to amend NYSE Rule 70.20(h)(ii) to remove the prohibition against specialist's ability to provide information about Floor broker reserve interest. The Exchange proposes that all Floor broker interest not designated DND be included in the information eligible for dissemination pursuant to NYSE Rule 115.

(B) Non-Displayed Reserve Orders

In addition to Minimum Display Interest, the Exchange further proposes to provide all market participants with the ability to maintain completely non-displayed interest. This proposed type of reserve interest for all market participants will not have any of the order designated for display. The Exchange proposes to create the "Non-Displayed Reserve Order" for Off-Floor participants and provide Floor brokers and DMMs with equivalent functionality.

Non-Displayed Reserve Orders will not be included in the information available to the DMM for manual execution.

Floor brokers may also utilize Non-Display Reserve functionality to enter reserve interest. If the Floor broker uses this functionality, there is no interest displayed in the published quotation, but the interest will be eligible for manual executions because the DMM has the ability to view the Floor broker agency interest in the aggregate. Floor broker agency interest file reserve interest may also be designated as "Do Not Display" ("DND"), meaning such interest will not be available to the DMM for manual executions. As such, Non-Displayed Reserve Order and Floor broker Non-Display functionality designated DND will not participate at the open or the close, during a gap quote situation or when a manual execution is required to trade out of an LRP that locks or crosses the market. Therefore, these types of interest may be executed at an inferior price, and will not be protected in any manual trade—at the choice of the customer.

DMM interest employing Non-Displayed Reserve functionality will, however, be eligible to participate in a manual transaction.

Off-Floor participants that want to have non-displayed liquidity participate in a manual transaction will be required to send a Minimum Display Order. Similarly, Floor brokers that choose to have non-displayed liquidity participate in a manual transactions must not designate such interest DND.

(2) Execution of Bids and Offers

The Exchange believes that the changes proposed herein create a market model where all participants have the ability to compete. As such, the Exchange proposes to amend NYSE Rule 72 to provide to all market participants the ability to receive executions on an equal basis ("parity") with other interest available at that price.[135] Individual Floor brokers and the DMM registered in the security shall each constitute a single market participant. All Off-Floor orders entered in Exchange systems at the Exchange BBO shall together constitute a single market participant ("Off-Floor Participant") for the purpose of share allocation. Specifically, unlike the current specialists, who must yield to all off Floor interest, DMM Interest at any price point will no longer be restricted in its ability to receive shares during an execution and no longer would be required to yield to any Off-Floor interest.

(A) Priority and Parity for Setting Interest

Proposed NYSE Rule 72 would modify the concept of priority to provide that where there is more than one bidder (offerer) participating in an execution and one of the bids (offers) was established as the first made at a particular price and such bid or offer is the only interest when such price is or becomes the best bid or offer published by the Exchange (the "Setting Interest"), that the displayed portion of such Setting Interest is entitled to priority. In order to qualify as Setting Interest, it must have been the *only*[136] interest quoted at a price. Only the *quoted* (*i.e.*, displayed) portion of the Setting Interest is entitled to priority ("Priority Interest").

Exchange systems will be responsible for share allocation and thus will create interest files for each market participant.

Exchange systems will allocate the first 15% of any execution (a minimum of one round lot)[137] at that price to the Priority Interest. For the remainder of that execution, Setting Interest will receive executions on parity with other interest available at that price. Exchange systems will repeat the allocation logic for the Setting Interest until the Priority Interest is completely executed. Any remaining non Priority Interest of the Setting Interest will be executed on parity.

The Exchange proposes to have Priority Interest retain its standing even if the Exchange BBO moves away from the price point. For example, assume that the DMM is established as the Setting Interest at $30.05 bid. A sell order is executed against the DMM's Priority Interest at $30.05 that does not completely execute the DMM's Priority

interest other than for the purpose of effecting transactions that are reasonably imminent where such Floor broker agency interest information is necessary to effect such transaction."

[135] The amendments proposed herein apply only to round-lot executions. Odd-lot executions will continue to be executed in the Odd-lot system and priced pursuant NYSE Rule 124. The DMM will act as the contra to all odd-lot executions as specialists do currently. The Exchange also proposes to delete NYSE Rule 123A.22 as it is no longer applicable because odd-lot orders are automatically executed in the Odd-lot system. In addition, conforming amendments are proposed to NYSE Rule 70.20 (a) to remove text pertaining to restrictions on a specialist's ability to trade on parity. In addition, the Exchange proposes to remove text in NYSE Rule 70.20(b) that refers to precedence based on size. The Exchange also proposes conforming amendments to NYSE Rule 108 subparagraphs (a) and (b) to remove language that discusses restrictions to parity and precedence based on size.

[136] If, at the time of quoting, Non-Displayed Reserve Orders or Floor broker and DMM interest employing Non-Displayed Reserve Functionality exist at the price point along with a single order or quote that has a published quantity, the single order will be deemed to be a setting order even if the Hiden Reserve Orders and Floor broker and DMM interest employing Hiden Reserve Functionality arrived first. In addition, if prior to quoting, there are two orders at the price point and one of those orders cancels, the remaining order that is the only interest quoted at the price is conspired the Setting Interest. *see* Proposed Rule 72(a)(ii); *see* also July 17th e-mail, *supra* note 3.

[137] All allocations will be done on a round lot basis. If 15% would result in the Priority Interest receiving a mixed lot, Exchange systems will round up to the nearest round lot.

Interest. The Exchange best bid then moves to $30.07. If the Exchange best bid again becomes $30.05 on that day, the remaining portion of the DMM's Priority Interest will again receive the first 15% of any subsequent execution at the $30.05 bid until the DMM's Priority Interest is executed or cancelled, trading in the stock is halted or the trading session ends.

Partial cancellations will count first against the non Priority interest of any Setting Interest. All allocations to the Setting Interest will be decremented from the Priority Interest first whether the allocation is based on priority or parity. Setting Interest may be executed on parity with no priority allocation if the quote moves to a better price point and thereafter an incoming order exceeds the shares available for execution at the newly established Exchange BBO. In those instances, the Setting Interest will be executed on parity and the Priority Interest will be decremented first. For, example, assume that Customer X is established as the Setting Interest at a bid of $30.05. A sell order is executed against Customer X's Priority Interest at $30.05 that does not completely execute Customer X's Priority Interest. The Exchange best bid then moves to $30.07. A subsequent sell order is entered into Exchange systems to execute against the $30.07 bid that exceeds the number of shares available for execution at the $30.07 bid. There is bid interest at the price of $30.06. In order to complete the execution of the sell order, Exchange systems will execute the remainder of the order against all the available interest at the bid prices of $30.06 and $30.05. Customer X's Priority Interest will be executed with all other available interest at $30.05 on parity as if there was no Setting Interest.

Where there is more than one bidder (offerer) participating in an execution and none of the bids (offers) was established as the Setting Interest at a particular price, the shares will be allocated on parity.

(B) Priority and Parity in the Absence of Setting Interest

Where there is no Setting Interest, Exchange systems will divide the size of the executing order by the number of participants. The total number of shares to be allocated to each participant will be distributed equally among the participants where possible. Within the single Off-Floor Participant, shares executed will be allocated in order of time priority of receipt of Off-Floor Participant Interest into Exchange systems. Executions will be allocated in round-lots. In the event the number of shares to be executed at the price point is insufficient to allocate round lots to all the participants eligible to receive an execution at the price point, the Exchange systems will create an allocation wheel of the eligible participants at the price point and the available shares will be distributed to the participants in turn.

On each trading day, the allocation wheel for each security is set to begin with the participant whose interest is entered or retained first on a time basis. Thereafter, participants are added to the wheel as their interest joins existing interest at a particular price point. If a participant cancels his, her or its interest and then rejoins, that participant joins as the last position on the wheel at that time.

Thus, if Display Book has displayed two bids from Off-Floor Participants for a total volume of 200 shares, the DMM and three Floor brokers are bidding at the same time for 100 shares each, Exchange systems will divide an execution among the participants as explained below.

Order #1 100 shares & Order #2 100 shares	Book participant
DMM 100 shares	Participant A.
Floor Broker 1 100 shares	Participant B.
Floor Broker 2 100 shares	Participant C.
Floor Broker 3 100 shares	Participant D.

In instances where the shares to be executed are insufficient to split among Participants, the distribution of shares will be executed serially. For example, a market order for 300 shares to sell entered in Exchange systems will allocate 100 shares to Book Participant Order #1, Participant A and Participant B. Subsequently, another order to sell 300 shares at the same price is received by Exchange systems. Those shares will be allocated to Participant C, Participant D, and Order #2 Book Participant.

Non-Displayed Interest at price points between the Exchange BBO will also trade on parity. Thus non-marketable orders that are priced in between the Exchange BBO will be eligible to be executed against all non-displayed interest in Exchange systems at those price points. The total number of shares to be allocated will be distributed based on parity.

The Exchange further proposes to change its overall allocation logic to require that for all executions, at the Exchange BBO or outside the Exchange BBO, the displayable bids (offers) shall trade first with orders to sell (buy). In the event that all displayable interest is completely executed at the price point and there is non-displayable interest available for execution at that price point, the remainder of the incoming order will be executed against the non-displayable bids (offers) at the price point. The non-displayable bids (offers) will trade on parity with the orders to sell (buy) at the price point.

(e) Additional Amendments

In addition to the substantive amendments discussed above, the Exchange proposes to make certain conforming amendments. Where applicable, the word "specialist" is proposed to be changed to "DMM," "specialty stock" changed to "registered security" and related conforming changes throughout the NYSE Rulebook.

The Exchange further proposes to amend NYSE Rule 7 to delete the term "Exchange Ticket" and define the Exchange BBO as the best bid and offer disseminated by the Exchange to the Consolidated Quotation System.

Conforming amendments are proposed to NYSE Rule 35 in order to remove rule text that refers to "tickets" for entrance on the Floor and clarify that such entrance is subject to Exchange approval.

In NYSE Rule 46A "Executive Floor Governors" the Exchange proposes to change the word "consist" to "comprise" in order to provide greater clarity in the rule. The Exchange further proposes to amend the rule to allow supervising DMMs to serve in the capacity of an Executive Floor Governor.

Conforming amendments are proposed for NYSE Rule 52 in order to clarify that pre-opening indications are disseminated pursuant to NYSE Rule 15 ("Pre-Opening Indications").

The Exchange proposes to amend NYSE Rule 60 ("Dissemination of Quotations") to include the appropriate names for the divisions of the Exchange, include modified vocabulary, remove language relating to "liquidity bid" and "liquidity "offer" from paragraphs (d) and (e), and reflect the accurate citations for the federal securities laws referenced therein. For example, the Exchange proposes to amend references to "reported security" to use the term "NMS security." In addition, references to Rule 11Ac1–1 will be amended to refer to Rule 602 under Reg. NMS. A reference to the Exchange's Market Surveillance Division is proposed to be amended to refer to NYSE Regulation, Inc.[138] In addition, the Exchange proposes to make clear the role of Initiating Officials in the review of market conditions when a security is in

[138] The Exchange has proposed similar conforming amendments to NYSE Rules 36 and 460.

"non-firm mode."[139] Further, NYSE Rule 60 clarifies the role of Initiating Officials when the Exchange quotation is not available for automatic execution.

NYSE Rule 79A.15(6) is proposed for deletion as "all or none" orders are no longer valid order types on the Exchange. Similarly, NYSE Rule 104A.20 (Specialists exchanging names) and 104A.30 (Specialists "stopping" stock on book) are proposed for deletion. These provisions relate to practices that were utilized when the Exchange had a system of competing specialists. Neither of these practices currently occurs on the Exchange.

The Exchange further proposes to amend NYSE Rules 61, 118.30, 122, 123B, 123C, 902, 904 and 906 to reflect that orders are entered on the Exchange or transmitted to the Display Book rather than presented to the specialist.

NYSE Rule 63.10 will be amended to remove the phrase "in the hands of the specialist and odd-lot dealers," as that phrase no longer accurately reflects the Exchanges current more electronic trading environment. Similarly, NYSE Rule 79A.15 ("Miscellaneous Requirements on Stock Market Procedures") will be amended to substitute the phrase "Exchange BBO" for "specialist's bid or offer" and to make conforming changes. The Exchange further proposes to delete the procedures described in NYSE Rule 79A.20, as the procedure described is no longer used. The Exchange proposes to amend current NYSE Rule 70 ("Bids and Offers") to have the title more accurately reflect the subject matter of the rule. As such, it is proposed that NYSE Rule 70 be titled "Execution of Floor Broker Interest." The Exchange further proposed to move the first two paragraphs of NYSE Rule 70 and Rule 70.10 to NYSE Rule 71 ("Precedence of Highest Bid and Lowest Offer") as the Exchange believes the subject matter in those paragraphs (establishing bids and offers) is more properly addressed in that rule.

NYSE Rule 85 "Cabinet Securities" is proposed for deletion as the Exchange no longer has securities dealings by means of cabinets.

Conforming changes are proposed to NYSE Rule 123A.71 to change the word "specialist" to "members." NYSE Rule 123A.72 is proposed for deletion because that rule served only to make NYSE Rule 123A.71 applicable to Floor brokers and the proposed amendment to NYSE Rule 123A.71 makes it unnecessary.

The Exchange further proposes to delete Supplementary Material .22 of NYSE Rule 123A as there are no longer odd-lot brokers operating on the Exchange. NYSE Rule 123A.25 ("Standard Machine Order Forms") is also proposed for deletion as it is no longer applicable in the current automated trading environment. Moreover, NYSE Rules 123D subparagraph (1) and 299A subparagraph (2) are also proposed for deletion because DMMs will, similar to current specialists, not be allowed to "stop" stock.[140]

The Exchange further proposes to amend NYSE Rule 91 ("Taking or Supplying Securities Named In Order") to delete Supplementary Material .20, because the Exchange will no longer have specialists. NYSE Rule 91.20 under Supplementary Material provides for the executions as principal of orders for accounts carried or serviced by specialist organizations. The Exchange does not propose to allow DMM units to carry or service customer accounts and therefore this portion of the rule is proposed for deletion.

In addition to designating current Rule 104 as Rule 104T and making conforming changes, the Exchange proposes a number of clarifications to describe changes to the text of the Rule. In Rule 104(b)(iii)(B), the exchange proposes to replace "published best bid or offer" with the defined term "BBO," when referring to the Exchange published best bid or offer. Similarly, the Exchange proposes to replace "best bid and offer" with "BBO" in Rule 104(c)(viii). In NYSE Rule 104T (b)(i) and (d)(i), the Exchange proposes to clarify that DMMs may have reserve interest at the Exchange best bid or offer by substituting the word "or" for "and" in the phrase "Exchange best bid and offer."

Conforming amendments to sections (9) (a) and (b) of Rule 440G (Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations) are proposed.

Conforming amendments are proposed to NYSE Rule 1000 in order to reflect that the order size eligibility, on the Exchange is up to a maximum of 6,500,000 shares.

(f) Implementation Schedule

The proposed amendments herein require the Exchange to make significant modifications to Exchange systems. Such modifications must be done over time. The Exchange therefore proposes that amendments approved herein be implemented over time pursuant to the schedule outlined below.

(1) Non-Pilot Rules

The Exchange proposes that upon Commission approval of the instant filing, that the amendments to NYSE Rules 13 be permanent rules of the Exchange. Specifically, the establishment of Reserve Order types on the Exchange and the rescission of CAP orders as viable order types on the Exchange would be approved established as permanent changes to the NYSE rulebook. Similarly, all conforming changes to other Exchange rules to all Floor brokers and DMMs to use equivalent reserve order functionality are established as permanent changes to the NYSE rulebook.

In addition, the Exchange proposes that amendments to NYSE Rules 2 and 103 establishing the DMMs and DMM units be also approved as permanent changes to the NYSE rulebook.

The Exchange further proposes that upon Commission approval of the instant filing that amendments to NYSE Rule 70 that: (i) Allow for the publication of Floor broker interest to Open Book; (ii) provide for the availability for additional liquidity on the Exchange by allowing d-Quote instructions to be active during the open and close; and (iii) offer additional opportunities for price improvement by allowing d-Quotes to trade with non-marketable IOC orders be approved as a permanent change to the NYSE rulebook.

(2) Pilot Rules

The Exchange further proposes to commence the New Model Pilot, subject to Commission approval, at which time, proposed NYSE Rule 72 and proposed NYSE Rule 104T will become effective.[141] The New Model Pilot will operate for a period of approximately one year and will be scheduled to end on September 1, 2009 or such earlier time as the Commission may determine to make the New Model Pilot rules permanent.

During the operation of the New Model Pilot, all market participants will have the ability to receive executions on an equal basis ("parity")[142] with other interest available at that price. It is anticipated that until October 14, 2008, DMMs will still receive order information about orders that are at or between the Exchange quote. DMMs must abide by their affirmative

[139] *See* July 17th e-mail, *supra* note 3.

[140] *See* July 16th e-mail, *supra* note 101.

[141] Proposed NYSE Rule 104T will operate until October 14, 2008.

[142] "Parity" refers to the allocation of shares in an execution on an equal basis among all participants to a transaction. A fuller description of parity is included in subsection (d)(2) of Proposed New Market Model.

obligations, meeting his or her requirements to maintain displayed bids and offers at the NBBO and re-enter liquidity pursuant to NYSE Rule 104T. Beginning October 15, 2008, DMMs will no longer be subject to a negative obligation.

Commencing on October 15, 2008, NYSE Rule 104T will cease operation and new NYSE Rule 104 will supersede it. As of October 15, 2008 the DMM will no longer receive any order by order information. DMMs will then be permitted to transmit CCS interest to the Display Book to trade at price points outside, at, and inside the Exchange BBO. The new Rule 104 and the portions of Rule 1000 relating to CCS interest of DMMs are subject to the Pilot that is scheduled to run until September 1, 2009.

During the operation of the New Model Pilot, the Exchange is committed to providing the Commission's Division of Trading and Markets and the Office of Economic Analysis with statistics related to market quality, trading activity, and sample statistics as requested by the Commission.

(g) Conclusion

The Exchange believes that the New Model will allow the Exchange to further enhance the speed of execution currently enjoyed by Exchange customers in the current more electronic trading environment on the Floor while providing the additional anonymity of execution sought by market participants.

The Exchange believes that the proposed modifications will provide a trading environment where market participants are competing on more equal footing relative to their responsibilities to the market. In providing certain functionality to one market participant and not another the Exchange acknowledges the reality that a level playing field is not created by treating unlike participants the same. DMMs, Floor brokers and Off-Floor participants do not have the same responsibilities to the market.

A DMM's ability to trade is constrained by his or her responsibility to cushion market volatility and to replenish liquidity when the DMM trades for his or her own account to establish or increase a position by reaching across the market to trade with the Exchange's published bid or offer. Similarly the Floor broker is constrained in his or her ability to trade for his or her account at the point of sale pursuant SEC Rule 11(a) described above. None of these responsibilities is imposed on the Off-Floor participant. Off-Floor participants are therefore able to trade unfettered by the constraints of market responsibilities.

However, DMMs, Floor brokers and Off-Floor participants have access to the same market information, although in certain instances Off-Floor participants may be privy to information available about an order that is being "shopped" off the Floor. Moreover, armed with equal information, in certain instances more than DMMs and Floor brokers, the Off-Floor participant uses a computer program for entering orders that employs an algorithm to decide the venue, timing, price, or even the final quantity of the orders to be sent to the market center for execution. In this manner, Off-Floor participants are able to break up a large trade into several smaller trades to manage their risk by having little to no market impact. The Exchange submits that a significant portion of executions on equities markets are the result of the use of algorithms.

The Exchange further submits that the proposed New Model will allow the Exchange to continue to provide a quality market that maintains a competitive market maker responsible for providing liquidity to the market when there is a recognized need for additional liquidity. DMMs will bridge the gap between supply/demand by purchasing when no one else is buying or selling when no one else is selling and by overall maintaining a fair and orderly market.

The New Model will allow the Exchange to maintain the element of human judgment that is particularly valuable in less liquid securities, at openings (re-openings), closings, and in order to trade out of Gap quote and LRP situations that would lock and cross the market. The Exchange further believes that the New Model will allow the Exchange to continue to make quality markets in securities during times of uncertainty, such as when an earnings surprise, news, or an outside event leads to market volatility and/or instability. In these situations, DMMs will act as a liquidity provider to reduce volatility, thus stabilizing prices, and maintaining a fair and orderly market that is the hallmark of the NYSE.

2. Statutory Basis

NYSE believes that the proposed rule change is consistent with Section 6(b) of the Act [143] in general, and the requirement in Section 6(b)(5) of the Act,[144] in particular, that the rules of an exchange be, among other things, designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes the proposed rule change is consistent with these principles in that it seeks to assure economically efficient execution of securities transactions, make it practicable for brokers to execute investors' orders in the best market and provide an opportunity for investors' orders to be executed without the participation of a dealer. The Exchange further believes that the proposed New Model will increase the speed and efficiency of automatic execution on the NYSE and create a trading environment where market participants compete more equally.

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

The proposed amendments reflect significant changes to the structure of the Exchange's market. As such, there have been numerous valuable discussions with Exchange customers, members, and member organizations concerning the concepts underlying these proposals. Specifically, there have been discussions concerning the structure and functioning of the new market model received from various constituencies of the Exchange. For example, current specialists and specialist member organizations commented on the nature of the duties and responsibilities of the DMM in the new model through a review of the current duties and responsibilities of today's specialists. This resulted in several suggestions that were made part of proposed Rules 104 with respect to duties and obligations of DMMs, Rule 72 with respect to parity allocation of executions and amendments to Rule 1000 with respect to the functioning of the Capital Commitment Schedule interest to be entered by DMMs. Customers of the Exchange provided input on the proposed revisions to the Reserve Orders (Rule 13) and parity allocation of executions. In certain instances, member organizations have provided written comment to draft rule text. Where necessary, those comments

[143] 15 U.S.C 78f(b).

[144] 15 U.S.C. 78f(b)(5).

have been addressed in modifications to the original proposal.

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 NYSE consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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–NYSE–2008–46 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–46. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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–NYSE–2008–46 and should be submitted on or before August 13, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[145]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16823 Filed 7–22–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58175; File No. SR–Phlx–2008–12]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to an Exemption From Examination Requirements for Off-Floor Traders

July 16, 2008.

On April 14, 2008, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 Phlx Rule 604(e)(iii) to modify the category of persons who are exempt from the requirement that Off-Floor Traders[3] complete the Series 7 General Securities Registered Representative Examination ("Series 7"). On May 30, 2008, Phlx filed Amendment No. 1 to the proposed rule change.[4] The proposal was published for comment in the **Federal Register** on June 12, 2008.[5] The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

Phlx states that the Series 7 exemption meant to apply to persons who traded on its equity trading floor and were associated with either a specialist organization or a floor brokerage organization that executed orders on an agency basis ("Former Floor Participants"). When Phlx replaced its equity trading floor with XLE, an electronic trading system, certain persons became Off-Floor Traders by definition, and consequently subject to the requirement to pass the Series 7. Phlx did not intend for this category of persons to be subject to the Series 7 requirement. Therefore, Phlx proposed to exempt these persons from the Series 7 by expanding the exemption in Rule 604 to include Market Maker Authorized Traders (MMATs) and Off-Floor Traders who only handle and/or make trading decisions regarding agency orders and any bona fide errors related to those agency orders.

Phlx believes the proposed rule change will make the administration of the Series 7 requirements for Off-Floor Traders more efficient, because under the current rule, the exemption applies to persons "primarily engaged" in submitting orders to XLE or making trading decisions with respect to XLE, which requires the Former Floor Participant and the Exchange's enforcement staff to make a judgment call. Under the proposed rule, however, an XLE participant needs to register with the Exchange in order to be an MMAT, so the determination of MMAT status is straightforward. In addition, Phlx staff can examine what type of orders (agency or proprietary) Off-Floor Traders handle for net capital purposes and could identify whether Off-Floor Traders would qualify for the proposed exemption. Finally for the same reasons, the proposed rule change should improve Phlx's enforcement efforts, because Phlx and its members will be able to more easily determine which persons are subject to the Series 7 requirement.

After careful review of 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

[145] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Phlx Rule 604(e)(i) defines an off-floor trader as a "person who is compensated directly or indirectly by a member or participant organization for which the Exchange is the DEA [Designated Examining Authority], or any other associated person of such member or participant organization, and who executes, makes trading decisions with respect to, or otherwise engages in proprietary or agency trading of securities, including, but not limited to, equities, preferred securities, convertible debt securities or options off the floor of the Exchange."

[4] Amendment No. 1 replaced and superseded the original filing in its entirety.

[5] *See* Securities Exchange Act Release No. 57923 (June 4, 2008), 73 FR 33479 (June 12, 2008).

a national securities exchange.[6] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[7] which requires, among other things, that the rules of an exchange be 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. The Commission believes that this proposed rule change will better capture the floor-based activities of Former Floor Participants by focusing on the status of, or type of, activity performed by those persons. In addition, it should provide a clearer standard that should allow Exchange staff, as well as members and individuals, to better determine who is subject to the Series 7 requirement. This should make the administration, as well as compliance and enforcement, of the Series 7 requirement more efficient.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–Phlx–2008–12), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16758 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58179; File No. SR–Phlx–2008–31]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendments No. 1 and 2 Thereto, Relating to Changes to Phlx's Governing Documents in Connection With the Acquisition of Phlx by The NASDAQ OMX Group, Inc.

July 17, 2008.

I. Introduction

On April 21, 2008, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 in connection with the acquisition of the Exchange by The Nasdaq Stock Market, Inc., now known as The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). On April 29, 2008, the proposed rule change was published for comment in the **Federal Register**.[3] The Exchange filed Amendment Nos. 1 and 2 to the proposed rule change on May 30, 2008 and July 2, 2008, respectively.[4] The Commission received no comments on the proposed rule change.

This order provides notice of filing of Amendment No. 2 to the proposed rule change, and grants accelerated approval to the proposed rule change, as modified by Amendments Nos. 1 and 2.

II. Background

On November 7, 2007, NASDAQ OMX announced that it had entered into an agreement with the Exchange, pursuant to which NASDAQ OMX would acquire all of the common stock of the Exchange.[5] Phlx shareholders would receive cash consideration for their common stock and would not retain any ownership interest in the Exchange.

The proposed acquisition would be effected through the merger of Pinnacle Merger Corporation, Inc. ("Merger Subsidiary"), a Delaware corporation and wholly-owned subsidiary of NASDAQ OMX, with and into the Exchange, with the Exchange surviving the merger (the "Merger").[6] The members of the board of directors of Merger Subsidiary would be selected by NASDAQ OMX from among the current Governors of the Exchange and would become the Board of Governors of Phlx ("Board") immediately after the effective time of the Merger.[7] The Exchange represents that the directors of Merger Subsidiary, and therefore the new Board, would satisfy the compositional requirements of the new Board, discussed below.[8]

After the Merger, the Exchange would be a wholly-owned subsidiary of NASDAQ OMX.[9] NASDAQ OMX would operate the Exchange as a separate self-regulatory organization ("SRO"). Accordingly, Phlx would maintain its current registration as a national securities exchange, and maintain separate rules, membership rosters, and listings that would be distinct from the rules, membership rosters, and listings of NASDAQ OMX's other national securities exchanges. Additionally, after the Merger, the Exchange would continue to operate the Stock Clearing Corporation of Philadelphia ("SCCP"),[10] its wholly-owned clearing agency, and The Philadelphia Board of Trade ("PBOT"), its wholly-owned futures exchange subsidiary. Separately, NASDAQ OMX also entered into an agreement with the Boston Stock Exchange, Inc. ("BSE"), pursuant to which NASDAQ OMX would acquire all of the outstanding membership interests in BSE ("BSE Acquisition").[11] Following the closing of the BSE Acquisition and the Merger, NASDAQ OMX will be the sole owner of five SROs: NASDAQ Exchange, BSE, the

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57703 (April 23, 2008), 73 FR 23293 ("Notice").

[4] In Amendment No. 1, Phlx represented that, on May 6, 2008, the Exchange obtained shareholder approval of the proposed rule change, as required by Delaware General Corporation Law, and that no further action by the Exchange in connection with the proposed rule change is required. *See also* General Instruction E to Form 19b–4 (concerning completion of action by a self-regulatory organization on a proposed rule change). Phlx also clarified that routing by NASDAQ Execution Services, LLC ("NES") to Phlx, on behalf of The NASDAQ Stock Market LLC ("NASDAQ Exchange"), takes two forms. Amendment No. 1 is technical in nature, and therefore is not subject to notice and comment.

In Amendment No. 2, Phlx filed the complete Certificate of Incorporation and amended By-Laws of NASDAQ OMX in order to propose their adoption as rules of Phlx. The By-Laws contained minor amendments to terminology to apply to Phlx all of the same provisions that are currently specifically applicable to the NASDAQ Exchange. The amended By-Laws were published for comment in a separate NASDAQ Exchange filing. *See* Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182 (May 8, 2008) (notice of SR–NASDAQ–2008–035) ("Nasdaq Stock Market Proposal").

[5] The Exchange demutualized in 2004, though it is not publicly traded. *See* Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–PHLX–2003–73) (approval order).

[6] *See* proposed Section 1–1(ii) of the By-Laws (defining "NASDAQ OMX Merger").

[7] *See* proposed Section 4–3(b) of the By-Laws and Notice, *supra* note 3, 73 FR at 23295.

[8] *See infra* notes 61–69 and accompanying text (discussing proposed compositional requirements of the Board).

[9] The Exchange would have a single class of common stock, all of which would be held by NASDAQ OMX.

[10] *See* Securities Exchange Act Release No. 58180 (July 17, 2008) (SR–SCCP–2008–01) (approving changes to SCCP's articles of incorporation, including language clarifying that all of the authorized shares of SCCP common stock are issued and outstanding and are held by Phlx).

[11] *See* Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (SR–BSE–2008–23) (notice of proposed rule change related to BSE Acquisition); Securities Exchange Act Release No. 57782 (May 6, 2008), 73 FR 27583 (May 13, 2008) (SR–BSECC–2008–01) (notice of proposal to amend the articles of organization and by-laws of the BSECC to reflect its proposed acquisition by NASDAQ OMX).

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[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

Boston Stock Exchange Clearing Corporation ("BSECC"), Phlx, and SCCP (collectively, "SRO Subsidiaries").

In the present filing, the Exchange has proposed to amend its certificate of incorporation ("Certificate"), by-laws ("By-Laws"), and certain rules ("Rules") to reflect NASDAQ OMX's proposed ownership of the Exchange. In general, the proposed changes are designed to address the Exchange's proposed new ownership structure and conform Phlx's governance provisions to those that are currently applicable to the NASDAQ Exchange. The Exchange is also using this opportunity to make several other changes to its governing documents to update certain language and make other minor changes that are not directly related to the proposed Merger.[12]

In addition, NASDAQ OMX has amended its By-Laws to make applicable to all of NASDAQ OMX's SRO subsidiaries, including Phlx and SCCP (after the Merger), certain provisions of NASDAQ OMX's Restated Certificate of Incorporation and NASDAQ OMX's By-Laws. These provisions of NASDAQ OMX's governing documents are designed to maintain the independence of each SRO subsidiary's self-regulatory function, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.[13]

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[14] In particular, the Commission finds that the proposed rule change is consistent with: (1) Section 6(b)(1) of the Act,[15] which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; (2) Section 6(b)(3) of the Act,[16] which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer (the "fair representation requirement"); and (3) Section 6(b)(5) of the Act,[17] in that it is designed, among other things, 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.

As noted above, the Merger would result in NASDAQ OMX owning two additional SROs (Phlx and SCCP). The Commission believes that the ownership of Phlx and SCCP by the same public holding company that owns the NASDAQ Exchange would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18] Further, the Commission does not believe that the ownership by one holding company of two exchanges and one clearing agency presents any adverse competitive implications in the current marketplace. The Commission notes that it has previously approved proposals in which a holding company owns multiple SROs.[19] The Commission continues to monitor such entities and notes that its experience to date with the issues raised by this ownership structure has not presented any concerns that have not been addressed, for example by the protections afforded at the holding company level.

In particular, as discussed below, though NASDAQ OMX is not itself an SRO, its activities with respect to the operation of Phlx and SCCP must be consistent with, and must not interfere with, the self-regulatory obligations of Phlx and SCCP.[20] Further, certain provisions of NASDAQ OMX's Certificate of Incorporation and By-Laws are rules of an exchange if they are stated policies, practice, or interpretations, as defined in Rule 19b–4 under the Act, of the exchange, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder.[21] Accordingly, Phlx has filed with the Commission the Certificate and amended By-Laws of NASDAQ OMX. Notably, NASDAQ OMX's amended By-Laws would make applicable to all of NASDAQ OMX's SRO subsidiaries, including Phlx and SCCP (after the Merger), certain provisions of NASDAQ OMX's Restated Certificate of Incorporation and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory function. These provisions facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.

Furthermore, the Commission believes that there is robust competition among market centers, as exchanges face increasing competition from non-exchange entities that trade the same or similar financial instruments, such as alternative trading systems.[22] In addition, despite consolidation among exchanges, other entities have recently applied for exchange registration, which evidences the continued ability of entities to enter the marketplace and further increase competition among SROs.[23] Accordingly, as described above, the Commission does not believe that ownership by a single holding company of multiple SROs presents any burden on competition in violation of the Act.[24] Nevertheless, the Commission

[12] For example, as discussed in Section III.E.6, *infra*, the language relating to how the Exchange's Weekly Bulletin is distributed would be updated to not restrict its distribution to mail, but rather to permit distribution by e-mail and posting on the Exchange's Web site. See Section 12–5(d) of the By-Laws.

[13] *See* Amendment No. 2, *supra* note 4 (including the amended By-Laws of NASDAQ OMX to the Phlx's proposal).

[14] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f(b)(1).

[16] 15 U.S.C. 78f(b)(3).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8) and 15 U.S.C. 78q–1(b)(3)(I).

[19] *See, e.g.*, Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77) (approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.).

[20] *See infra* Section III.C.1 (discussing the relationship between NASDAQ OMX and Phlx).

[21] 15 U.S.C. 78s(b) and 17 CFR 240.19b–4, respectively.

[22] *See, e.g.*, Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144, 40144 (July 11, 2008) (where the Commission recognized that "[n]ational securities exchanges registered under Section 6(a) of the Exchange Act face increased competitive pressures from entities that trade the same or similar financial instruments * * *").

[23] *See, e.g.*, Securities Exchange Act Release No. 57322 (February 13, 2008), 73 FR 9370 (February 20, 2008) (File No. 10–182) (notice of filing of application and Amendment No. 1 thereto by BATS Exchange, Inc. for registration as a national securities exchange).

[24] The Commission notes that NASDAQ OMX also entered into an agreement with the BSE, pursuant to which NASDAQ OMX would acquire all of the outstanding membership interests in BSE. *See* Securities Exchange Act Release Nos. 57757 (May 1, 2008), 73 FR 26159 (May 8, 2008) (SR–BSE–2008–23) (notice of proposed rule change related to BSE Acquisition); and 57782 (May 6, 2008), 73 FR 27583 (May 13, 2008) (SR–BSECC–2008–01) (notice of proposal to amend the articles of organization and by-laws of the BSECC to reflect its proposed acquisition by NASDAQ OMX). If the Commission also were to approve the BSE Acquisition, NASDAQ OMX would be the sole owner of five SROs: NASDAQ Exchange, Phlx, SCCP, BSE, and the BSECC. The Commission will consider the

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will continue to monitor SROs, including those that are under common ownership, for compliance with the Act and the rules and regulations thereunder, as well as the SROs' own rules.

A. Capital Stock

The proposed Merger would result in NASDAQ OMX owning all of the issued, authorized, and outstanding common stock of the Exchange.[25] Accordingly, the Exchange proposes to amend the Certificate to reduce the amount of common and preferred stock, and to explicitly state that NASDAQ OMX will hold all of the common stock of the Exchange. Specifically, the Exchange proposes to: (1) Reduce the amount of common stock that the Exchange has authority to issue from one million to 100 shares; [26] (2) state that all authorized shares of common stock shall be issued, outstanding, and held by NASDAQ OMX; [27] (3) eliminate the designation of Class A and Class B common stock; [28] (4) reduce the amount of preferred stock that the Exchange has authority to issue from 100,000 to 100 shares; [29] and (5) state that only one share of preferred stock, the single share of Series A Preferred Stock,[30] is outstanding.[31] In addition, the Exchange proposes to delete or amend several provisions applicable to the Exchange's common stock that would become obsolete after the Merger because NASDAQ OMX would control 100% of the common stock.[32] These changes are necessary to reflect the change in ownership of the Exchange after the Merger, and the Commission finds them to be consistent with the Act.

B. Ownership Concentration Limitations and Voting Limits

Phlx proposes to amend the Certificate to replace the current ownership concentration limitations and voting limitations with new restrictions that would recognize that, following the Merger, NASDAQ OMX would own all of the common stock of the Exchange. As discussed below, the Exchange proposes to delete language in Article FOURTH of the Certificate, which limits the amount of common stock of the Exchange that any person may own or vote, directly or indirectly, without prior Commission approval. In place of this restriction, Phlx proposes to amend its Certificate and By-Laws to prohibit Phlx from transferring or assigning its common stock without prior Commission approval and from issuing, transferring, or assigning its preferred stock without prior Commission approval.[33]

The current Certificate imposes limits on direct and indirect changes in control of Phlx through voting and ownership limits applicable to holders of its common stock. These provisions enable the Commission, as well as the Exchange, to monitor potential changes in control of the Exchange, and thereby assist both the Commission and the Exchange in carrying out their regulatory responsibilities under the Act.[34] In particular, the Certificate currently provides that, unless approved by the Board and by the Commission under Section 19(b) of the Act, no Person (either alone or together with its Related Persons) may own (of record or beneficially), whether directly or indirectly, more than 40% of the then-outstanding shares of Phlx common stock. To the extent that such Person (or its Related Persons) purports to own more than 40% of the then outstanding shares of common stock of the Exchange, the Person (and its Related Persons) is not entitled to exercise any rights and privileges incident to ownership of shares in excess of the 40% limit.[35] The Certificate also provides that no Member (either alone or together with its Related Persons) may own, of record or beneficially, whether directly or indirectly, more than 20% of the then outstanding shares of common stock of the Exchange.[36] Moreover, unless approved by the Board and by the Commission under Section 19(b) of the Act, no Person, either alone or together with its Related Persons, has any right to vote, or to give any consent or proxy with respect to, more than 20% of the then outstanding shares of common stock of the Exchange.[37]

Currently, the Board would need to approve an amendment to the By-Laws to permit any Person, together with its Related Persons, to exercise voting rights with respect to the shares in excess of the 20% voting limit or to own more than 40% of the outstanding shares of common stock.[38] Such amendment would need to be filed with the Commission pursuant to Section 19(b) of the Act,[39] which allows the Commission an opportunity to determine, among other things, whether any additional measures may be necessary to provide sufficient regulatory jurisdiction over the proposed controlling persons.[40]

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implications of those proposed acquisitions when it reviews that proposal.

[25] *See* proposed Article FOURTH(c)(iv) of the Certificate and proposed Section 29–4(c) of the By-Laws.

[26] *See* proposed Article FOURTH of the Certificate.

[27] *See* proposed Article FOURTH(c)(iv) of the Certificate.

[28] *See, e.g.*, proposed Article FOURTH of the Certificate and proposed Section 1–1(d) of the By-Laws. For example, Article FOURTH(b)(ii) sets forth the different dividend priority of holders of Class A common stock and Class B common stock in the event of a Liquidity Event (as defined in that subparagraph). This provision would be obsolete once only one class of common stock is authorized and outstanding. Correspondingly, the Exchange proposes to eliminate that language. Similarly, the Exchange proposes to eliminate Article FOURTH(c)(vi) of the Certificate, which governs the automatic conversion of Class A common stock, and language in Article FOURTH(c)(iii) of the Certificate that distinguishes between the voting rights of holders of Class A and Class B common stock.

On January 20, 2007, all Class A common stock converted to Class B common stock shares. *See* Phlx Annual Report 2006 at 42. Upon conversion to Class B, the eligibility of holders of Class A shares for a contingent dividend terminated. *See id.* The former holders of the Class A shares otherwise continued to have the same rights and privileges, including voting, as the Class B holders. *See id.*

[29] *See* proposed Article FOURTH of the Certificate.

[30] The share of Series A Preferred Stock, which is currently issued and outstanding, is held by the Trust pursuant to the Trust Agreement. *See* Section 1–1(mm) of the By-Laws (defining "Trust") and Section 1–1(ee) of the By-Laws (defining "Trust Agreement"). The Trustee of the Trust is required, under Section 4.1 of the Trust Agreement, to vote the share as directed by the vote of the Member Organization Representatives of Member Organizations entitled to vote. This voting arrangement is designed to give Members a voice in the management of the Exchange and is necessary because, under Delaware law, only stockholders can elect the directors of a Delaware corporation. *See* Securities Exchange Act Release No. 49098, *supra* note 5, 69 FR at 3979. The Merger would not result in a transfer of ownership of the Series A Preferred Stock.

[31] *See* proposed Article FOURTH(b)(iv) of the Certificate.

[32] For example, Phlx proposes to amend the dividend rights of common stock (*see* proposed Article FOURTH(c)(ii) of the Certificate) and eliminate provisions governing common stock incentive compensation. *See infra* note 146 and accompanying text (discussing the proposal to eliminate incentive compensation).

[33] *See* proposed Article FOURTH(c)(iv) of the Certificate (restriction on transferring or assigning common stock). This subparagraph also provides that all authorized shares of common stock of the Exchange (100 shares) be issued and outstanding and reflects that all of the common stock would be held by NASDAQ OMX. The Commission notes that any proposed issuance of common stock would constitute an amendment to that provision, which would be subject to the filing of a proposed rule change with the Commission. *See also* proposed Section 29–4(c) of the By-Laws. *See* proposed Article FOURTH(a) and (b)(v) of the Certificate and proposed Section 29–4(d) of the By-Laws (restriction on issuing, transferring, or assigning preferred stock). *See also infra* note 43 (restrictions on the issuance of preferred stock).

[34] *See* Securities Exchange Act Release No. 49098, *supra* note 5, 69 FR at 3985.

[35] See Article FOURTH(b)(v)(A) of the Certificate.

[36] *See* Article FOURTH(b)(v)(B) of the Certificate.

[37] *See* Article FOURTH(b)(iii)(B) of the Certificate.

[38] The Board cannot approve such amendment with respect to Members.

[39] *See* Article FOURTH(b)(iii)(B)(1) and FOURTH(b)(v)(A)(1) of the Certificate.

[40] *See* Securities Exchange Act Release No. 49098, *supra* note 5, 69 FR at 3985. The Commission notes

As proposed, NASDAQ OMX would acquire all of the common stock of the Exchange. To reflect such ownership by one entity, the Exchange proposes to eliminate the 40% ownership and 20% voting limits. Phlx also proposes to eliminate the prohibition on any Member, either alone or together with its Related Persons, from owning (of record or beneficially) more than 20% of its outstanding common stock of the Exchange.[41]

In place of these restrictions, Phlx proposes to adopt new restrictions on the transfer or assignment of common stock. Specifically, proposed Article FOURTH(c)(iv) of the Certificate would be revised to state that: (1) All 100 authorized shares of common stock of the Exchange shall be issued and outstanding, and shall be held by NASDAQ OMX; and (2) NASDAQ OMX may not transfer or assign any shares of Phlx common stock to any entity, unless such transaction is approved by the Commission.[42] The Exchange also proposes to adopt a restriction on the issuance of preferred stock, as well as similar restrictions on the transfer or assignment of preferred stock.[43]

In addition, the NASDAQ OMX Certificate of Incorporation imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of its SRO subsidiaries and to ensure that its SRO subsidiaries and the Commission are able to carry out their regulatory obligations under the Act. Specifically, no person who beneficially owns shares of common stock, preferred stock, or notes of NASDAQ OMX in excess of 5% of the securities generally entitled to vote may vote the shares in excess of 5%.[44] This limitation would mitigate the potential for any NASDAQ OMX shareholder to exercise undue control over the operations of Phlx, and it facilitates Phlx's and the Commission's ability to carry out their regulatory obligations under the Act.

The NASDAQ OMX Board may approve exemptions from the 5% voting limitation for any person that is not a broker-dealer, an affiliate of a broker-dealer, or a person subject to a statutory disqualification under Section 3(a)(39) of the Act,[45] provided that the NASDAQ OMX Board also determines that granting such exemption would be consistent with the self-regulatory obligations of its SRO subsidiary.[46] Further, any such exemption from the 5% voting limitation would not be effective until approved by the Commission pursuant to Section 19 of the Act.[47] Phlx's proposed rule change reflects an amendment to the NASDAQ OMX By-Laws to require the NASDAQ OMX Board, prior to approving any exemption from the 5% voting limitation, to determine that granting such exemption would also be consistent with Phlx's self-regulatory obligations.[48]

The Commission approved the existing limits in Phlx's Certificate to enable the Exchange to carry out its self-regulatory responsibilities, and to enable the Commission to fulfill its responsibilities under the Act.[49] After the Merger, these goals would be achieved by the proposed new restrictions on the transfer or assignment of Phlx capital stock and on the issuance of preferred stock, together with the ownership and voting restrictions on NASDAQ OMX shareholders. In particular, the simplified provisions of Phlx's Certificate and By-Laws are tailored to an exchange whose common stock is wholly-owned by one company. By explicitly stating that NASDAQ OMX would be the owner of 100% of the Exchange's issued and outstanding common stock, and that no preferred stock has been issued other than the Series A Preferred Stock held by the Trust, any purported issuance, transfer, or assignment of any capital stock would constitute an amendment to the Certificate and By-Laws and therefore be subject to a filing with the Commission under Section 19 of the Act. Moreover, the NASDAQ OMX Certificate currently includes restrictions on any person voting shares in excess of 5%. The changes to the NASDAQ OMX By-Laws would require the NASDAQ OMX Board, prior to approving an exemption from the 5% voting limitation, to determine that granting such exemption would be consistent with Phlx's self-regulatory obligations.

Accordingly, the Commission finds that the elimination of the current ownership and voting limits and the adoption of new controls on the issuance, transfer, and assignment of Phlx capital stock, together with the ownership and voting limitations in NASDAQ OMX's Certificate and By-Laws, are designed to prevent any shareholder from exercising undue control over the operation of Phlx and to ensure that Phlx and the Commission are able to carry out their regulatory obligations under the Act and thereby should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or Phlx to effectively carry out their respective regulatory oversight responsibilities under the Act.

C. Management of the Exchange

1. Relationship between NASDAQ OMX and Phlx

After the merger, Phlx would become a subsidiary of NASDAQ OMX. Although NASDAQ OMX is not an SRO and, therefore, will not itself carry out regulatory functions, its activities with respect to the operation of Phlx must be consistent with, and not interfere with, Phlx's self-regulatory obligations. Proposed changes to NASDAQ OMX's By-Laws would make applicable to all of NASDAQ OMX's SRO subsidiaries, including Phlx (after the Merger), certain provisions of NASDAQ OMX's Restated Certificate of Incorporation and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory function, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each

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that this proposed rule change satisfies the requirements in existing Article FOURTH(b)(v)(A) and (b)(iii)(B) of the Certificate and that the Commission's approval will allow NASDAQ OMX to exceed the existing ownership and voting limits in existing Article FOURTH. The proposed rule change will become operative upon consummation of the Merger.

[41] *See* Article FOURTH(c)(v)(B) of the Certificate.

[42] *See also* proposed Section 29–4(c) of the By-Laws.

[43] *See* proposed Section 29–4(d) of the By-Laws. The Exchange would have authority to issue 100 shares of preferred stock, of which one share would be designated Series A Preferred. *See* proposed Article FOURTH of the Certificate. Phlx has not issued, and does not currently intend to issue, any preferred stock other than the Series A Preferred Stock. *See* Notice, *supra* note 3, 73 FR at 23293. The restrictions on transfer or assignment would also apply to the Series A Preferred Stock. See proposed Article FOURTH(a) of the Certificate; *see also* proposed Article FOURTH(b)(v) of the Certificate. The proposed Merger would not impact the ownership of the one outstanding share of Series A Preferred Stock, which will continue to be held by the Trust pursuant to the Trust Agreement.

[44] *See* Article Fourth.C, NASDAQ OMX Certificate.

[45] 15 U.S.C. 78c(a)(39). *See* Article Fourth.C.6, NASDAQ OMX Certificate.

[46] Specifically, the NASDAQ OMX Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, NASDAQ OMX or the other operations of NASDAQ OMX, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to an facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. *See* Article Fourth.C.6, NASDAQ OMX Certificate.

[47] *See* Section 12.5, NASDAQ OMX By-Laws.

[48] *See* proposed Section 12.5, NASDAQ OMX By-Laws.

[49] *See supra* note 34 and accompanying text.

SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.[50]

Although NASDAQ OMX will not itself carry out regulatory functions, its activities with respect to the operation of its SRO subsidiaries, including Phlx and SCCP, must be consistent with, and not interfere with, those subsidiaries' self-regulatory obligations. The By-Laws of NASDAQ OMX include certain provisions to address this concern. In particular, the By-Laws of NASDAQ OMX specify that NASDAQ OMX and its officers, directors, employees, and agents irrevocably submit to the jurisdiction of the United States federal courts, the Commission, and each self-regulatory subsidiary of NASDAQ OMX for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of any self-regulatory subsidiary.[51] Further, NASDAQ OMX agreed to provide the Commission with access to its books and records.[52] NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function[53] of the Exchange and not to use such information for any non-regulatory purpose. In addition, the NASDAQ OMX Board, as well as its officers, employees, and agents are required to give due regard to the preservation of the independence of Phlx's self-regulatory function.[54] Similarly, the NASDAQ OMX Board, when evaluating any issue, would be required to take into account the potential impact on the integrity, continuity, and stability of the its SRO subsidiaries.[55] Finally, the NASDAQ OMX By-Laws require that any changes to the NASDAQ OMX Certificate and By-Laws be submitted to the Board of Directors of each of its SRO subsidiaries, including the Exchange, and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.

The Commission believes that the NASDAQ OMX By-Laws, as amended to accommodate the Merger, are designed to facilitate the Phlx's ability to fulfill its self-regulatory obligations and are, therefore, consistent with the Act. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,[56] which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

The Commission also believes that under Section 20(a) of the Act[57] any person with a controlling interest in NASDAQ OMX would be jointly and severally liable with and to the same extent that NASDAQ OMX is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act[58] creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act[59] authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

2. Composition and Term of Board

The Exchange proposes to give its Board discretion to determine its size from time to time,[60] and after the Merger the Board would likely be reduced in size from its current slate of 23 Governors. Specifically, the Board would include one Governor who is the CEO, one Governor who is the Vice-Chair of the Board,[61] one PBOT Governor,[62] one Member Governor,[63] one Stockholder Governor,[64] and a number of Independent Governors determined by the Board,[65] including the Designated Independent Governors. "Designated Independent Governors" would continue to be defined as those Independent Governors who are voted for by Members, and who are then elected to the Board by the Holder of the Series A Preferred Stock according to the vote of the Members.[66]

Though it may be reduced in size, the Board would be composed, as it currently is, of a majority of Independent Governors, who, by definition, would have no Material Relationship with the Exchange, any affiliate of the Exchange, any Member of the Exchange, any Member affiliate, or any issuer of securities that are listed or

[50] *See* Amendment No. 2, *supra* note 4 (including the amended By-Laws of NASDAQ OMX to the Phlx's proposal).

[51] *See* proposed Section 12.3, NASDAQ OMX By-Laws.

[52] *See* proposed Section 12.1(c), NASDAQ OMX By-Laws. To the extent that they relate to the activities of Phlx, all books, records, premises, officers, directors, and employees of NASDAQ OMX would be deemed to be those of the Phlx. *See id.*

[53] This requirement to keep confidential non-public information relating to the self-regulatory function shall not limit the Commission's ability to access and examine such information or limit the ability of directors, officers, or employees of the Nasdaq Holding Company from disclosing such information to the Commission. *See* proposed Section 12.1(b), NASDAQ OMX By-Laws. Holding companies with SRO subsidiaries have undertaken similar commitments. *See, e.g.*, Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979, 71983 (December 19, 2007) (SR–ISE–2007–101) (order approving the acquisition of International Securities Exchange, LLC's parent, International Securities Exchange Holdings, Inc., by Eurex Frankfurt AG).

[54] *See* Section 12.1(a), NASDAQ OMX By-Laws.

[55] *See* proposed Section 12.7, NASDAQ OMX By-Laws.

[56] 15 U.S.C. 78f(b)(1).

[57] 15 U.S.C. 78t(a).

[58] 15 U.S.C. 78t(e).

[59] 15 U.S.C. 78u–3.

[60] *See* proposed Article SIXTH(a) of the Certificate and proposed Section 4–1 of the By-Laws.

[61] The Vice-Chair would continue to be an individual who, anytime within the prior three years, has been a Member primarily engaged in business on the Exchange's equity market or equity options market or who is a general partner, executive officer (vice-president or above) or a Member associated with a Member Organization primarily engaged in business on the Exchange's equity market or equity options market. *See* Section 5–3 of the By-Laws. The term "Member Organization" is defined in Section 1–1(v) of the By-Laws.

[62] A PBOT Governor would continue to be defined as a Governor who is a member of PBOT and is duly elected to fill the one vacancy on the Board allocated to the PBOT Governor. *See* Section 1–1(aa) of the By-Laws.

[63] A Member Governor would continue to be defined as a Governor who is a Member or a general partner or an executive officer (vice-president and above) of a Member Organization and is duly elected to fill the vacancy on the Board allocated to the Member Governor. *See* Section 1–1(u) of the By-Laws. Phlx proposes to amend its Certificate and By-Laws to reflect its proposal that the new Board consist of only one Member Governor. *See* proposed Article SIXTH(a)(ii) of the Certificate and proposed Sections 1–1(e), 1–1(u) and 4–1 of the By-Laws.

[64] *See* proposed Section 4–1 of the By-Laws and proposed Article SIXTH(a)(iii) of the Certificate. A Stockholder Governor would be defined as a Governor who is an officer, director (or a person in a similar position in business entities that are not corporations), designee or an employee of a holder of common stock or any affiliate or subsidiary of such holder of common stock and is duly elected to fill the vacancy on the Board allocated to the Stockholder Governor. *See* proposed Section 1–1(hh) of the By-Laws; *see also* proposed Article SIXTH(a)(ix) of the Certificate.

[65] As discussed below, Independent Governors would continue to constitute a majority of the Board, and Designated Independent Governors, would, together with the Member Governor and the PBOT Governor, equal at least 20% of the total number of Governors. *See* Section 4–1 of the By-Laws.

[66] *See* Section 1–1(f) of the By-Laws and Article FOURTH(a)(iii) of the Certificate, which Phlx proposes to renumber (*see* proposed Article FOURTH(b)(iii)).

traded on the Exchange or a facility of the Exchange.[67] Notably, the new Board would select its Chair from among its members that are Independent Governors, instead of the current arrangement where the CEO also serves as the Chairman of the Board.[68]

The Commission finds that the proposed changes regarding the composition of the Board are consistent with the Act, including Section 6(b)(1) of the Act,[69] which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act and comply with the requirements of the Act.

Phlx proposes to set forth in detail the powers and duties of the Chair and Vice-Chair.[70] This provision is intended to be generally consistent with current NASDAQ Exchange By-Law Article VII, and the Commission finds it consistent with the Act.

The Exchange also proposes to change the term of office for all Governors from three years to one year[71] and eliminate term limits for Governors.[72] The Commission finds this consistent with the Act and notes that establishing one-year terms for directors is consistent with other proposals previously approved by the Commission.[73] Further, the Commission notes that neither Phlx's proposed parent company, NASDAQ OMX, nor NASDAQ Exchange have term limits for their respective boards.[74]

In addition, Phlx proposes that, in the event of a vacancy in the office of Vice-Chair, the Nominating, Elections and Governance Committee would select a replacement to serve the remainder of the unexpired term, subject to approval by the Board.[75] This provision is intended to be generally consistent with current NASDAQ Exchange By-Law Article IV. Section 4–19 of the By-Laws designates, with specificity, when a Governor's term begins, and provides that a Governor's term ends only when his or her successor is elected and qualifies, or when the Governor resigns or is removed. The Exchange proposes to modify this provision to eliminate the reference to a Governor's term beginning at a particular time and provides that a Governor's term will end when a successor is elected or upon their earlier resignation, removal, or death. The Commission finds these changes consistent with the Act and believes that they should provide additional clarity and, therefore, would facilitate orderly successions of Governors.[76]

3. Nomination, Election, and Removal of Non-Designated Governors

The Exchange proposes changes to the nomination and election process for non-Designated Governors (*i.e.*, Independent Governors, the Vice-Chair, the CEO, and the Shareholder Governor). These changes are primarily designed to simplify the process to accommodate a single Stockholder. Currently, the non-Designated Governors are nominated through different mechanisms, including: (1) The Nominating, Elections and Governance Committee nominates the individual then holding the office of CEO as Chairman of the Board for election by the Stockholders; (2) the Chairman recommends a Vice-Chairman candidate to the Nominating, Elections and Governance Committee for election by Stockholders; and (3) the Nominating, Elections and Governance Committee review the qualifications of nominees, including independent nominees, for the Stockholder Governors and Independent Governors (excluding the Designated Independent Governors).[77] Phlx now proposes that the holder of its common stock present for nomination to the Nominating, Elections and Governance Committee the candidates for Vice-Chair, Stockholder Governor, and Independent Governors.[78] These candidates would be placed on the ballot and elected by the holder of common stock at the annual meeting of Shareholders. Thus, NASDAQ OMX, as sole holder of common stock of the Exchange, would nominate and elect all of the non-Designated Governors. This approach is consistent with the NASDAQ Exchange's processes for nomination of non-Member Representative Directors by a nominating committee that may seek the input and recommendations of NASDAQ OMX as the owner of the NASDAQ Exchange.[79]

The Exchange also proposes to change the process for removing non-Designated Governors. Currently, non-Designated Governors may be removed only for cause, except that upon a recommendation by the Board to Stockholders such Governors may be removed without cause. An affirmative vote of two-thirds of the total number of Stockholders entitled to vote thereon is required to remove a non-Designated Governor. The proposed change would more explicitly permit the removal of non-Designated Governors with or without cause, and to allow removal of such Governors by the affirmative vote of a majority of the voting power entitled to vote for their election (*i.e.*, NASDAQ OMX).[80] This change would reflect the Exchange's proposed status as a wholly-owned subsidiary of NASDAQ OMX. The Board would continue to have the ability to recommend to the Stockholder that a Governor be removed for any reason deemed sufficient by the Board,[81] but such recommendation would no longer be a prerequisite for removal.

The Commission finds that the proposed changes to the nomination, election, and removal processes for non-Designated Governors are consistent with Section 6(b)(1) of the Act, which

[67] *See* proposed Section 4–1 of the By-Laws (the Board shall be composed of a majority of Independent Governors); proposed Article SIXTH(a)(vii) of the Certificate (defining "Independent Governor"). The terms "Independent," "Material Relationship," and "Member" are defined in Sections 1–1(o), 1–1(s), and 1–1(t) of the By-Laws, respectively.

[68] *See* proposed Section 5–2 of the By-Laws. Currently, the Chairman of the Board is the CEO. *See* Article SIXTH(a)(v) of the Certificate and Sections 4–1 and 5–1 of the By-Laws (all providing that the Chairman of the Board shall be the individual then holding the office of CEO).

[69] 15 U.S.C. 78f(b)(1).

[70] *See* Article V of the By-Laws.

[71] *See* proposed Section 4–3(a) of the By-Laws. That section currently provides that the Stockholder Governors, Independent Governors (including the Designated Independent Governors), Member Governors, and the PBOT Governor serve for three-year terms, which are staggered.

[72] *See* proposed Section 4–3(a) of the By-Laws. That section currently prohibits Governors, except for the Chairman of the Board and the Vice-Chairman of the Board, from serving for more than two consecutive full terms.

[73] *See, e.g.*, Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120) (approving one-year terms for NYSE Euronext directors). Additionally, the Restated Certificate of Incorporation of the NASDAQ Stock Market, Inc. also provides for one-year terms for directors other than Preferred Stock Directors.

[74] *See* Article IV of the NASDAQ OMX By-Laws and Article III of the NASDAQ Exchange By-Laws.

[75] *See* proposed Section 5–3 of the By-Laws.

[76] This proposed change is identical to a proposal by another national securities exchange recently approved by the Commission. *See* Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979 (SR–ISE–2007–101) (approving proposed Section 3.2 of the by-laws of the International Securities Exchange, LLC).

[77] *See* Section 28–3 of the By-Laws.

[78] *See* proposed Section 28–3 of the By-Laws. As proposed, Section 28–3 has no provision for the nomination or election of the Chair of the Board because the Board would appoint its Chair from among the members of the Board who are Independent Governors. *See* proposed Section 5–2 of the By-Laws.

[79] *See* NASDAQ Exchange By-Law Article III, Section 6.

[80] *See* proposed Article SIXTH (b)(i) of the Certificate. The Exchange also proposes to allow any action required or permitted to be taken at any annual or special meeting of Stockholders to be taken by Stockholders (*i.e.*, NASDAQ OMX) without a meeting, unless otherwise specified in the Certificate. *See* proposed Article SEVENTH of the Certificate and proposed Section 28–13 of the By-Laws. In light NASDAQ OMX's ownership of all of the common stock of the Exchange, the Commission finds this change to be consistent with the Act.

[81] *See* proposed Section 4–4 of the By-Laws.

requires an exchange to be organized in a manner that allows it to carry out the purposes of the Act. The proposed changes appropriately streamline the nomination, election, and removal processes for non-Designated Governors in light of NASDAQ OMX's ownership of all of the common stock of the Exchange.

Fair Representation

Section 6(b)(3) of the Act requires that the rules of an exchange assure fair representation of its members in the selection of its directors and administration of its affairs.[82] As discussed above, the Exchange proposes to give its Board discretion to determine its size.[83] Members would, nevertheless, continue to select at least 20% of the Board after the Merger, including the Member Governor, the PBOT Governor,[84] and the Designated Independent Governors (collectively, the "Designated Governors").[85] These Designated Governors would continue to be elected by the Holder of Series A Preferred Stock (*i.e.*, the Trust[86]), and therefore they would continue to be elected indirectly by the Members. Phlx proposes to change Section 3–7(a) of the By-Laws, which prohibits a Member Organization from endorsing more than one nominee for Governor, to clarify that Member Organizations are prohibited from endorsing more than one nominee *per vacancy*. This proposed change is designed to clarify the rights of Members in the independent nomination process by eliminating any ambiguity that each Member Organization may endorse one independent nominee per Designated Governor vacancy, not one independent nominee per election.

Designated Governors currently may be removed only for cause, unless the Board recommends that they be removed without cause. In either case, removal of a Designated Governor requires a vote by Member Organization Representatives at an annual or special meeting.[87] Phlx proposes to simplify the process to provide that Designated Governors may be removed, with or without cause, only by vote of Member Organization Representatives at an annual or special meeting.[88] The Board would continue to have the ability to recommend to the Members that a Designated Governor be removed for any reason deemed sufficient by the Board,[89] but such recommendation would no longer be a prerequisite for removal. Importantly, the Commission notes that the Designated Governors, which are selected by a vote of the Members, may only be removed upon the affirmative vote of Members. While the Board may recommend to the Members that a Designated Governor be removed, the Board may not unilaterally remove a Designated Governor.

In addition, Members will be represented on key Standing Committees. Specifically, under the By-Laws, at least half of the Admissions Committee and the Foreign Currency Options Committee will continue to be required to be permit holders or participants or be associated with a Member Organization or participant organization,[90] and at least half of the Options Committee will continue to be required to be permit holders or be associated with a Member Organization.[91] Further, the By-Laws will continue to require that the Business Conduct Committee share jurisdiction over the revocation of permits and foreign currency options participations in connection with disciplinary matters with the Admissions Committee.[92]

Several Standing Committees also may review proposed rule changes before such proposals are presented to the Executive Committee or the Board for approval for filing with the Commission. These committees on which Members serve would continue to perform this function after the Merger. For example, the Business Conduct Committee may review proposed changes to the disciplinary provisions that are set forth in Rule 960 before such proposals are presented to the Executive Committee or the Board.[93] Further, the Options Committee makes or recommends for adoption such rules as it deems necessary for the convenient and orderly transaction of business upon the equity and index options trading floor, as well as makes and enforces rules and regulations relating to order, decorum, health, safety and welfare on the equity and index options trading floor and the immediately adjacent premises of the Exchange.[94] Additionally, the Exchange proposes to ensure Member representation on the Quality of Markets Committee.[95] Finally, Designated Governors, which are selected by Members, would compose at least 20% of the Executive Committee.[96]

The Commission finds that the selection of at least 20% of Governors of the Board,[97] the manner in which such Designated Governors will be nominated and elected,[98] the process for removing Designated Governors,[99] together with the representation of Members on key Standing Committees, satisfy the fair representation requirements of Section 6(b)(3) of the Act,[100] which requires that an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs. The Commission also notes that these provisions are consistent with previous proposals approved by the Commission.[101]

4. Special Committee of the Board

Phlx proposes to delete references to a "special committee of the Board of Governors" that hears appeals from determinations of the Nominating, Elections and Governance Committee on appeals concerning eligibility for election to the Board.[102] The special committee had been composed of Governors who were not then standing for re-election. However, because the

[82] 15 U.S.C. 78f(b)(3).

[83] *See supra* note 60 and accompanying text.

[84] A PBOT Governor would continue to be defined as a Governor who is a member of PBOT and is duly elected to fill the one vacancy on the Board allocated to the PBOT Governor. *See* Section 1–1(aa) of the By-Laws; *see also* proposed Article SIXTH(a)(i) of the Certificate.

[85] The nominations process for Designated Governors (*i.e.*, the Designated Independent Governors, the Member Governor, and the PBOT Governor) is described in Section 3–7 of the By-Laws.

[86] *See supra* note 30 (discussing the purpose and operation of the Trust).

[87] *See* Article SIXTH(b)(iii) of the Certificate.

[88] *See* proposed Section 3–3 of the By-Laws. A special meeting of the Members could be called either by Members, the Board, or the Chair of the Board. *See* Section 3–2(b) of the By-Laws. Such Governors could be removed by the holder of the Series A Preferred Stock following a vote of the Member Organization Representatives. *See* proposed Article SIXTH (b)(ii) of the Certificate.

[89] *See* proposed Section 4–4 of the By-Laws.

[90] *See* Sections 10–6(a) and 10–17 of the By-Laws.

[91] *See* Section 10–20 of the By-Laws.

[92] *See* Section 10–6(b) of the By-Laws.

[93] The Business Conduct Committee is composed of nine members as follows: three Independent Governors; one Member or person associated with a Member Organization who conducts business on XLE; one Member who conducts options business at the Exchange; and four persons who are Members or persons associated with a Member Organization. *See* Section 10–11 of the By-Laws.

[94] *See* Section 10–20 of the By-Laws.

[95] *See infra* notes 133–134 and accompanying text (discussing Member representation on the Quality of Markets Committee).

[96] *See infra* text accompanying note 110 (discussing the composition of the Executive Committee).

[97] *See* proposed Article SIXTH(a)(iv) of the Certificate and proposed Section 4–1 of the By-Laws.

[98] *See supra* Section III.C.2 and *infra* Section III.C.4, respectively.

[99] *See supra* Section III.C.3.

[100] 15 U.S.C. 78f(b)(3).

[101] *See, e.g.*, Securities Exchange Act Release Nos. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (approving the application of the NASDAQ Exchange for registration as a national securities exchange) and 49098, *supra* note 5.

[102] *See* proposed Section 11–1(b) of the By-Laws.

Exchange proposes to eliminate the staggering of the Board and require all Governors to be elected annually, it would not be possible to form such a special committee. Instead, the Exchange proposes that the full Board preside over such appeals.[103]

The Commission finds that this proposal is consistent with Sections 6(b)(1) and 6(b)(3) of the Act.[104] In particular, the Commission notes that Designated Governors selected by the Members will constitute at least 20% of the Board, and therefore Members will be represented when the Board acts as an adjudicative body to hear appeals concerning eligibility for election to the Board.

5. Standing Committees of the Board

The Exchange proposes several changes to its Standing Committees, which reflect incremental modifications to the structure and scope of its current committees. As discussed below, the Commission finds these changes to be consistent with the Act, including Section 6(b)(1) of the Act,[105] which requires that a national securities exchange be organized in such a manner as to allow the exchange to carry out the purposes of the Act, comply with the requirements of the Act, and enforce compliance with the Act by its members and persons associated with its members.

Automation Committee and the Marketing Committee. The Exchange proposes to eliminate two Standing Committees: the Automation Committee [106] and the Marketing Committee.[107] According to the Exchange, these committees are no longer necessary because, after the NASDAQ OMX Merger, these functions would be guided and handled at the parent company level.[108] The Commission believes that the elimination of these Exchange committees, combined with Phlx's reliance on NASDAQ OMX to perform the functions of those committees, is consistent with Section 6(b)(1) of the Act, which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act. The Commission notes that, as the Exchange contemplates future changes to its automated trading systems, the Exchange would be required to file any changes to its rules with the Commission pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder.[109]

Executive Committee. In addition, the Exchange proposes to change the composition of the Executive Committee and limit its authority. Currently, Section 10–14(a) provides that the Executive Committee be composed of the following nine members: the Chairman of the Board, who serves as Chair of the Committee; the Vice-Chairman of the Board; the Chairman of the Finance Committee; the Chairmen of two floor committees; two Stockholder Governors; and two Independent Governors. Phlx proposes to amend this provision to allow the Board to determine the size of the committee, except that the Committee must include: the Chair of the Board, who would be the Chair of the Committee; the Vice-Chair of the Board; the Stockholder Governor; and a number of Designated Governors equal to at least 20% of the total number of Governors on the committee.[110]

The Executive Committee currently appoints, subject to approval by the Board, all members (except the Chairmen) of the Standing Committees, excluding the Nominating, Elections and Governance Committee and the Executive Committee.[111] The Exchange now proposes to instead provide that the Board, instead of the Executive Committee, select all members of Standing Committees,[112] including most Standing Committee Chairs.[113] This change would conform the Exchange's practice to how NASDAQ OMX currently operates.[114] The Commission finds that these changes are consistent with Sections 6(b)(1) and 6(b)(3) of the Act.[115]

Audit Committee. Phlx proposes to modify the responsibilities of the Audit Committee to conform to similar responsibilities and processes of the Audit Committees of NASDAQ OMX and the NASDAQ Exchange.[116] Specifically, Phlx proposes to replace the enumerated duties of the committee with respect to external auditors with a more general charge to select, evaluate and, where appropriate, replace the Exchange's independent auditors (or nominate the independent auditors to be proposed for ratification by the Stockholders).[117] Phlx would also confer to the committee more specific responsibilities with respect to the Exchange's Internal Audit Department ("IAD"), including authority to hire or terminate the head of the IAD and determine the IAD's budget. Further, Phlx proposes to eliminate the requirement that the committee review all legal matters that may materially impact the Exchange's financial statements and all regulatory examination, inspection, and other reports. The Commission finds these changes consistent with Section 6(b)(1) of the Act, and notes that such changes are based on the Audit Committees of NASDAQ OMX and the NASDAQ Exchange.

Finance Committee. The Exchange proposes to change the composition of the Finance Committee and update the description of the committee's responsibilities.[118] Currently, the committee is composed of the following nine members: the Chairman of the Board; the Vice-Chairman of the Board; one Stockholder Governor; four Independent Governors, and two Members or persons associated with a Member Organization, one of whom conducts business primarily on XLE or on the equity options floor. Phlx

[103] *See id.*

[104] 15 U.S.C. 78f(b)(1) and 15 U.S.C. 78f(b)(3).

[105] 15 U.S.C. 78f(b)(1).

[106] *See* Section 10–10 of the By-Laws. The Automation Committee currently is charged with periodically reviewing and approving automation plans affecting the trading floors, subsidiaries and the Exchange's administrative areas.

[107] *See* Section 10–18 of the By-Laws. The Marketing Committee currently acts in an advisory capacity to the officers of the Exchange in marketing the services of the Exchange.

[108] *See* Notice, *supra* note 3, 73 FR at 23295.

[109] 15 U.S.C. 78s(b) and 17 CFR 240.19b–4, respectively.

[110] *See supra* text accompanying note 96 (discussing the representation of Designated Governors on the Executive Committee).

[111] *See* Sections 10–1(b), 10–4, and 10–14(c) of the By-Laws. Chairmen of the Standing Committees are selected, subject to Board approval, by the Nominating, Elections and Governance Committee. *See* Section 10–19(d) of the By-Laws.

[112] *See* proposed Sections 10–1(b) and 10–4 of the By-Laws. Correspondingly, the Exchange proposes to delete Sections 10–14(c) and 10–19(d) of the By-Laws which provide, respectively, that the Executive Committee shall appoint members of the Standing Committees (excluding their Chairmen), subject to Board approval, and that the Nominating, Elections and Governance Committee shall select all Standing Committee Chairmen, subject to approval by the Board.

[113] As amended, the By-Laws would specifically provide that: (1) The Chair of the Board is the Chair of the Executive Committee; (2) the Chair of the Board is the Chair of the Finance Committee; and (3) the Nominating, Elections and Governance Committee select its own Chair from among the members of such Committee who are Independent Governors. *See* proposed Sections 10–14(a), 10–15 and 10–19(a) of the By-Laws, respectively.

[114] *See* NASDAQ OMX By-Law Article IV, Section 4.13.

[115] 15 U.S.C. 78f(b)(1) and 15 U.S.C. 78f(b)(3).

[116] *See* NASDAQ OMX Audit Committee Charter approved April 18, 2007 and NASDAQ Exchange By-Law Article III.

[117] *Compare* Section 10–9(b) of the By-Laws *with* proposed Section 10–9 of the By-Laws.

[118] *See* proposed Section 10–15 of the By-Laws. The Exchange proposed to delete the Supplementary Material in Section 10–15, which sets forth a series of directives issued by the Board that were specifically applicable to the Finance Committee. These proposed changes are not directly related to the Merger.

proposes that following the Merger, the Finance Committee would be composed of: the Chair of the Board; the Vice-Chair of the Board; a number of Designated Independent Governors equal to at least 20% of the total number of voting members on the Finance Committee; two Members or persons associated with a Member Organization who may be Governors one of whom conducts business on XLE or on the equity options floor;[119] and such other Governors as the Board may appoint.[120] Phlx states that the elimination of the requirement that one of the committee members "primarily" conduct business on XLE or the equities option floor would allow a greater pool of candidates to be eligible to serve on the Finance Committee and is consistent with a recent change to Section 10–11 of the By-Laws.[121]

The Exchange also would eliminate the current restriction that prohibits the Chair of the Board from creating tie votes of the Finance Committee, and would designate the Chair of the Board as the Finance Committee Chair.[122] Finally, the Exchange proposes to delete the Supplementary Material that sets forth a series of directives issued by the Board that are specifically applicable to the Finance Committee.[123] Elimination of the Supplementary Material is designed to allow the Board flexibility in establishing capital expenditure policies, which may include delegation to Board committees and/or officers. The Exchange states that this more flexible approach is consistent with NASDAQ OMX's processes.[124] The Commission finds that this proposal is consistent with Section 6(b)(1) of the Act, and notes that Phlx's obligation to adequately fund its regulatory oversight program[125] is unaffected by the proposed elimination of the Supplementary Material to Section 10–15 of the By-Laws.

Nominating, Elections and Governance Committee. The Exchange also proposes certain changes to the composition of the Nominating, Elections and Governance Committee. Currently, the committee is composed of three Independent Governors, at least one of which is a Designated Independent Governor, one Stockholder Governor, and one Member Governor. As proposed, the committee would be composed of four Independent Governors and one Member Governor.[126] The Exchange also proposes to delete the term limit applicable to this committee and delete the prohibition against members of this committee standing for re-election to the Board. These proposals are designed, according to the Exchange, to increase the pool of candidates eligible to serve on the Committee and the Board.[127] The Commission finds that these changes are consistent with Section 6(b)(1) of the Act. The Commission notes that it recently approved a similar Phlx proposal to increase the pool of candidates eligible to serve on one of Phlx's Standing Committees.[128]

Quality of Markets Committee. Phlx proposes to clarify the requirement that the Quality of Markets Committee include at least as many Independent members[129] as it does the "combined number" of Stockholder-chosen members and members who are Members of the Exchange.[130] The addition of the language "combined number" makes clear that the number of Stockholder-chosen committee members[131] are added to the number of Members serving on the committee[132] and that total is then compared to the number of "Independent" committee members, who do not have to be Governors.

Additionally, the Exchange proposes to adopt a new requirement that at least 20% of the total number of committee members be Members.[133] This is designed to provide fair representation of Phlx members on this committee and harmonize the role of the committee with that of the NASDAQ Exchange's Quality of Markets Committee.[134]

6. Officers of the Exchange

The Exchange proposes various changes with respect to officers of the Exchange. First, the Exchange proposes to separate the roles of Chairman of the Board and CEO. The CEO would be ineligible to serve as Chair of the Board,[135] and the By-Laws would be amended to describe separately the responsibilities of the Chair of the Board and the CEO.[136]

Second, under the proposed rule change, the Board, instead of the CEO/Chairman, would appoint all officers of the Exchange, and would fix their duties, responsibilities, and terms of appointment.[137]

Third, Phlx proposes to set forth in detail the powers and duties relating to the Chair, Vice-Chair, and officers of the Exchange.[138]

Fourth, the Exchange proposes to create an office of the President who would, in the absence of the Chair of the Board and the CEO, preside at all meetings of the Board at which the President is present. Additionally, the President would have all powers and duties usually incident to the office of the President, except as specifically limited by the Board, and would be charged with general supervision of Exchange operations.[139] The Exchange also proposes to delete current Section 5–5 of the By-Laws, which addresses contingencies in the event the Chairman of the Board is unable to serve. The elimination of this provision reflects the changes to the role of the Chair of the Board and the creation of a separate CEO position, as well as the new position of President.

The Commission finds that these proposed changes are consistent with the Act, including Section 6(b)(1) of the

[119] Under the proposal, these committee members need not be Governors, but any non-Governor would serve in a non-voting capacity. *See* proposed Section 10–15 of the By-Laws.

[120] *See* proposed Section 10–15 of the By-Laws.

[121] *See* Notice, *supra* note 3, 73 FR at 23296. The Commission notes that this change is similar to a recently-approved change to a different By-Law. *See* Securities Exchange Act Release No. 57023 (December 20, 2007), 72 FR 74398 (December 31, 2007) (SR–Phlx–2007–83) (approving a proposal to similarly expand the type of business that may be conducted to qualify as a Business Conduct Committee member).

[122] Under the current provision, the Chair of the Committee must be either the Vice-Chair, Stockholder Governor, or Member Governor.

[123] Currently, the supplementary material relates to directives that are applicable to the Finance Committee in the exercise of its duties, powers and authority under the By-Laws. For example, the supplementary material states that the Finance Committee may authorize certain expenditures of any budgeted line items; may delegate to the staff of the Exchange so much of its authority to make expenditures as it deems appropriate; and shall perform its functions and act with the same powers and limitations for the Exchange and all subsidiaries of the Exchange. *See* Supplementary Material to Section 10–15 of the By-Laws.

[124] *See* Notice, *supra* note 3, 73 FR at 23296.

[125] 15 U.S.C. 78s(g).

[126] *See* proposed Section 10–19(a) of the By-Laws.

[127] *See* Notice, *supra* note 3, 73 FR at 23296.

[128] *See* Securities Exchange Act Release No. 57023, *supra* note 121.

[129] "Independent" committee members would be "Independent" within the meaning of Section 1–1(o) of the By-Laws.

[130] *See* proposed Section 10–21 of the By-Laws.

[131] NASDAQ OMX, as Stockholder, would select the Stockholder member(s) of this committee. *See* Notice, *supra* note 3, 73 FR 23296.

[132] The Board would select the Member(s) serving on the committee pursuant to Section 10–1(b) of the By-Laws.

[133] *See* proposed Section 10–21 of the By-Laws.

[134] *See* NASDAQ Exchange By-Law Article III, Section 6. *See supra* text accompanying notes 95 and 97–100.

[135] The Board would select its Chair from among the Independent Governors. *See* proposed Section 5–2 of the By-Laws.

[136] *See* proposed Sections 5–2 and 5–4 of the By-Laws. Under the current By-Laws, only the responsibilities of the Chairman of the Board are described (in Section 5–1 of the By-Laws).

[137] *See* proposed Sections 5–1, 5–4, 5–5, 5–8, 5–9 and 5–10 of the By-Laws.

[138] *See* Article V of the By-Laws. These provisions are intended to be generally consistent with current NASDAQ OMX By-Law Article VII, and NASDAQ Exchange By-Law Article IV.

[139] *See* proposed Section 5–5 of the By-Laws.

Act, which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act and comply with the requirements of the Act. Under these circumstances, the Commission believes that the creation of an independent Chair of the Board should foster a greater degree of independent decision-making by the governing body of the Exchange and mitigate the conflict between an SRO's regulatory functions on the one hand, and its business operations on the other.

D. Interpretations of and Amendments to the By-Laws

The Exchange proposes to clarify the process governing By-Law interpretations and amendments. With respect to interpretations, Section 4–17 of the By-Laws grants to the Board power to interpret the By-Laws and rules adopted pursuant thereto, and provides that any such interpretations are final, binding, and conclusive. Phlx proposes to clarify that the Board must determine affirmatively whether such interpretations must be filed with the Commission as proposed rule changes, and, if so, provides that any such interpretation not become effective until filed with, or filed with and approved by, the Commission.[140]

With respect to amendments, Section 22–1 currently allows the By-Laws to be amended by either: (1) An affirmative vote of a majority of the entire Board at any regular or special meeting of the Board; or (2) the affirmative vote of the holders of a majority of the shares of common stock of the Exchange then issued and outstanding at any regular or special meeting of the Stockholders. The Exchange proposes to amend this provision to state affirmatively that By-Law amendments must be filed with, or filed with and approved by, the Commission. The Exchange also proposes to require that both the Board and the holder of common stock of the Exchange approve proposed By-Law amendments.[141]

The Commission finds that proposed Sections 4–17 and 22–1 of the By-Laws are consistent with Section 6(b)(1) of the Act,[142] because they reflect the obligation of the Board to ensure compliance with the rule filing requirements under the Act. Additionally, the Commission finds these changes to be consistent with Section 19(b)(1) of the Act and Rule 19b–4 under the Act, which require that an SRO file with the Commission all proposed rules, as well as all proposed changes in, additions to, and deletions of its existing rules. These provisions clarify that certain By-Law interpretations and all By-Law amendments constitute proposed rule changes within the meaning of Section 19(b)(2) of the Act and Rule 19b–4 under the Act,[143] and obligate the Exchange's Board to affirmatively make those determinations.

E. Other Changes

1. Provisions Applicable to Common Stock

Phlx proposes a number of changes that reflect the proposed ownership by NASDAQ OMX of all the common stock of the Exchange. For example, Phlx proposes to delete the following provisions: (1) Article FOURTH(b)(iv) of the Certificate, which requires written notice to the Board of intention to acquire more than 5% of the Exchange's outstanding common stock; (2) Section 29–1 of the By-Laws, which requires that sales, transfers, and other dispositions of common stock be in blocks of 100 shares; (3) Section 29–2 of the By-Laws, governing lockups; (4) Section 29–5 of the By-Laws, regarding reimbursement for expenses incurred in connection with any transfer of capital stock; (5) Section 30–1 of the By-Laws, regarding stock certificates; (6) Section 30–2 of the By-Laws, concerning closing of the transfer books and determination of record dates; and (7) Article FOURTH(c)(v)(C) of the Certificate and Sections 29–4 and 30–3 of the By-Laws, which allow the Exchange to not register any transfer of capital stock of the Exchange that violates certain provisions of the Certificate or By-Laws. Additionally, existing provisions in Article XXIX of the By-Laws that contemplate a possible public offering of the Exchange's stock would be deleted and replaced with restrictions on stock transfer discussed above.[144] Because these provisions are applicable to non-public companies with several stockholders, the Exchange does not believe these provisions would be applicable following the Merger. In addition, the Exchange proposes to delete provisions that govern the use of common stock and/or common stock option incentive compensation that may be awarded to Governors and officers of the Exchange,[145] because such compensation would no longer be feasible if NASDAQ OMX owned 100% of the common stock of the Exchange.[146] The Commission finds that the elimination of these obsolete provisions are consistent with the Act and do not raise any novel regulatory issues.

2. Specified Board Votes

Sections 13–5,[147] 13–7,[148] 17–4,[149] and 18–3[150] of the By-Laws reference an affirmative vote of either 14 or 15 Governors, which used to represent a supermajority of the Board. The Exchange proposes to modify these provisions to remove the numerical reference and instead require an affirmative vote of a majority of all Governors. This change is consistent with the governing documents of Phlx's proposed parent company, NASDAQ OMX, where a supermajority vote is required only when the voting power of the then-outstanding stock entitled to vote is implicated.[151] The Commission finds that these changes maintain the requirement of a minimum majority Board vote and are consistent with Section 6 of the Act.

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[140] *See* proposed Section 4–17 of the By-Laws.

[141] *See* proposed Section 22–1 of the By-Laws. Under the current provision, By-Law amendments must be approved by either the Board *or* the holders of a majority of common stock of the Exchange. The Commission notes that Stockholder approval could be obtained outside of a regular or special meeting of the Stockholders by unanimous written consent pursuant to proposed Section 28–13 of the By-Laws.

[142] 15 U.S.C. 78f(b)(1).

[143] *See* Section 3(a)(27) of the Act (defining proposed rule change).

[144] *See supra* notes 33–43 and accompanying text (discussing the proposed limits on issuing, transferring, and assigning Phlx capital stock).

[145] *See* Section 6–1 of the By-Laws.

[146] The Exchange notes that, in the future, potential equity stock compensation would likely consist of NASDAQ OMX stock. *See* Notice, *supra* note 3, 73 FR at 23295.

[147] Section 13–5 of the By-Laws (Liability of Officers, Directors and Substantial Stockholders) imposes personal liability on officers, directors, and substantial stockholders of a Member Organization that is an Exchange Member when that corporation violates the By-Laws or the Rules. The Board, however, may vote to relieve the person of such personal liability.

[148] Section 13–7 of the By-Laws (Violation of Terms of Registration) provides the Board may vote to terminate the registration of a Member Organization for violating or failing to meet of the terms and conditions of its registration.

[149] Section 17–4 of the by-Laws (Time for Settlement of Insolvent Member or Participant) allows for the termination of a permit or participation when a Member or foreign currency options participant whose permit or rights and privileges have been suspended fails to settle with his creditors and apply for reinstatement within six months from the time of such suspension (or within such further time as the Board of Governors grants) or fails to obtain reinstatement. The Board, however, may vote to grant to extend the time for settlement.

[150] Section 18–3 of the By-Laws (Responsibility of Member or Participant for Acts of His Organization) imposes personal liability on a Member or foreign currency options participant that is a general partner in a Member Organization or participant organization for violations of the By-Laws or Rules by the partnership. The Board, however, may vote to relieve the general partner of such personal liability or reduce the amount of such liability.

[151] *See, e.g.*, Section 4.6 of the NASDAQ OMX By-Laws.

3. Capital Stock

The Exchange proposes to eliminate the current provisions of Article XXIX of the By-Laws that govern restrictions on transfers of capital stock of the Exchange. The proposed new provisions of Article XXIX include but are not limited to transfer restrictions on the capital stock of the Exchange.[152] In particular, proposed Sections 29–1, –2, –3, –5, –6, and –7 address stock certificates, stock ledgers, transfers of stock, and record date, respectively. The Exchange states that these are standard provisions for a Delaware stock corporation and contemplate ownership of all common stock of the Exchange by NASDAQ OMX.[153] The Commission notes that these new provisions are based on NASDAQ OMX By-Law Article IX, Capital Stock, Sections 9.1 through 9.7. The Commission finds that these changes are consistent with Section 6 of the Act and do not raise any novel regulatory issues.

4. Payment of Dividends

Proposed Section 29–8 of the By-Laws, which is similar to Section 15 of the LLC Agreement of the NASDAQ Exchange, would prohibit the Exchange from using Regulatory Funds to pay dividends.[154] The Commission finds that the prohibition on the use of regulatory fines, fees, or penalties to fund dividends is consistent with Section 6(b)(1) of the Act because it will further Phlx's ability to effectively comply with its statutory obligations and is designed to ensure that the regulatory authority of the Exchange is not improperly used.[155] This restriction on the use of regulatory funds is intended to preclude Phlx from using its authority to raise regulatory funds for the purpose of benefiting its shareholders, or for other non-regulatory purposes, such as to fund executive compensation.

5. Special Meetings

Current Section 4–14 of the By-Laws empowers only the Chairman of the Board or, in certain, circumstances, the Vice-Chairman of the Board, to call special meetings of the Board. The Exchange proposes to broaden this provision to also allow the interim Chair of the Board to call special meetings of the Board, under certain circumstances. The Commission finds that this proposal is consistent with Section 6(b)(1) of the Act, which requires a national securities exchange to be organized in such a way so as to be capable of carrying out the purposes of the Act. In particular, the Commission believes that this change will provide additional flexibility where appropriate to the Board to convene special meetings to conduct the business of the Exchange.

6. Annual Report and Weekly Bulletin

Section 4–21 of the By-Laws requires the distribution of an annual, independently-audited financial report of the Exchange to Stockholders, Members, participants, Member Organizations, and participant organizations. Phlx proposes to delete this requirement and instead require that annual financial reports be kept on file at the Exchange and made available for inspection upon request to any Stockholder, Member, participant, Member Organization, or participant organization. The Exchange states that financial information on the Exchange also would be reflected in the public consolidated financial statements of NASDAQ OMX once the Merger is complete, and the Commission notes that this proposal does not affect the requirement that Phlx comply with Rule 6a–2 under the Act to amend its Form 1.[156] Further, Phlx proposes to change how its Weekly Bulletin is distributed. Section 12–5(d) of the By-Laws provides that it must be mailed, and the Exchange proposes to update this provision to permit distribution by e-mail and posting on the Exchange's Web site. The Commission finds that these changes are consistent with Section 6 of the Act and do not raise any novel regulatory issues.

7. Stock Exchange Fund and Gratuity Fund

The Exchange proposes to eliminate Sections 9–1 through 9–6 of the By-Laws relating to the Stock Exchange Fund.[157] The purpose of the Stock Exchange Fund is to appoint trustees to manage the investment of certain funds of the Exchange and collect interest, dividends, and income from the funds for the Exchange. The Exchange believes these provisions are unnecessary because, after the Merger, the financial management of the Exchange will be overseen directly by the Board and subject to public company financial controls established by NASDAQ OMX. Similarly, the Exchange proposes to delete a provision in Section 4–4 of the By-Laws relating to the gratuity fund. This provision is obsolete, as the Exchange states that the fund no longer exists.[158]

8. Miscellaneous Changes

Additionally, the Exchange proposes to make the following changes to the Certificate and By-Laws to correct typographical errors, effect stylistic changes, move text, and/or update the language to more accurately reflect current practices. The Exchange proposes to:

- Change the title of the Certificate;
- Update the address of its registered office in Delaware; [159]
- Correct an error by changing the term "Board of Directors" to "Board of Governors;" [160]
- Update cross-references; [161]
- Add new definitions to its By-Laws and Rules; [162]
- Eliminate certain language from the Certificate that is also in the By-Laws; [163]
- Replace the term "Chairman" with "Chair" in referencing the head of the

[152] The proposed restrictions on Phlx capital stock are discussed *supra* notes 33, 43, and accompanying text.

[153] See Notice, *supra* note 3, 73 FR at 23297.

[154] Proposed Section 1–1(kk) of the By-Laws defines "Regulatory Funds" as fees, fines, or penalties derived from the regulatory operations of the Exchange. However, Regulatory Funds do not include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of the Exchange even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange. *See id.*

[155] See, e.g., Securities Exchange Act Release No. 51029 (January 12, 2005), 70 FR 3233, 3241 (January 21, 2005) (SR–ISE–2004–29) (approving an International Securities Exchange, LLC rule interpretation that requires that revenues received from regulatory fees or regulatory penalties be segregated and applied to fund the legal, regulatory, and surveillance operations of the Exchange and not used to pay dividends to the holders of Class A Common Stock).

[156] 17 CFR 249.1.

[157] Correspondingly, the Exchange proposes to delete references to the Stock Exchange Fund in Section 4–4 of the By-Laws.

[158] See Notice, *supra* note 3, 73 FR at 23295, n.31.

[159] *See* proposed Article SECOND of the Certificate.

[160] *See* Article FOURTH of the Certificate.

[161] *See* proposed Article FOURTH(b)(iii) of the Certificate and proposed Sections 1–1(w) of the By-Laws.

[162] For example, the Exchange proposes to add a definition of the terms: "Commission;" "NASDAQ OMX Merger" (Phlx also proposes to define the term "NASDAQ OMX Merger" in its proposed Rule 1(qq)); "Regulatory Funds;" "Preferred Stock;" and "Trust," and update the definition of the term "Trust Agreement." Additionally, Phlx would eliminate the defined term "Class A Common Stock" and modify the term "Common Stock," in accordance with its proposal to issue only one class of common stock. The Exchange also proposes to modify the definitions of "Member Governor" and "Stockholder Governor" to correspond with its proposal to decrease the number of Member Governors from two to one, and the number of Stockholder Governors from six to one.

[163] The language in Article SIXTH(b)(i)–(ii) of the Certificate, which Phlx proposes to eliminate, is also in Section 4–4(b)(ix)–(x) of the By-Laws.

Board [164] and the heads of Board committees; [165]

- Replace the term "Vice-Chairman" with "Vice-Chair;" [166]
- Replace references to the "director" of either the Membership Services or Examinations Departments in Sections 17–1 and 17–3 of the By-Laws with more general references to the departments; [167]
- Replace the terms "Stockholder" and "Stockholders" with stockholder and stockholders, respectively; [168]
- Replace "without" with "outside of" in Article TWELFTH of the Certificate;
- Use the defined term "Member" (instead of "member") in the definition of "non-member;" [169]
- Use the term "Member Organization" instead of "member organization;" [170]
- Update the definition of "Trust Agreement;" [171] and
- Correct typographical errors in Section 4–4 of the By-Laws (*i.e.*, add "the" to (b)(i), add "a" to (b)(vi), and replace "also" with "and."

The Commission finds these changes to be consistent with Section 6 of the Act generally, including Section 6(b)(1). The proposed minor changes update the Exchange's governing documents and make them more internally consistent, and thereby facilitate Members' understanding of their obligations and the Exchange's ability to administer its rules.

F. Changes to Exchange Rules

The Exchange proposes to amend Rule 98 (Emergency Committee) to provide the Board with discretion concerning the composition of the Emergency Committee. Currently, the composition of the Emergency Committee is fixed to consist of the Chairman of the Board, the On-Floor Vice-Chairman of the Exchange, the Off-Floor Vice-Chairman of the Exchange,[172] and the Chairmen of the Options and Foreign Currency Options Committees. The Commission notes that other exchanges also have an emergency committee whose composition is determined by the board of the exchange.[173] The Commission believes that the proposed changes to Rule 98 (Emergency Committee) should provide the Board with greater flexibility to manage the affairs of the Exchange in an emergency and are consistent with Sections 6(b)(1) of the Act,[174] which requires, among other things, a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act.

The Exchange also proposes to amend Rule 164 (Trading Halts) to provide the Board with discretion in designating the officers of the Exchange responsible for declaring any trading halts when in their opinion such suspension would be in the public interest. Currently, only the Chairman and Chief Executive Officer or his designee has the authority to suspend trading pursuant to Rule 164. The Commission believes that the proposed change to Rule 164 (Trading Halts) is consistent with the Act, and in particular with Sections 6(b)(1) and 6(b)(5) of the Act,[175] which require, among other things, that an exchange be organized and have the capacity to carry out the purposes of the Act and have rules designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest, because it will continue to allow the Exchange to respond in a timely manner, consistent with the Exchange's rules, to a situation where suspension of trading would be in the public interest. Currently, the Chairman and Chief Executive Officer [176] is authorized to suspend trading pursuant to Rule 164 or to delegate that power to another individual.[177] The Commission believes that, by making the Board responsible for trading suspension decisions, or alternatively for deciding to which Exchange officers that authority should be delegated, the proposal strengthens Board oversight of decisions to halt trading and makes Rule 164 less susceptible to any potential abuse of discretion.

Finally, the Exchange proposes to add to Rule 1 (Definitions) a definition of the NASDAQ OMX Merger.[178] The Exchange also proposes to amend Rule 972 (Continuation of Status After the NASDAQ OMX Merger) to reflect that current members, inactive nominees, member organizations, foreign currency options participants, foreign currency options participant organizations, as well as approved lessors of foreign currency options participations holding such status prior to the Merger would continue to hold such status following the Merger.[179] This change clarifies that current members and participants would continue in their current status following the Merger and would continue to have uninterrupted access to the Exchange.[180]

G. Additional Reporting Requirements for Listing Affiliated Securities

The Exchange proposes to adopt new Rule 990, which is based on NASDAQ Exchange Rule 4370.[181] Rule 990 would impose heightened requirements on Phlx if it lists a security of NASDAQ OMX or any of its affiliates ("Nasdaq Affiliates"). In the event that a Nasdaq Affiliate lists a security (the "Affiliate Security") on Phlx, the proposed rule would require Phlx to file a report with the Commission on a quarterly basis detailing Phlx's monitoring of: (1) The Nasdaq Affiliate's compliance with the provisions of the Rule 800 Series; and (2) the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Rule 163, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data.

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[164] *See, e.g.*, proposed Section 4–11 of the By-Laws.

[165] *See, e.g.*, proposed Section 8–1 of the By-Laws.

[166] *See, e.g.*, proposed Section 4–14 of the By-Laws.

[167] Under the proposed rule, notices would still be required to be sent to these departments, but not necessarily to the director.

[168] *See, e.g.*, Article TENTH of the Certificate. The term "Stockholder Governor" would remain, although the term "Stockholder Governors" would be made singular (*i.e.*, "Stockholder Governor") to reflect the Exchange's proposal to reduce the number of such Governors from six to one.

[169] *See* proposed Sections 1–1(o), 1–1(y), 3–12(a), 10–14(d), 12–7, 13–1, 13–5, 13–8, 14–11, 16–1, and 20–3 of the By-Laws.

[170] *See* proposed Sections 4–6(b), 10–14(d), 10–17, and 17–2 (adding both Member Organization and participant organization) of the By-Laws.

[171] *See* proposed Section 1–1(ee) of the By-Laws.

[172] The Exchange states that the position of Off-Floor Vice-Chairman of the Exchange no longer exists and reference to this position remained in Rule 98 inadvertently. *See* Notice, *supra* note 3, 73 FR at 23297.

[173] *See, e.g.*, American Stock Exchange LLC Constitution, Article XII, Emergency Committee.

[174] 15 U.S.C. 78f(b)(1).

[175] 15 U.S.C. 78f(b)(1) and 15 U.S.C. 78f(b)(5), respectively.

[176] Under the proposed rule change, there would no longer be one position entitled "Chairman and Chief Executive Officer." *See supra* Section III.C.7 and more specifically note 136 and accompanying text (explaining the proposal to separate the roles of Chairman and Chief Executive Officer).

[177] *See* Securities Exchange Act Release No. 54538 (September 28, 2006), 71 FR 59184, 59188 (October 6, 2006) (SR–Phlx–2006–43) (approving current Rule 164).

[178] *See* proposed Rule 1(qq).

[179] This provision was adopted in connection with, and currently refers to, the Exchange's 2004 demutualization.

[180] This provision was adopted in connection with, and currently refers to, the Exchange's 2004 demutualization.

[181] *See* NASDAQ Exchange Rule 4370. *See also* NYSE Rule 497, Additional Requirements for Listed Securities Issued by NYSE Euronext or its Affiliates.

The Exchange also would be required to notify the Commission at the same time it notifies the Nasdaq Affiliate if the Exchange determines that the Nasdaq Affiliate was not in compliance with any of its listing standards. Phlx would be required to notify the Commission within five business days of its receipt of a plan of compliance from the Nasdaq Affiliate and advise the Commission on whether the plan of compliance was accepted by Phlx or what other action was taken with respect to the plan, and the time period provided to regain compliance with the Rule 800 Series, if any.

In addition, the Exchange would be required to commission an annual review and report by an independent accounting firm of the compliance of the Affiliate Security with the Rule 800 Series. The Exchange would be required to furnish promptly a copy of the report to the Commission.

The listing of an Affiliate Security on Phlx could potentially create a conflict of interest between the Phlx's regulatory responsibilities to vigorously oversee the listing and trading of an Affiliate Security on Phlx, and its own commercial or economic interests. Such listing may raise questions as to the Phlx's ability to independently and effectively enforce the Commission's and the Exchange's rules against a Nasdaq Affiliate. Proposed Rule 990 is designed to address this concern.

The Commission finds that that proposed Rule 990 is consistent with Sections 6(b)(1) and 6(b)(5) of the Act [182] because it requires heightened reporting by Phlx to the Commission with respect to oversight of the listing and trading on Phlx of an Affiliate Security and will assist Phlx in effectively enforcing its Rules with respect to the listing and trading of these securities. In addition, the requirement that an independent accounting firm review such issuer's compliance with Phlx's listing standards adds a degree of independent oversight to Phlx's regulation of the listing of these securities, which may mitigate any potential or actual conflicts of interest and should help ensure thorough oversight of the Affiliate Security on the same basis as any other listed security.

[182] 15 U.S.C 78f(b)(1) and 15 U.S.C. 78f(b)(5), respectively.

H. Restriction on Affiliation with NASDAQ OMX

1. Limitation on Phlx Members' Ownership of NASDAQ OMX

The Exchange proposes to adopt new Rule 985(a) to prohibit Members [183] and persons associated with Members from beneficially owning more than 20% of the then-outstanding voting securities of NASDAQ OMX.[184] Members that trade on an exchange traditionally had ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.[185] A member that is a controlling shareholder of an exchange or an exchange's holding company might be tempted to exercise that controlling influence by pressuring or directing the exchange to refrain from, or the exchange otherwise may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.[186]

The Commission finds that the ownership restriction in proposed Rule 985(a), combined with the voting limitations in NASDAQ OMX's Certificate of Incorporation Article Fourth.C and By-Law 12.5,[187] is consistent with the Act, including Sections 6(b)(1) and 6(b)(5) of the Act. These limitations should minimize the potential that a Phlx member could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

2. Limitations on Affiliation between Phlx and Its Members

Proposed Rule 985(b) would prohibit Phlx or an entity with which it is affiliated from acquiring or maintaining an ownership interest in, or engaging in a business venture [188] with, a Phlx member or an affiliate of a Phlx member in the absence of an effective filing with the Commission under Section 19(b) of the Act.[189] Further, the rule would prohibit a Phlx member from becoming an affiliate of Phlx or an affiliate of an entity affiliated [190] with Phlx in the absence of an effective filing under Section 19(b) of the Act. However, Rule 985(b) would exclude from this restriction two types of affiliations.

First, a Phlx member or an affiliate of a Phlx member could acquire or hold an equity interest in NASDAQ OMX that is permitted pursuant to proposed Rule 985(a) (*i.e.*, less than 20% of the outstanding voting securities) without the need for the Exchange to file such acquisition or holding under Section 19(b) of the Act.[191] Second, Phlx or an entity affiliated with Phlx could acquire or maintain an ownership interest in, or engage in a business venture with, an affiliate of a Phlx member without the need for the Exchange to file such affiliation under Section 19(b) of the Act, if there were information barriers between the member and Phlx and its facilities. These information barriers would have to prevent the member from having an "informational advantage" concerning the operation of Phlx or its facilities or "knowledge in advance of other Phlx members" of any proposed

[183] The Rules use the term "members" to refer to members of the Exchange (previously defined as "Members").

[184] *See* proposed Rule 985(a).

The Commission also notes that NASDAQ OMX's Restated Certificate of Incorporation imposes limits on direct and indirect changes in control that are designed to prevent any shareholder from exercising undue control over the operation of the exchange and to ensure that the exchange and the Commission are able to carry out their regulatory obligations under the Act. Specifically, no person, which would include any Member, who beneficially owns shares of common stock, preferred stock, or notes in excess of five percent of the securities generally entitled to vote may vote the shares in excess of five percent. *See* NASDAQ OMX Certificate of Incorporation Article Fourth.C.

[185] *See* Securities Exchange Act Release Nos. 57478 (March 12, 2008), 73 FR 14521, 14523 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080); 55389 (March 2, 2007) 72 FR 10575, 10578 (March 8, 2007) (SR–CBOE–2006–110); 55293 (February 14, 2007), 72 FR 8033, 8037 (February 22, 2007) (SR–NYSE–2006–120); 53382 (February 27, 2006), 71 FR 11251, 11257 (March 6, 2006) (SR–NYSE–2005–77); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131); 51149 (February 8, 2005), 70 FR 7531, 7538 (February 14, 2005) (SR–CHX–2004–26); 49718 (May 17, 2004), 69 FR 29611, 29624 (May 24, 2004) (SR–PCX–2004–08); 49098, *supra* note 5 at 3986; and 49067 (January 13, 2004), 69 FR 2761, 2767 (January 20, 2004) (SR–BSE–2003–19).

[186] *See, e.g.*, Securities Exchange Act Release No. 49718, *supra* note 185 at 29624.

[187] *See supra* Section III.B (discussing the voting limits applicable to NASDAQ OMX securities).

[188] Phlx would define a "business venture" as an arrangement under which (A) Phlx or an entity with which it is affiliated and (B) a Member or an affiliate of a Member, engage in joint activities with the expectation of shared profit and a risk of shared loss from common entrepreneurial efforts. *See* proposed Rule 985(b)(i).

[189] 15 U.S.C. 78s(b).

[190] Phlx defines the term "affiliate" under proposed Rule 985(b) as having the meaning specified in Rule 12b–2 under the Act; provided, however, that for purposes of Rule 985(b), one entity shall not be deemed to be an affiliate of another entity solely by reason of having a common director.

[191] As discussed above, proposed Rule 985(a) provides that "[n]o member or person associated with a member shall be the beneficial owner of greater than twenty percent (20%) of the then-outstanding voting securities of The NASDAQ OMX Group Inc."

changes to the operations of Phlx or its trading systems. Further, Phlx may only notify an affiliated member of any proposed changes to its operations or trading systems in the same manner as it notifies non-affiliated members. Additionally, Phlx and its affiliated member may not share employees, office space, or data bases. Finally, the Board must certify, annually, that Phlx has taken all reasonable steps to implement, and comply with, the rule.

Proposed Rule 985 is based on the rules of Nasdaq, which the Commission previously found consistent with the Act.[192] The Commission similarly finds that proposed Rule 985 is consistent with the requirements of Section 6(b)(5) of the Act, which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.[193]

The Commission is concerned about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.[194] The Commission believes that Phlx's proposed rule is designed to mitigate these concerns by requiring that Phlx file a proposed rule change in connection with proposed affiliations between Phlx and Members unless such affiliation is due to a Member's interest in NASDAQ OMX permitted under proposed Rule 985(a) or conforms to the specified information barrier requirements.

If Phlx entered into an affiliation with a member (or any other party) that resulted in a change to a Rule or the need to establish new Rules, as defined under the Act, then such affiliation would be subject to the requirements of Section 19(b) of the Act and Rule 19b–4 thereunder. Proposed Rule 985(b) would not affect this statutory rule filing requirement.

3. Exceptions to Limitations on Affiliation Between Phlx and Its Members

NASDAQ OMX currently owns two broker-dealers: NES and NASDAQ Options Services, LLC ("NOS"). NES and NOS are members of Phlx. Absent relief, after the closing of NASDAQ OMX's acquisition of Phlx, NASDAQ OMX's ownership of NES and NOS would cause NES and NOS to violate the provision in proposed Rule 985(b) prohibiting Members from being affiliated with the Exchange.

Phlx has proposed that NES and NOS be permitted to become affiliates of the Exchange, subject to certain conditions and limitations. First, Phlx proposes that NES and NOS would only route orders to Phlx that first attempt to access liquidity on the NASDAQ Exchange.[195] Second, NES and NOS will remain facilities of the NASDAQ Exchange. Under NASDAQ Exchange rules, NES operates as a facility[196] of NASDAQ Exchange and routes orders to other market centers as directed by NASDAQ Exchange. Similarly, NOS is operated and regulated as a facility of NASDAQ Exchange with respect to its routing of System Securities ("NOS facility function"), and, consequently, the operation of NOS in this capacity will be subject to Exchange oversight, as well as Commission oversight.[197] NASDAQ Exchange is responsible for ensuring that NES and NOS, each a facility of the NASDAQ Exchange, are operated consistent with Section 6 of the Act and NASDAQ Exchange's rules. In addition, NASDAQ Exchange must file with the Commission rule changes and fees relating to NES and NOS. Third, use of NES's and NOS's routing function by NASDAQ Exchange members will continue to be optional. Parties that do not desire to use NES may enter orders into the NASDAQ Exchange as immediate-or-cancel orders or any other order-type available through the NASDAQ Exchange that is ineligible for routing.[198] Similarly, NOM participants are not required to use NOS to route orders, and a NOM participant may route its orders through any available router it selects.[199] In addition, the Commission notes that NES and NOS are members of an SRO unaffiliated with the NASDAQ Exchange, which serves as their designated examining authority under Rule 17d–1.[200]

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.[201] Although the Commission continues to be concerned about potential unfair competition and conflict of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, the Commission believes that it is appropriate and consistent with the Act to permit NES and NOS to become affiliates of Phlx for the limited purpose of providing routing services for NASDAQ Exchange for orders that first attempt to access liquidity on NASDAQ Exchange's systems before routing to Phlx, and in light of the protections afforded by the other conditions described above.

[192] *See* Nasdaq Rule 2130 and Securities Exchange Act Release No. 53128, *supra* note 101. *See also* Nasdaq Rule 2140 and Securities Exchange Act Release No. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR–NASDAQ–2006–006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members).

[193] 15 U.S.C. 78f(b)(5).

[194] *See* Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77) (order approving the New York Stock Exchange, Inc.'s merger with Archipelago Holdings, Inc.). *See also* Securities Exchange Act Release No. 54170 supra note 192 (order approving Nasdaq's proposal to adopt a similar rule, Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members).

[195] NES currently provides to NASDAQ Exchange members optional routing services to other market centers, including Phlx, as set forth in NASDAQ Exchange's rules. *See* NASDAQ Exchange Rules 4751, 4755, and 4758. NOS provides to NASDAQ Exchange members that are Nasdaq Options Market ("NOM") participants routing services to other market centers. Pursuant to NASDAQ Exchange's rules, NOS: (1) routes orders in options currently trading on NOM, referred to as "System Securities;" and (2) routes orders in options that are not currently trading on NOM ("Non-System Securities"). *See* NOM Rules, Chapter VI Sections 1(b) and 11. *See also* Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080) ("NOM Approval Order"). With respect to System Securities, NOM participants may designate orders to be routed to another market center when trading interest is not available on NOM or to execute only on NOM. *See* NOM Rules, Chapter VI, Section 11. *See also* NOM Approval Order, 73 FR at 14532–14533.

[196] *See* NASDAQ Exchange Rule 4758(b)(3). *See also* Securities Exchange Act Release No. 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR–NASDAQ–2007–078) ("NES Routing Release"). As a facility of NASDAQ Exchange, NASDAQ Exchange Rule 4758(b) acknowledges that NASDAQ Exchange is responsible for filing with the Commission rule changes related to the operation of, and fees for services provided by, NES and that NES is subject to exchange non-discrimination requirements.

[197] *See* NOM Rules, Chapter 11(e). *See also* NOM Approval Order, *supra* note 195, 73 FR at 14533.

[198] *See* NASDAQ Exchange Rule 4758(b)(7).

[199] *See* NOM Rules, Chapter VI, Section 11(a) (allowing Participants to designate orders as available for routing or not available for routing). *See also* NOM Approval Order, *supra* note 195, 73 FR at 14533, n.91 and accompanying text.

[200] *See* NASDAQ Exchange Rule 4758(b)(4), and NOM Rules, Chapter 11(e). *See* NES Routing Release, *supra* note 196; and NOM Approval Order, *supra* note 195, 73 FR at 14533, n.189 and accompanying text.

[201] *See supra* note 194 and accompanying text.

III. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[202] for approving the proposal, as modified by Amendment Nos. 1 and 2, prior to the thirtieth day after the date of publication of notice of filing of Amendment No. 2 in the **Federal Register**.[203] In Amendment No. 2, Phlx proposed to adopt as rules of the Exchange the Certificate of Incorporation and By-Laws of NASDAQ OMX. The Certificate of Incorporation, as filed by the Exchange, was previously approved by the Commission as rules of Nasdaq.[204] The NASDAQ OMX By-Laws were similarly approved by the Commission.[205] As filed by the Exchange, the NASDAQ OMX By-Laws include certain new terminology to reflect the acquisition of Phlx by NASDAQ OMX. These changes were filed by NASDAQ Exchange as a proposed rule change, and were published for comment.[206] The Commission received no comments on the proposed changes to the NASDAQ OMX By-Laws.

As discussed more fully above and in the NASDAQ Stock Market Proposal, certain provisions of NASDAQ OMX's Certificate and By-Laws are designed to facilitate the ability of NASDAQ OMX's SRO Subsidiaries, including Phlx, to maintain the independence of each of the SRO Subsidiaries' self-regulatory function, enable each SRO Subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.[207] As stated above, the Commission finds that such provisions are consistent with the Act.[208] Notably, the NASDAQ OMX Certificate and By-Laws are rules of NASDAQ Exchange that have been approved previously by the Commission, as noted above, and the changes to the NASDAQ OMX By-Laws were published for notice and comment, as noted above, and the Commission did not receive any comments thereon. Accordingly, the Commission finds good cause for approving the Phlx's proposal, as modified by Amendment Nos. 1 and 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

[202] 15 U.S.C. 78s(b)(2).

[203] Pursuant to Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

[204] *See* Securities Exchange Act Release No. 51328, *supra* note 101.

[205] *See id.*

[206] *See* Securities Exchange Act Release No. 57761, *supra* note 4.

[207] *See supra* Section III.C.1 (discussing, for example the duty of the board, officers, employees and agents NASDAQ OMX to give due regard to the preservation of the independence of the Phlx's self-regulatory function).

[208] *See supra* note 56 and accompanying text.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2008–31 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2008–31. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–Phlx–2008–31 and should be submitted on or before August 13, 2008.

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[209] that the proposed rule change (SR–Phlx–2008–31), as modified by Amendment Nos. 1 and 2 thereto, be and hereby is approved on an accelerated basis.

By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16760 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

[209] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58185; File No. SR–Phlx–2008–54]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Participation Guarantees for Crossing and Facilitation Orders

July 17, 2008.

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 July 14, 2008, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. The Phlx has submitted the proposed rule change as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Exchange Rule 1064, "Crossing, Facilitation and Solicited Orders," to

[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)(6).

provide that the percentage of the order which a Floor Broker is entitled to cross in equity, index and U.S. dollar-settled foreign currency options, after all public customer orders that were (1) on the limit order book and then (2) represented in the trading crowd at the time the market was established have been satisfied, is 40% of the remaining contracts in the order if the order is traded at or between the best bid or offer given by the crowd in response to the Floor Broker's initial request for a market.

The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.phlx.com/regulatory/reg_rulefilings.aspx.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to enhance the Exchange's ability to compete for order flow in all options traded on the Exchange by establishing uniform participation guarantee rules.

Exchange Rule 1064, Commentary .02 currently guarantees a participation percentage to Floor Brokers representing crossing and facilitation orders in open outcry. The percentage of the order which a Floor Broker is entitled to cross, after all public customer orders that were (1) on the limit order book and then (2) represented in the trading crowd at the time the market was established have been satisfied, is currently 40% of the remaining contracts in the order respecting equity options, and 20% of the remaining contracts in the order respecting index options and U.S. dollar-settled foreign currency options.

Under the proposal, the participation guarantee would be the same for all options traded on the Exchange. Specifically, Rule 1064, Commentary .02 (iii) would continue to allow a participation guarantee to Floor Brokers of 40% for equity options (including options overlying Exchange Traded Fund shares), and would increase the participation guarantee to Floor Brokers representing crossing and facilitation orders in index options and U.S. dollar-settled foreign currency options from the current 20% to 40%. Thus, the participation guarantee for all options traded on the Exchange would be 40%.

The proposed rule change would have an effect on the Enhanced Specialist Participation [5] respecting index options and U.S. dollar-settled foreign currency options. Rule 1064, Commentary .02(vi)(A) currently states that, respecting orders for index options and U.S. dollar-settled foreign currency options, the Enhanced Specialist Participation may only be 20% of the original order after customer orders have been executed for orders crossed pursuant to paragraph (vi) unless the Floor Broker has chosen to cross less than its 20% entitlement, in which case the Enhanced Specialist Participation will be a percentage that combined with the percentage the firm crossed is no more than 40% of the original order. The proposed rule change would increase the "20% entitlement" specified in the rule to 40%. Thus, the Enhanced Specialist Participation will apply only to the extent that the Floor Broker elects not to cross his or her entire 40% entitlement.

For purposes of simplicity, the Exchange proposes to amend Commentary .02(vi)(B) to state that the specialist shall not be entitled to receive the Enhanced Specialist Participation in equity, index and U.S. dollar-settled foreign currency options unless the Floor Broker has chosen to cross less than its 40% entitlement, and to incorporate this text into one single paragraph (A), since it would no longer be necessary to differentiate index options and U.S. dollar-settled foreign currency options from all other options traded on the Exchange for purposes of the crossing and facilitation participation guarantee.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by enabling the Exchange to better compete for order flow through an increase to the participation guarantee for crossing and facilitation orders in index options and U.S. dollar-settled foreign currency options.

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 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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [8] and subparagraph (f)(6) of Rule 19b–4 thereunder.[9] Because the Phlx has designated the proposed rule change as one that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) hereunder. As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to filing the proposal with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that 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.

[5] The "Enhanced Specialist Participation" entitles the specialist to a greater than equal share of the portion of an executed order that is divided among the specialist and any non-customer accounts that were bidding or offering at the same execution price. *See* Exchange Rule 1014(g).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2008–54 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2008–54. 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. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–Phlx–2008–54 and should be submitted on or before August 13, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16837 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58180; File No. SR–SCCP–2008–01]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend and Restate Its Articles of Incorporation

July 17, 2008.

I. Introduction

On April 24, 2008, Stock Clearing Corporation of Philadelphia ("SCCP") filed with the Securities and Exchange Commission ("Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on May 20, 2008.[2] SCCP filed Amendment No. 1 to the proposed rule change on July 2, 2008.[3] The Commission received no comments on the proposed rule change. This order provides notice of filing of Amendment No. 1 to the proposed rule change, and grants accelerated approval to the proposed rule change, as modified by Amendment No. 1.

II. Description

SCCP is amending its current Articles of Incorporation ("Articles") to more clearly state that all of the authorized shares of common stock of SCCP are issued and outstanding and are held by Phlx. In addition, SCCP is adding language to its Articles relating to transfers and assignments of SCCP shares of stock. SCCP is restating its Articles to consolidate previous amendments and make other technical amendments, which according to SCCP will modernize the existing language in the Articles.[4]

The purpose of the amendment and restatement of the Articles is to ensure that any future change in ownership of SCCP stock, whether transferred or assigned, in whole or in part, would be filed with the Commission under Section 19 of the Act and the rules promulgated thereunder. This language is consistent with language recently approved by the Commission in connection with the amending by Phlx of its Certificate of Incorporation and By-Laws [5] as a result of the proposed acquisition of Phlx by NASDAQ OMX.[6]

III. Discussion

The Commission finds that the rule change is consistent with the requirements of the Act and the rules and regulations thereunder and particularly with the requirements of Section 17A(b)(3)(C) of the Act.[7] The proposed rule change would amend SCCP's Articles to reflect the proposed NASDAQ OMX Merger. The Commission notes that the proposed rule change does not amend SCCP's rules or procedures with respect to the clearance and settlement of securities transactions or the safeguarding of securities and funds which are in SCCP's control or for which it is responsible. Section 17A(b)(3)(C) of the Act requires that a clearing agency's rules assure the fair representation of its shareholders and participants in the selection of its directors and administration of its affairs. SCCP

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 57817 (May 14, 2008), 73 FR 29171.

[3] In Amendment No. 1, SCCP filed the complete Certificate of Incorporation and amended By-Laws of The NASDAQ OMX Group, Inc. ("NASDAQ OMX") in order to propose their adoption as rules of SCCP. The By-Laws contained minor amendments to terminology to apply to SCCP and SCCP's parent corporation, the Philadelphia Stock Exchange, Inc. ("Phlx"), all of the same provisions that are currently specifically applicable to The NASDAQ Stock Market LLC ("NASDAQ"). Such amendments are being made in connection with the NASDAQ OMX Merger, as defined in footnote 6 below. The amended By-Laws were published for comment in a separate filing by NASDAQ. *See* Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182 (May 8, 2008) (notice of SR–NASDAQ–2008–035) ("NASDAQ Stock Market Proposal").

[4] The specific amendments proposed for SCCP's Articles can be viewed at *http://www.phlx.com/SCCP/sccp_rules/SR-SCCP-2008-01.pdf*.

[5] Securities Exchange Act Release No. 58179 (July 17, 2008) [File No. SR–Phlx–2008–31] (order approving proposed rule change relating to NASDAQ OMX's acquisition of Phlx).

[6] On November 7, 2007, NASDAQ OMX announced that it had entered into an agreement with Phlx pursuant to which NASDAQ OMX would acquire all of the outstanding capital stock of Phlx. In connection with this acquisition, Pinnacle Merger Corp., a Delaware corporation and wholly owned subsidiary of NASDAQ OMX, would be merged with and into Phlx with Phlx surviving the merger ("NASDAQ OMX Merger"). As a result of the NASDAQ OMX Merger, all of Phlx's common stock would be owned by NASDAQ OMX. Thereafter, NASDAQ OMX would operate Phlx as a wholly-owned subsidiary and SCCP as an indirect wholly-owned subsidiary. Phlx and SCCP would continue to be separate self-regulatory organizations.

[7] 15 U.S.C. 78q–1(b)(3)(C).

would remain a wholly-owned subsidiary of Phlx following the NASDAQ OMX Merger and the SCCP By-Laws relating to the selection, composition, powers, and duties of the SCCP board of directors, committees, and officers would remain unchanged. Accordingly, the Commission finds that SCCP's rules would continue to assure the fair representation of its shareholders and participants in the section of SCCP's directors and the administration of SCCP's affairs as required by Section 17A(b)(3)(C).

IV. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[8] for approving the proposal, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of filing of Amendment No. 1 in the **Federal Register**.[9] In Amendment No. 1, SCCP proposed to adopt as rules of SCCP the Certificate of Incorporation and By-Laws of NASDAQ OMX. The Certificate of Incorporation, as filed by the SCCP, was previously approved by the Commission as rules of the NASDAQ.[10] The NASDAQ OMX By-Laws were similarly approved by the Commission.[11] As filed by the SCCP, the NASDAQ OMX By-Laws include certain new terminology to reflect the acquisition of Phlx and SCCP by NASDAQ OMX. These changes were filed by NASDAQ Exchange as a proposed rule change, and were published for comment.[12] The Commission received no comments on the proposed changes to the NASDAQ OMX By-Laws.

As discussed more fully in the NASDAQ Stock Market Proposal, certain provisions of NASDAQ OMX's Certificate and By-Laws are designed to facilitate the ability of NASDAQ OMX's SRO subsidiaries, including SCCP, to maintain the independence of each of the SRO subsidiaries' self-regulatory function, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.[13] As stated above, the Commission finds that such provisions are consistent with the Act.[14] Notably, the NASDAQ OMX Certificate of Incorporation and By-Laws are rules of NASDAQ that have been approved previously by the Commission, as noted above, and the changes to the NASDAQ OMX By-Laws were published for notice and comment, as noted above, and the Commission did not receive any comments thereon. Accordingly, the Commission finds good cause for approving SCCP's proposal, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 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–SCCP–2008–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–SCCP–2008–01. 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 Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of SCCP. 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–SCCP–2008–01 and should be submitted on or before August 13, 2008.

VI. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.[15]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (SR–SCCP–2008–01), as modified by Amendment No. 1 thereto, be and hereby is approved on an accelerated basis.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–16824 Filed 7–22–08; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(2).

[9] Pursuant to Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

[10] *See* Securities Exchange Act Release No. 51328 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving the application of NASDAQ for registration as a national securities exchange).

[11] *See id.*

[12] *See* Securities Exchange Act Release No. 57761, *supra* note 3.

[13] In addition to the NASDAQ OMX Merger, NASDAQ OMX entered into an agreement with the Boston Stock Exchange ("BSE"), pursuant to which NASDAQ OMX would acquire all of the outstanding membership interests in BSE ("BSE Acquisition"). *See* Securities Exchange Act Release Nos. 57757 (May 1, 2008), 73 FR 26159 (SR–BSE–2008–23) (notice of proposed rule change related to BSE Acquisition) and 57782 (May 6, 2008), 73 FR 27583 (May 13, 2008) (SR–BSECC–2008–01) (notice of proposal to amend the articles of organization and by-laws of the Boston Stock Exchange Clearing Corporation to reflect its proposed acquisition by NASDAQ OMX).

[14] *See supra* note 7 and accompanying text.

[15] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f). *See* Securities Exchange Act Release No. 58179, *supra* note 5.

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Approval of Noise Compatibility Program; Orlando Executive Airport, Orlando, FL

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the Noise Compatibility

Program submitted by the Greater Orlando Aviation Authority under the provisions of 49 U.S.C. (the Aviation Safety and Noise Abatement Act, hereinafter referred to as "the Act") and 14 CFR Part 150. These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96–52 (1980). On December 31, 2007, the FAA determined that the noise exposure maps submitted by the Greater Orlando Aviation Authority under Part 150 were in compliance with applicable requirements. On June 23, 2008, the FAA approved the Orlando Executive Airport noise compatibility program. All of the recommendations of the program were approved.

DATES: *Effective Date:* The effective date of the FAA's approval of the Orlando Executive Airport Noise Compatibility Program is June 23, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Lindy McDowell, Federal Aviation Administration, Orlando Airports District Office, 5950 Hazeltine National Drive, Orlando, Florida 32822, phone number: 407–812–6331. Documents reflecting this FAA action may be reviewed at this same location.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the Noise Compatibility Program for Orlando Executive Airport, effective June 23, 2008.

Under Section 47504 of the Act, an airport operator who has previously submitted a Noise Exposure Map may submit to the FAA a Noise Compatibility Program which sets forth the measures taken or proposed by the airport operator for the reduction of existing non-compatible land uses and prevention of additional non-compatible land uses within the area covered by the Noise Exposure Maps. The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with Federal Aviation Regulations (FAR) Part 150 is a local program, not a Federal Program. The FAA does not substitute its judgment for that of the airport operator with respect to which measure should be recommended for action. The FM's approval or disapproval of FAR Part 150 program recommendations is measured according to the standards expressed in FAR Part 150 and the Act, and is limited to the following determinations:

a. The Noise Compatibility Program was developed in accordance with the provisions and procedures of FAR Part 150;

b. Program measures are reasonably consistent with achieving the goals of reducing existing non-compatible land uses around the airport and preventing the introduction of additional non-compatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport Noise Compatibility Program are delineated in FAR Part 150, Section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where Federal funding is sought, requests for project grants must be submitted to the FAA Airports District Office in Orlando, Florida.

Greater Orlando Aviation Authority submitted to the FAA on December 18, 2007, the Noise Exposure Maps, descriptions, and other documentation produced during the noise compatibility planning study conducted from November, 2003, through December, 2006. The Orlando Executive Airport Noise Exposure Maps were determined by FAA to be in compliance with applicable requirements on December 31, 2007. Notice of this determination was published in the **Federal Register** on December 31, 2007.

The Orlando Executive Airport study contains a proposed Noise Compatibility Program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from the year 2007 to the year 2012. It was requested that FAA evaluate and approve this material as a Noise Compatibility Program as described in Section 47504 of the Act. The FM began its review of the Program on December 31, 2007, and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new or modified flight procedures for noise control). Failure to approve or disapprove such program within the 180-day period shall be deemed to be an approval of such program.

The submitted program contained four (4) proposed actions for noise mitigation on and off the airport. The FAA completed its review and determined that the procedural and substantive requirements of the Act and FAR Part 150 have been satisfied. The overall program, therefore, was approved by the FAA effective June 23, 2008.

Outright approval was granted for all of the specific program elements. Mitigation measures approved include:

Operational Measure

1. Modification of the Current Helicopter Flight Track to and From the North

Currently the helicopter flight corridor north of the Airport passes over residential areas north of Fashion Square Mall. To avoid these residential areas, it is recommended that nonemergency rotorcraft operations to and from the north fly to Colonial Drive (SR 50) then west to I–4 and then turn northbound along the Interstate. All other rotorcraft tracks are recommended to remain in effect with no changes. (NCP, pages 10–2, 13–1; Exhibits D, 11–1; and Tables 10–1A., 13–1, 13–2)

FAA Action: Approved as voluntary measure, subject to traffic, weather, and airspace safety and efficiency.

Land Use Measure

1. Property Acquisition Program

The development of a voluntary acquisition program that allows non-compatible land uses to be removed from high noise exposure areas. It is recommended that residences located within the 2006 baseline 70 DNL and greater contour be considered for voluntary property acquisition through the use of FAA noise funding. (NCP, pages 10–3, 12–1, 12–3; Exhibits F, 12–1; and Tables 13–2)

FAA Action: Approved. Acquisitions are limited to existing non-compatible land uses located within the 65 DNL

noise contour of the approved NEMs, and are consistent with FAA's 1998 remedial mitigation policy (63 FR 16409). The specific identification of structures recommended for inclusion in the program and specific definition of the scope of the program will be required prior to approval for Federal funding.

Program Management Measure

1. Additional Noise Monitoring Equipment

It is recommended that five (5) additional noise monitors be acquired. Potential sites that have been identified for three of the new monitors include three schools located southwest of OEA along the Runway 7 extended centerline. The remaining two new monitors will be used to replace existing outdated monitors. It is also recommended that an Air to Ground Monitoring Tower be acquired to aid in communications. This system provides a scanner which is interfaced into a digital recording server and processed via a software application. (NCP, pages 10–3, 10–6, 13–1; Exhibits 10–2; and Tables 10–1B, 13–1)

FAA Action: Approved. Eligibility for Federal funding of five noise monitors and Air to Ground Monitoring Tower will be determined at the time of application. Fixed noise monitoring equipment is ineligible where the Part 150 noise exposure maps (existing and forecast) show no non-compatible land uses, For purposes of aviation safety, this approval does not extend to the use of monitoring equipment for enforcement purposes by in-situ measurement of any preset noise thresholds and shall not be used for mandatory enforcement of any voluntary measure.

2. Pilot Brochure

Develop a "Pilot Handout" to identify noise abatement procedures associated with OEA. The handout would be provided to FBOs, pilots and others using the facility. The intent of the handout is to make pilots aware of the existing and future voluntary noise mitigation procedures in effect at the Airport. (NCP, pages 10–3, 13–1; and Tables 10–10,13–1, 13–2)

FAA Action: Approved. Inserts or other information must not be construed as mandatory air traffic procedures. Prior to release, language in the brochure should be reviewed for wording and content by the appropriate FAA office. The content of the brochure is subject to specific approval by appropriate FAA officials outside of the FAR Part 150 process and is not approved in advance by this determination.

These determinations are set forth in detail in a Record of Approval signed by the FAA on June 23, 2008. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative office of the Greater Orlando Aviation Authority. The Record of Approval also will be available on-line at: *http://www.faa.gov/airports_airtraffic/airports/environmental/airport_noise/part_150/states/.*

Issued in Orlando, Florida on July 10, 2008.

W. Dean Stringer,

Manager, Orlando Airports District Office.

[FR Doc. E8–16509 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

America's Byways Public Awareness Initiative

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice; Request for Statement of Interest.

SUMMARY: The Federal Highway Administration (FHWA), cooperatively with the America's Byways Resource Center (ABRC) in Duluth, Minnesota, invites statements of interest about participating in a domestic, multi-year America's Byways® Partnership Marketing Campaign. As part of this marketing campaign, the ABRC would like to partner with interested parties to establish a national Public Awareness Initiative to elevate the awareness, understanding, and appreciation of the America's Byways collection. This initiative offers an ideal environment for national partners with brand profiles consistent with the National Scenic Byways Program to spotlight their products while raising the awareness of America's Byways. This notice seeks Statements of Interest from parties, such as corporations, associations, nonprofit organizations, and public authorities, who are interested in working with ABRC and FHWA in the Partnership Marketing Campaign.

DATES: Statements of interest should be received on or before September 22, 2008. However, statements received after this date may still be considered depending on available resources.

ADDRESSES: Mail or hand deliver statements of interest to the America's Byways Resource Center, 394 Lake Avenue South, Suite 600, Duluth, MN 55802, or submit via e-mail to *partnerships@byways.org* or fax to (218) 625–3333.

FOR FURTHER INFORMATION CONTACT: Henry Hanka, (218) 625–3306, Special Projects Manager, America's Byways Resource Center, 394 Lake Avenue South, Suite 600, Duluth, MN 55802, or Gary Jensen, (202) 366–2048, Office of Planning, Environment & Realty, HEP–2, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 7:30 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access: An electronic copy of this document may be downloaded by accessing the Office of the Federal Register's home page at *http://www.archives.gov* and from the Government Printing Office's Web page at *http://www.gpoaccess.gov/nara.*

Background: The National Scenic Byways Program was established under the Intermodal Surface Transportation Efficiency Act of 1991, and was reauthorized and amended most recently in 2005 under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). It is codified at Title 23, United States Code, section 162. Under the program, the Secretary of Transportation recognizes certain roads as National Scenic Byways or All-American Roads based on their intrinsic qualities—archaeological, cultural, historic, natural, recreational, and scenic qualities. There are 126 such designated byways in 44 States which the FHWA promotes collectively as America's Byways®. It is a program that recognizes and supports outstanding roads while providing resources to help manage the intrinsic qualities within the broader byway corridor. The vision of the FHWA's National Scenic Byways Program is to create a distinctive collection of American roads, their stories and treasured places. The program's mission is to provide resources to the byway community in creating a unique travel experience and enhanced local quality of life through efforts to preserve, protect, interpret, and promote the intrinsic qualities of designated byways.

Partnership Marketing Campaign: In 2005, Congress authorized ABRC to carry out public awareness activities for America's Byways. As a result, the ABRC developed a Partnership Marketing Campaign. Under this Campaign, the ABRC intends to partner

with interested parties to establish the strategic and creative framework for a national communications effort. The core objectives of this campaign are as follows:

- Increase awareness for America's Byways at the community, regional and national level among the general public and special interest groups.
- Build a greater understanding and appreciation for the America's Byways experience.
- Increase visitation and usage across the America's Byways Collection.
- Generate economic impact for the individual byway communities.

The Campaign is designed to combine the shared commitment of the FHWA and ABRC with the expertise and resources of a broader range of public and private partners to integrate resources, execute a more extensive communications effort, and enter more markets with greater exposure. As part of this partnership, private and public sector partners may have opportunities to position their brands and products with the America's Byways® brand in a joint marketing and communication environment. Such partners could include, but are not limited to, entities in the following areas: Automotive; hospitality/hotels/rental cars; food service; retail; and outdoor recreation.

Partner benefits may also include exposure through strategic partnerships that may reach a broader audience, while promoting protection and sustainability of the environment; and being seen as a leader in a national domestic tourism campaign.

The FHWA and ABRC are considering various options for this initiative, but consistent with the direction from Longwoods Travel USA® research, would look to start with national partners whose businesses especially link with the tourism categories of Touring/Special Events and Outdoor Adventure. See: *http://www.bywaysresourcecenter.org/resources/specialprojects/partnershipmarketing*. Longwoods Travel USA® concludes that these segments represent over 51 percent of trips by car, RV or motorcycle overnight travelers. The research also showed that the potential for new byway customers is great, with the number one item of importance in attracting new visitors is that more information and publicity is needed.

Statements of Interest: This notice seeks interest from parties, such as corporations, associations, nonprofit organizations, and public authorities, who can, together with FHWA and ABRC, promote America's Byways. Statements of interest should include a basic business profile of the interested party, products offered, and a brief summary of current national communications and marketing scope. Based on responses to this notice and other information, the FHWA and the ABRC will work with selected interested parties to integrate their ideas into the national marketing strategy. The statements of interest will be used by FHWA and ABRC to evaluate which potential partners can assist us in attracting new visitors and gain more publicity consistent with our research. There is a level of uncertainty associated with planning against an unknown investment of funding and resources from potential partners. The FHWA and the ABRC are considering various options for this initiative, but would look to start with national partners whose businesses especially complement the America's Byways tourism categories of Touring/Special Events and Outdoor Adventure.

Upon receipt of a statement of interest, the ABRC, in cooperation with FHWA, will confirm receipt of the statements of interest. Those parties determined by the ABRC, in cooperation with FHWA, to have the greatest potential to assist us in attracting new visitors and gain more publicity for America's Byways will then be contacted to discuss further their level of interest, available resources, existing and future communications efforts, and to discuss next steps.

Issued on: July 15, 2008.

James D. Ray,

Acting Federal Highway Administrator.

[FR Doc. E8–16886 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for certain steel products used in Federal-aid construction projects in Florida and Illinois.

DATES: The effective date of the waiver is July 24, 2008.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via e-mail at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via e-mail at *michael.harkins@dot.gov*. Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for two specific cases.

In accordance with Division K, section 130, of the "Consolidated Appropriations Act, 2008" (Pub. L. 110–161), the FHWA published a notice of intent to issue a waiver on its Web site on May 28, 2008, for motor brakes and machinery brakes for a Federal-aid project in Florida (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=11*). In addition, the FHWA published a notice of intent to issue a waiver on its Web site on June 5, 2008, for guard bars, manganese castings, turnout braces, and weld kits associated with a Federal-aid railroad project in Illinois (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=12*). No comments were received in response to either of these notices; therefore, the FHWA concludes that there are no domestic manufacturers for these products and a Buy America waiver is appropriate as provided by 23 CFR 635.410(c)(1).

In accordance with the provisions of section 117 of the "SAFETEA–LU Technical Corrections Act of 2008" (Pub. L. 110–244, 122 Stat.1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the

effective date of the waiver. Comments may be submitted to the FHWA's Web site via the links above to the Florida and Illinois waiver pages noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410)

Issued on: July 15, 2008.

James D. Ray,

Acting Administrator, Federal Highway Administration.

[FR Doc. E8–16885 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Uniform Relocation and Real Property Acquisition for Federal and Federally Assisted Programs; Fixed Payment for Moving Expenses; Residential Moves

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: The purpose of this notice is to publish changes in the Fixed Residential Moving Cost Schedule for the States and Territories of Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Utah, Virgin Islands, Virginia, and Wyoming as provided for by section 4622(b) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended. The schedule amounts for the States and Territories not listed above remain unchanged. The Uniform Act applies to all programs or projects undertaken by Federal agencies or with Federal financial assistance that cause the displacement of any person.

DATES: The provisions of this notice are effective August 22, 2008, or on such earlier date as an agency elects to begin operating under this schedule.

FOR FURTHER INFORMATION CONTACT: Carolyn Winborne James, Office of Real Estate Services, (202) 493–0353, *Carolyn.James@dot.gov*; Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at: *http://www.archives.gov/* and the Government Printing Office's database at: *http://www.access.gpo.gov/*.

Background

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4601–4655 (Uniform Act), established a program, which includes the payment of moving and related expenses, to assist persons who are displaced because of Federal or federally assisted projects. The FHWA is the lead agency for implementing the provisions of the Uniform Act and has issued governmentwide implementing regulations at 49 CFR part 24.

The following 17 Federal departments and agencies have, by cross-reference, adopted the governmentwide regulations: Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Homeland Security; Environmental Protection Agency; Federal Emergency Management Agency; General Services Administration; Department of Health and Human Services; Department of Housing and Urban Development; Department of the Interior; Department of Justice; Department of Labor; Department of Veterans Affairs; National Aeronautics and Space Administration; Tennessee Valley Authority.

Section 4622(b) of the Uniform Act provides that, as an alternative to being paid for actual residential moving and related expenses, a displaced individual or family may elect payment for moving expenses on the basis of a moving expense schedule established by the head of the lead agency. The governmentwide regulations at 49 CFR 24.302 provide that the FHWA will develop, approve, maintain, and update this schedule, as appropriate.

The purpose of this notice is to update the schedule published on May 16, 2005 (70 FR 25875). The schedule is being updated to reflect the increased costs associated with moving personal property and was developed from data provided by State highway agencies. This update increases the schedule amounts in the States and Territories of Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Utah, Virgin Islands, Virginia, and Wyoming. The schedule amounts for the States and Territories not listed above remain unchanged. The payments listed in the table below apply on a State-by-State basis. Two exceptions and limitations apply to all States and Territories. Payment is limited to $100.00 if either of the following conditions applies:

(a) A person has minimal possessions and occupies a dormitory style room, or

(b) A person's residential move is performed by an agency at no cost to the person.

The schedule continues to be based on the "number of rooms of furniture" owned by a displaced individual or family. In the interest of fairness and accuracy, and to encourage the use of the schedule (and thereby simplify the computation and payment of moving expenses), an agency should increase the room count for the purpose of applying the schedule if the amount of possessions in a single room or space actually constitutes more than the normal contents of one room of furniture or other personal property. For example, a basement may count as two rooms if the equivalent of two rooms worth of possessions is located in the basement. In addition, an agency may elect to pay for items stored outside the dwelling unit by adding the appropriate number of rooms.

Authority: 42 U.S.C. 4622(b) and 4633(b); 49 CFR 1.48 and 24.302.

Issued on: July 16, 2008.

James D. Ray,

Acting Federal Highway Administrator.

BILLING CODE 4910–22–P

Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended, Fixed Residential Moving Cost Schedule (2008)

The payments listed in the table below apply on a State-by-State basis. Two exceptions and limitations apply to all States and Territories. Payment is limited to $100.00 if either of the following conditions apply:

(a) A person has minimal possessions and occupies a dormitory style room, or

(b) A person's residential move is performed by an agency at no cost to the person.

State	Occupant Owns Furniture									Occupant does not own furniture	
	Number of Rooms of Furniture										
	1 room	2 rooms	3 rooms	4 rooms	5 rooms	6 rooms	7 rooms	8 rooms	Addt'l room	1 room/ no furn.	Addt'l room no furn.
Alabama	$500	$650	$800	$950	$1100	$1250	$1400	$1550	$150	$350	$50
Alaska	700	900	1125	1350	1550	1725	1900	2075	300	500	200
American Samoa	282	395	508	621	706	790	875	960	85	226	28
Arizona	700	800	900	1000	1100	1200	1300	1400	100	395	60
Arkansas	450	675	900	1100	1300	1475	1650	1800	150	250	50
California	625	800	1000	1175	1425	1650	1900	2150	225	400	65
Colorado	500	700	900	1050	1200	1350	1500	1650	150	300	50
Connecticut	620	810	1000	1180	1425	1670	1910	2150	150	225	60
Delaware	475	670	830	1050	1195	1340	1480	1625	145	380	50
District of Columbia	500	650	800	950	1100	1250	1400	1650	150	300	50
Florida	550	700	875	1050	1200	1350	1500	1650	200	450	125
Georgia	600	975	1300	1600	1875	2125	2325	2525	200	375	100
Guam	282	395	508	621	706	790	875	960	85	226	28
Hawaii	550	900	1250	1550	1850	2100	2350	2600	200	300	100
Idaho	500	650	800	950	1100	1200	1300	1400	100	300	50
Illinois	600	750	900	1000	1150	1300	1450	1600	200	475	50
Indiana	475	675	875	1000	1125	1250	1400	1500	200	375	100
Iowa	550	700	800	900	1000	1100	1225	1350	125	400	50
Kansas	400	600	800	1000	1200	1400	1600	1800	200	250	50
Kentucky	450	620	790	960	1130	1300	1470	1640	170	350	50
Louisiana	500	700	900	1100	1300	1500	1700	1900	200	375	60
Maine	650	900	1150	1400	1650	1900	2150	2400	250	400	100
Maryland	500	650	800	950	1100	1250	1400	1650	150	300	50

Massachusetts	500	650	800	950	1100	1250	1400	1550	150	300	50
Michigan	650	900	1100	1250	1400	1550	1700	1850	300	500	200
Minnesota	500	650	850	1050	1250	1450	1650	1850	200	375	75
Mississippi	550	650	800	1000	1200	1350	1500	1650	200	300	50
Missouri	800	900	1000	1100	1200	1300	1400	1500	200	400	100
Montana	500	700	800	900	1100	1300	1500	1700	200	350	50
Nebraska	370	520	665	815	925	1025	1150	1260	115	295	38
Nevada	500	700	900	1100	1300	1500	1700	1900	200	350	60
New Hampshire	500	700	900	1100	1300	1500	1700	1900	200	200	150
New Jersey	600	700	800	950	1100	1250	1350	1500	250	225	35
New Mexico	650	850	1050	1250	1450	1650	1850	2050	200	400	60
New York	600	750	900	1050	1200	1350	1500	1650	150	350	100
North Carolina	500	700	900	1100	1300	1500	1650	1800	150	350	50
North Dakota	440	635	800	965	1130	1265	1350	1515	165	385	55
N. Mariana Is.	282	395	508	621	706	790	875	960	85	226	28
Ohio	400	600	800	950	1100	1250	1400	1550	150	250	50
Oklahoma	450	600	750	900	1025	1150	1275	1400	100	300	50
Oregon	400	550	750	950	1125	1300	1475	1650	175	350	100
Pennsylvania	500	750	1000	1200	1400	1600	1800	2000	200	400	70
Puerto Rico	500	700	850	950	1150	1300	1450	1600	150	425	100
Rhode Island	450	625	800	900	1000	1200	1350	1500	150	300	50
South Carolina	650	750	1025	1200	1500	1650	1800	1975	200	500	50
South Dakota	450	600	750	900	1000	1200	1400	1600	200	300	40
Tennessee	500	700	900	1100	1300	1500	1700	1900	200	300	50
Texas	400	550	700	850	1000	1100	1200	1300	100	300	50
Utah	495	630	775	910	1045	1205	1340	1475	135	325	55
Vermont	400	550	650	850	1000	1100	1200	1300	150	300	75
Virgin Islands	500	700	850	950	1150	1300	1450	1600	150	425	100
Virginia	550	750	950	1150	1350	1550	1750	1950	200	350	75
Washington	600	800	1000	1200	1400	1600	1800	2000	200	300	50
West Virginia	600	750	900	1050	1200	1350	1500	1650	200	300	50
Wisconsin	450	600	750	900	1050	1200	1350	1500	150	350	50
Wyoming	450	550	700	850	1000	1100	1300	1400	150	300	50

[FR Doc. E8–16893 Filed 7–22–08; 8:45 am]
BILLING CODE 4910–22–C

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2007–29126]

Program Guidance for Metropolitan Planning Program and State Planning and Research Program Grants: Final Circular

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Availability of Final Circular.

SUMMARY: The Federal Transit Administration (FTA) has placed in the docket and on its Web site final guidance in the form of a circular on Metropolitan Planning and State Planning and Research Program Grants. The final circular revises and combines into one document the contents of previous Circular 8100.1B for the Metropolitan Planning Program (MPP) and previous Circular 8200.1 the State Planning and Research Program (SPRP). The final circular also provides information on Consolidated Planning Grants (CPG) between FTA and the Federal Highway Administration (FHWA).

DATES: *Effective Date:* September 1, 2008.

FOR FURTHER INFORMATION CONTACT: Victor Austin, Office of Planning and Environment (TPE), Federal Transit Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, phone: 202–366–2996, or e-mail *victor.austin@dot.gov*. Legal questions may be addressed to Christopher Van Wyk, Office of Chief Counsel (TCC), Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, phone: 202–366–1733, or e-mail, *christopher.vanwyk@dot.gov*.

SUPPLEMENTARY INFORMATION:

Availability of Final Circular

You may download the circular from the Federal government's electronic docket at *http://www.regulations.gov*. You may also download an electronic copy of the circular from FTA's Web site at *http://www.fta.dot.gov*. Paper copies of the circular may be obtained by calling FTA's Administrative Services Help Desk at 202–366–4865.

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I. Overview

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, Aug. 10, 2005) updated Chapter 53 of Title 49 of the U.S. Code with new requirements for metropolitan and statewide planning (49 U.S.C. 5303, 5304). On February 14, 2007, FTA and FHWA jointly published a final rule, "Statewide Transportation Planning; Metropolitan Transportation Planning," updating 23 CFR parts 450 and 500 and 49 CFR part 613 to reflect the new provisions enacted by SAFETEA–LU (72 FR 7224, Feb. 14, 2007). The new regulations govern the work performed under the Metropolitan Planning Program (MPP) (23 CFR part 450) and the State Planning and Research Program (SPRP) (23 CFR part 420).

The rulemaking process included extensive public outreach conducted jointly by FTA and FHWA. This involved publication of a Notice of Proposed Rulemaking in the **Federal Register** and a 90-day comment period during which over 150 comments were submitted to the docket. This effort was supported by six public outreach sessions, two national telecasts on the Internet, and a series of informational sessions in conjunction with various transportation stakeholder association events, including the Association of State Highway and Transportation Officials (AASHTO), American Public Transportation Association (APTA), the National Association of Regional Councils (NARC), the Association of Metropolitan Planning Organizations (AMPO) and State DOTs.

Although SAFETEA–LU made several changes to the planning process, the legislation did not make substantive changes to the eligibility for and processes of the MPP. SAFETEA–LU did change the funding eligibility of the SPRP to include only funds from 49 U.S.C. 5305, 5315, and 5322. Thus, funding activities under Sections 5312 and 5317, allowable under the previous legislation for SPRP, are no longer eligible activities.

SAFETEA–LU also unified the MPP and SPRP programs under the same section in 49 U.S.C. 5305. Prior to SAFETEA–LU, program eligibility and criteria for the MPP could be found in 49 U.S.C. 5303(g), but program eligibility and criteria for the SPRP was found in 49 U.S.C. 5313(b). In addition, SAFETEA–LU restricts the use of planning funds under both the MPP and SPRP to the States, the District of Columbia, and Puerto Rico and places responsibilities for the funds to these entities. The final circular adds information on the Consolidated Planning Grants (CPG), a program administered by FTA and FHWA.

FTA reserves the right to update this circular due to changes in other revised or new guidance and regulations that undergo notice and comment, without further notice and comment on this circular.

II. Summary of and Response to Comments

The FTA circulars that previously covered Metropolitan Planning (Circular 8100.1B) and State Planning and Research Programs (Circular 8200.1) were last updated in 1996 and 2001, respectively. Although SAFETEA–LU did not make substantive changes to the eligibilities and procedures for funding under the Metropolitan Planning and State Planning and Research Program, FTA believes it is necessary to update the circulars that apply to the above programs so that they reflect the new and revised planning provisions in law and subsequent regulations.

A. Chapter I—Introduction and Background

This introductory chapter is a general overview of what FTA plans to include in all the new and revised program circulars for the orientation of readers new to FTA programs. Chapter I also includes definitions and a history of FTA's planning programs.

One commenter suggested that there be further public notice and comment if FTA amends or updates this circular due to changes in other circulars or regulations that undergo notice and comment. FTA disagrees. When the revision of a circular or regulation requires an opportunity for notice and comment, there is no need to satisfy that requirement again just to update a reference to that revised document in this circular. FTA has clarified that statement, however, in the text of this notice and in the final circular itself.

Another comment stated that FTA should adopt the Bureau of Census abbreviation of Urbanized Area and use the abbreviation "UA" rather than "UZA." Upon careful consideration, FTA has determined that this change should not be made in order to preserve consistency with references made in other FTA circulars and documents.

B. Chapter II—Metropolitan Planning Program

This chapter replaces the former Chapter II—"Eligibility," in previous Circular 8100.1A and consolidates it with Chapter I—"General Overview," Chapter II—"Eligibility," Chapter III—"Metropolitan Planning and Assistance: Formula and Notification," Chapter IV—"Unified Planning Work Program," Chapter V—"Application Instructions," Chapter VII—"Grant Agreement," and Chapter VIII—"State Management," of the previous Circular 8100.1A, with minor updates. This new consolidated chapter provides an overview of the entire MPP program with regard to its statutory authority and program goals. It defines the role of the individual States, metropolitan planning organizations (MPOs), and FTA, and it explains the program's relationship to other FTA-funded programs. The chapter also provides information on eligible planning activities, steps required in developing a Unified Planning Work Program (UPWP), the MPP assistance formula and notification, the grant agreement, and the administration of MPP grants.

One commenter asked that the words "engineer" and "design" be eliminated from the Program Overview section where the circular discusses the program and projects available for grant assistance. Because FTA's use of these terms is taken from statutory language in 49 U.S.C. 5305, it is appropriate for FTA to reference them here. FTA noticed that through an oversight that it removed language from the previous circulars on Project Task Budget, Local Share, and Cost Allocation Plan/Indirect Costs. FTA has added this language back into the final circular.

One comment asked that the circular address the relationship of the MPO and transit operators when there are several designated recipients (DRs). Because the focus of this circular is on the MPP and SPRP funding programs, only brief mention is made of the role of the DR under FTA's Section 5307 program relative to the role of the MPO in preparing the Transportation Improvement Program (TIP). More detailed discussion of the roles and responsibilities of DRs under the Section 5307 program is more appropriately provided in FTA Circular 9030.1C, which focuses on the Section 5307 program. FTA Circular 9030.1C is undergoing review, and FTA will consider the above comment in that effort.

Another comment suggested that FTA clarify that UZAs with a population over 200,000 are designated as Transportation Management Areas (TMAs) in the section "Relationship to Other DOT Programs under Urbanized Area Formula Program." FTA agrees with this comment and will add the abbreviation "TMAs" in the above referenced section.

One commenter suggested that there should be a system in place to better define which MPO or agency has responsibility for a particular metropolitan planning area (MPA) in situations where geographic boundaries of MPAs cross State lines. FTA notes the planning regulations already address this issue at 23 CFR 450.312 ("Metropolitan planning area boundaries"). Thus, there is no need to provide resolution of this issue in the circular.

One commenter stated that MPOs should not be responsible for conducting any of the system planning and corridor-level alternative analyses for specific transit projects. FTA has addressed this issue by regulation at 23 CFR 450.318. That regulatory section allows, but does not require, MPOs, States, or public transportation operators to undertake a multimodal, system-level corridor or subarea planning study as part of the metropolitan transportation planning process. Planning within an MPA is a collaborative, coordinated process. Determinations of individual agency responsibilities in conducting systems planning and alternative analysis studies are local decisions within the bounds of the statutory and regulatory provisions on planning.

One commenter stated that MPOs should not be directly responsible for safety, security, and emergency transportation and evacuation planning. This comment is outside the scope of this circular, which only makes these types of planning activities eligible for Federal financial assistance, rather than setting forth the MPOs' responsibilities in these areas. FTA has delineated the role of MPOs in safety and security planning in FTA's planning regulations at 23 CFR part 450. Pursuant to those regulations, MPOs are required to address safety and security through the metropolitan transportation planning process.

One commenter stated that the information required for a UPWP and Simplified Statement of Work (SOW) should be consistent and should contain some detailed information about costs, timeframes, and objectives of the proposed projects. The requirements for the UPWP for TMAs and optional SOWs in non-TMAs are already described in the regulations at 23 CFR Part 450, but for purposes of clarity, FTA has expanded the description in the circular to incorporate language taken directly from the regulations.

To lessen reporting the burden, one commenter stated that the sentence, "Additionally, the UPWP should list the accomplishments from the previous fiscal year," should be deleted from the UPWP section of the circular. FTA supports the suggestion and has deleted that sentence because progress reports already are required under terms of the grant agreement for receiving MPP funds, per FTA Circular 5010.1C, as referenced in Section 7, Administration of MPP Grants.

FTA received six comments on MPP Assistance Formula and Notification. In general, three of the comments asked for more information and clarification on the formula allocation for MPP assistance. In response, FTA refers these three commenters to FTA' annual **Federal Register** notice, "Apportionments and Allocations," which reports the apportionment of both basic and supplemental MPP funding among the States. FTA's most recent notice, "FTA Fiscal Year 2008 Apportionments and Allocations and Program Information; Notice" (73 FR 4958, Jan. 28, 2008) describes Fiscal Year 2008 funding. The apportionment formula is further addressed by 49 U.S.C. 5305. FTA will add the following clarification to the section in the circular on supplemental MPP assistance: "FTA has determined that only States that have one or more UZAs with a population greater than one million in each are eligible to receive supplemental MPP assistance." The responsibility for sub-allocating the entire amount of MPP funds is placed at the local level. Section 5305(d)(2) of Title 49, U.S. Code states that each State must allocate its MPP assistance consistent with the formula developed by the State in cooperation with its MPOs and approved by FTA. More information may be obtained from the State representatives in the State(s) of interest.

The fourth comment on the MPP asked that the sentence in the section on MPP "Authorization" be expanded to add the phrase: "and 17.28 percent for statewide planning" to include the formula for the SPRP in the same section as the as the MPP. To this, the commenter is referred to the statutory formula mentioned in Chapter III on SPRP. The focus of Chapter III is on the SPRP, and it appropriately addresses the formula allocation (17.28 percent) for this program; Chapter II focuses primarily on the MPP.

The fifth comment on the MPP asked that the circular clarify that the State is

the grantee and that the MPO is the subrecipient. FTA agrees, and the language has been revised to refer to the State as both DR and grantee for the MPP and SPRP.

The sixth comment on the MPP stated that a sentence in the section on third party contracts was unclear. FTA agrees with the commenter and, in response, has rewritten the sentence in question exactly as suggested by the commenter: "In the case of the MPP, the procurement, execution, audit and closing of third party contracts are both MPO and State responsibilities."

One comment on the administration of MPP grants stated that the planning grants should not be closed out solely due to the amount of time a project is inactive, but rather should also consider factors that may have stalled progress. FTA does not agree that the current process for closing out planning grants is based solely on the amount of time a project is inactive. The guidelines established by FTA for grant close-out does provide flexibility for the MPO to complete the planning work elements and activities in a reasonable timeframe. The final circular continues this flexibility by allowing the State and MPO to specify a reasonable amount of time to complete planning work elements and activities.

Finally, as a result of continuing internal staff review and discussion that took place during the comment period, FTA has decided to include an explicit provision enacted in SAFETEA–LU that requires States to allocate MPP "Basic Assistance" to MPOs within 30 days of apportionment. The statutory language has been included verbatim.

C. Chapter III—Statewide Planning and Research Program (SPRP)

This chapter replaces Chapter III—"Metropolitan Planning and Assistance: Formula and Notification," in previous Circular 8100.1A. This new chapter consists of information found in Chapter II—"State Planning and Research: Formula and Notification," Chapter IV—"State Planning," Chapter V—"Training Activities," and Chapter VII—"Human Resource Activities" of previous Circular 8200.1, with some minor updates. The new chapter provides an overview of the SPRP program in terms of its statutory authority and program goals, and it explains the program's relationship to and coordination with other FTA-funded programs. The chapter also defines the role of the individual States and FTA, and provides information on eligible grant activities, SPRP assistance formula and notification, and State planning activities.

One commenter stated that it is unclear whether a change in the Governor of a State would also result in the change of the State recipient of SPRP funds. The final circular keeps the same language from the previous circular, which states, "The Governor of each State must designate a State recipient for its SPRP funds." FTA believes the above language is clear and that the authority of the Governor to designate a State recipient carries forward to newly installed Governors when they take office.

One comment suggested that FTA add a definition for "youth" in the section "Relationship to the Locally Developed Coordinated Public Transit Human Services Transportation Plan." FTA has slightly revised this section to more closely track the applicable statutory provisions; as a result, the word "youth" is no longer used in this section.

D. Chapter IV—Consolidated Planning Grants (CPG)

This new chapter, which provides information on the CPG, a program administered by FTA and FHWA, replaces the former Chapter IV—"Unified Planning Work Program," in previous Circular 8100.1B. The CPG program allows FTA and FHWA funding that supports metropolitan and statewide transportation planning to be combined into a single consolidated grant. This program fosters a cooperative effort between the Federal agencies and the participating States to streamline the delivery of their planning programs by providing the flexibility to transfer the planning funds to either FTA or FHWA for processing. States electing to use the CPG programs must consolidate grants for administration under either FTA or FHWA.

There was one comment that stated that the consolidation process of the CPG program might be infeasible and difficult to manage for transit or highway-only UPWP tasks. The comment also requested further clarification on the CPG process. FTA notices that the CPG has been offered for the past 11 years to States and MPOs as an optional program for combining FTA and FHWA planning funds. Since 1996, the CPG Program has been listed in the **Federal Register** notice, "Apportionments and Allocations and Program Information" (73 FR 4958, Jan. 28, 2008). The FHWA's July 19, 2007, Memorandum, "Information: Fund Transfers to Other Agencies and Among Title 23 Programs," available at *http://www.fhwa.dot.gov/legsregs/directives/policy/fundtrans20070719.htm,* outlines provisions to consolidate processes and procedures for transfers between FHWA and FTA.

One comment sought clarification on the length of time required for participation in the CPG program. FTA's response is that there is no required timeframe for participation in the CPG program.

Another comment asked whether all MPOs in a State must participate in the CPG program and whether MPOs can go back to separate grants at a later time. FTA wants to clarify that participation by MPOs in the CPG program is voluntary. Furthermore, MPOs can go back to a separate grant system if they later decide that they no longer want to participate in the CPG program.

One comment asked for clarification on what activities are eligible and whether transit projects are eligible if FTA funds are consolidated in FHWA. To clarify, any project eligible under the UPWP would remain eligible if funds are consolidated in FHWA, including any transit projects listed in the UPWP.

Another comment asked whether FHWA would administer the entire CPG program and asked what role FTA would play. The CPG program is a cooperative effort between FTA and FHWA to streamline the delivery of their planning programs' resources. The intent is not to have FHWA or FTA as the sole manager of the CPG program. The designated "lead agency" will have day-to-day responsibility for grant administration (e.g., work program changes, allowable cost determination, and audit processing), but the lead agency will coordinate with and solicit input from the other agency on all matters of policy and program significance, such as work program approval, progress reporting, and satisfaction of work commitments for grant closeout.

One commenter stated that the benefits of the CPG program are unclear. The commenter wanted to know who makes the decision to consolidate planning funds. The benefits and explanation of the CPG program are detailed in Chapter IV—"Benefits of the CPG to States and MPOs." States and MPOs decide together whether planning funds will be consolidated and administered either by FTA or FHWA.

One comment on the CPG program stated that no matter which agency the funds are consolidated under, there should be no restrictions on the use of the consolidated funds as long as they are applied toward projects in the UPWP. FTA does not support including a blanket prohibition against restrictions on the use of the consolidated planning funds. Importantly, the multimodal context and project eligibilities

associated with FTA's MPP and SPRP programs and FHWA's metropolitan planning (PL) and statewide planning and research (SPR) programs do not change when those funds are combined under a CPG. Another comment stated that the benefits of the CPG program would streamline the planning process for certain tasks and added that neither transit nor highway projects should be granted preferential treatment when being considered for funding and that all analyses be conducted on equal terms. FTA agrees with this comment and further notes that the metropolitan and statewide planning work programs developed through a cooperative planning process will be accepted as the grant application for both FTA and FHWA planning funds under the CPG program.

FTA received one comment on the inequity that might occur given the long lead time and extra scrutiny that occur when funds are flexed to transit agencies. This commenter appears to be referring to the flexible funding programs Surface Transportation Program and Congestion Mitigation and Air Quality Improvement Program, which are separate programs from the CPG and have their own particular requirements. The CPG program allows the States and MPOs to combine FTA metropolitan or statewide planning funds with FHWA planning funds. Comments on the flexible funding programs are outside the scope of this circular.

E. Chapter V—Application Instructions

This chapter updates Chapter V—"Application Instructions," and Chapter VI—"Certifications and Assurances," in previous Circular 8100.1A and merges them into one chapter. While providing minor updates to information on the MPP program, this chapter also incorporates information, with minor updates, from Chapter III—"Application Instructions," of previous Circular 8200.1. This section details the application process of MPOs and States that apply for and receive funds from MPP and SPRP grants. This section also discusses the certifications and assurances and their location within the FTA's Transportation Electronic Award and Management (TEAM) system, a streamlined electronic interface between grant applicants, recipients, and FTA that allows complete electronic grant application submission, review, approval, and management.

FTA received one comment on the inconsistency in submitting an application through TEAM and the requirement for original signatures. FTA agrees with this comment and has revised this section to reflect the electronic submittal of applications, deleting the requirement for original signatures.

One comment stated that certifications pursuant to 49 U.S.C. Section 5333(b) (commonly referred to as Section 13(c)) are not required for planning grants and that discussion of the Department of Labor certifications and participation should be deleted. FTA agrees with this comment and has deleted the reference to Section 13(c) certifications and DOL participation.

F. Appendices

Appendices A through C of Circular 8100.1A have been relabeled and reorganized. FTA is also adding an index of common terms used throughout the circular following Appendix D. The new Appendix A contains an outline of a UPWP document and replaces the former "Definitions" section, which has been moved to Chapter I. Appendix B is a revised "MPP Sample Project Budget," which was formerly located in Appendix B of previous Circular 8100.1B, as well as a revised "SPRP Sample Project Budget," which was formerly located in Appendix B of previous Circular 8200.1. Appendix C contains references to other sources that are relevant to the planning programs. Appendix D contains FTA regional and metropolitan contact information.

Issued in Washington, DC, this 17th day of July, 2008.

James S. Simpson,

Administrator.

[FR Doc. E8–16825 Filed 7–22–08; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications for Modification of Special Permit.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Request of modifications of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix "M" denote a modification request. Their applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before August 7, 2008.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue SE., Washington, DC or at *http://dms.dot.gov.*

This notice of receipt of applications for modification of special permits is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 10, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

Modification Special Permits

Application number	Docket number	Applicant	Regulation(s) affected	Nature of special permit thereof
9266–M	.....	Eurotainer SA 92817 Puteaux Cedex.	49 CFR 173.315; 178.245.	To modify the special permit to authorize the transportation in commerce of an additional Division 2.2 hazardous material.
11834–M	RSPA–97–2131	Ashland, Inc. Columbus, OH	49 CFR 173.173; 173.202.	To modify the special permit to authorize the transportation in commerce of additional Class 3 and Division 5.2 materials.
12116–M	RSPA–98–4243	Proserv UK Limited (Former Grantee: Proserv (North Sea), Ltd.) Aberdeen, Scotland.	49 CFR 178.36	To modify the special permit to authorize a ceramic coating to be applied to certain cylinders.
12844–M	RSPA–01–10753.	Delphi Corporation Vandalia, OH.	49 CFR 173.301(a)(1); 173.302a(a)(1);175.3.	To modify the special permit to allow failures in endcaps in units that are built specifically for hydroburst testing.
13133–M	RSPA–02–13796.	Department of Energy Albuquerque, NM.	49 CFR 172.320; 173.54(a); 173.56(b); 173.57; 173.58; 173.62.	To modify the special permit to remove the sample limitation.
14488–M	.....	Sanofi Pasteur Swiftwater, PA	49 CFR 173.24(b)(1)	To reissue the special permit originally issued on an emergency basis for the transportation in commerce of an influenza vaccine in a custom stainless steel batch reactor and to allow for renewal.
14632–M	PHMSA–08–0031.	Kalitta Charters II, LLC Ypsilanti, MI.	49 CFR 172.101 Column (9B); 172.204(c)(3); 173.27(b)(2)(3); 175.30.	To reissue the special permit originally issued on an emergency basis for the transportation in commerce by cargo only aircraft of Class 1 explosives which are forbidden or exceed quantities presently authorized.
14656–M	.....	PurePak Technology Corporation Chandler, AZ.	49 CFR 173.158(f)(3)	To modify the special permit to authorize a smaller outer packaging.

[FR Doc. E8–16443 Filed 7–22–08; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before August 22, 2008.

ADDRESS COMMENTS TO: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC or at *http://dms.dot.gov*.

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 10, 2008.

Delmar F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

NEW SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
14721–N	.....	Pacific Bio-Material Management, Inc. dba Pacific Scientific Transport Fresno, CA.	49 CFR 173.196, 178.609	To authorize the one-way transportation in commerce of certain Category infectious substances by motor vehicle in alternative packaging. (mode 1).
14722–N	.....	Centronic LLC	49 CFR 173.302a, 173.306(b)(4) and 175.3.	To authorize the manufacture, marking, sale and use of non-DOT specification containers described as hermetically-sealed electron tube devices for the transportation of certain non-flammable compressed gases. (modes 1, 2, 3, 4, 5).

NEW SPECIAL PERMITS—Continued

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
14723–N		American Spray-tech, North Branch, NJ.	49 CFR I 73.306(a)(3)(v)	To authorize the transportation in commerce of certain aerosols containing a Division 2.2 compressed gas in certain non-refillable aerosol containers which are not subject to the hot water bath test. (mode 1).
14724–N		Formulated Solutions, Clearwater, FL.	49 CFR 173.306(a)(3)(v)	To authorize the manufacture, marking, sale and use of a bag-on-valve container for the transportation of non-flammable aerosols which have been tested by an alternative method in lieu of the hot water bath test. (modes 1, 3, 4, 5).
14726–N		Thermo King Corporation, Minneapolis, MN.	49 CFR 177.834(1)	To authorize the transportation in commerce of certain hazardous materials in a motor vehicle equipped with a cargo heater. (mode 1).
14728–N		International Isotopes Inc., Idaho Falls, ID.	49 CFR 173.416(c)	To authorize the transportation in commerce of existing Type B packagings contructed to DOT-Specification 6M, 20 WC or 21 WC for the transportation of radioactive material by motor vehicle. (mode 1).
14733–N		GTM Technologies, Inc., San Francisco, CA.	49 CFR 173.301, 173.302a, 173.304a, 173.312 and 178.75.	To authorize the manufacture, marking, sale and use of a steel freight container mounted with non-DOT Specification cylinders for transportation of helium and methane. (mode 1).
14734–N		Chlor Alkai, Olin Corporation, Cleveland, TN.	49 CFR 172.203(a), 173.26 and 179.13.	To authorize the transportation in commerce of Sodium hypochlorite in DOT specification 111A100W5 tank car tanks that exceed the maximum allowable gross weight on rail (263,000 lbs.). (mode 2).

[FR Doc. E8–16437 Filed 7–22–08; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications Delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Delmer F. Billings, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, (202) 366–4535.

Key to "Reason for Delay"

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit applications.

Meaning of Application Number Suffixes

N—New application.

M—Modification request.

PM—Party to application with modification request.

Issued in Washington, DC, on July 16, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

Application No.	Applicant	Reason for delay	Estimated date of completion
	Modification to Special Permits		
11579–M	Austin Powder Company, Cleveland, OH	3, 4	07–31–2008
14167–M	Trinityrail, Dallas, TX	4	07–31–2008
8723–M	Alaska Pacific Powder Company, Anchorage, AK	1	07–31–2008
12440–M	Luxfer Gas Cylinders, Riverside, CA	4	09–30–2008
	New Special Permit Applications		
14621–N	Beijing Tianhai, Industry Co., Ltd., Beijing, China	1	07–31–2008
14616 N	Chlorine Service Company, Kingwood, TX	3	08–31–2008
14622–N	Occidental Chemical Corporation, Dallas, TX	4	07–31–2008

[FR Doc. E8–16689 Filed 7–22–08; 8:45 am]
BILLING CODE 4910–60–M

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Privacy Act of 1974; Systems of Records

AGENCY: Bureau of the Public Debt, Treasury.

ACTION: Notice of systems of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Bureau of the Public Debt, Treasury, is publishing its inventory of Privacy Act systems of records.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a) and the Office of Management and Budget (OMB), Circular No. A–130, the Bureau of the Public Debt (BPD) has completed a review of its Privacy Act systems of records notices to identify changes that will more accurately describe these records. The systems of records were last published in their entirety on June 10, 2005, at 70 FR 33939–33955.

On May 22, 2007, the Office of Management and Budget (OMB) issued Memorandum M–07–16 entitled "Safeguarding Against and Responding to the Breach of Personally Identifiable Information." It required agencies to publish the routine use recommended by the President's Identity Theft Task Force. As part of that effort, the Department published the notice of the proposed routine use on October 3, 2007, at 72 FR 56434, and it was effective on November 13, 2007. The new routine use has been added to each BPD system of records below. Other changes throughout the document are editorial in nature and consist principally of revising address information, minor editorial changes and editing of headings for consistency.

Department of the Treasury regulations require the Department to publish the existence and character of all systems of records every three years (31 CFR 1.23(a)(1)). BPD has leveraged this requirement to incorporate the review of its current holding of personally identifiable information required by M–07–16. With respect to its inventory of Privacy Act systems of records, BPD has determined that the information contained in its systems of records is accurate, timely, relevant, complete, and is the minimum necessary to maintain the proper performance of a documented agency function.

Systems Covered by this Notice

This notice covers all systems of records adopted by the Bureau of the Public Debt up to January 1, 2008. The systems notices are reprinted in their entirety following the Table of Contents.

Dated: July 11, 2008.

Elizabeth Cuffe,

Deputy Assistant Secretary for Privacy and Treasury Records.

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Bureau of the Public Debt

TREASURY/BPD.001

SYSTEM NAME:

Human Resources and Administrative Records—Treasury/BPD.

SYSTEM LOCATION:

Records are maintained at the following Bureau of the Public Debt locations: 200 Third Street, Parkersburg, WV; 320 Avery Street, Parkersburg, WV; Second and Avery Streets, Parkersburg, WV; and 799 9th Street, NW., Washington, DC. Copies of some documents have been duplicated for maintenance by supervisors for employees or programs under their supervision. These duplicates are also covered by this system of records.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Records cover present and former employees, applicants for employment, contractors, vendors, and visitors.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records is limited to those records the Bureau of the Public Debt needs to function in an efficient manner and does not cover those records reported under another system of records notice.

(A) *Human Resources Records:* These records relate to categories such as disciplinary and adverse actions; leave and hours of duty; alternate work schedules, standards of conduct and ethics programs; indebtedness; employee suitability and security determinations; grievances; performance problems; bargaining unit matters; Federal labor relations issues; relocation notices; outside employment; recruitment; placement; merit promotion; special hiring programs, including Summer Employment, Veterans Readjustment, Career Development for Lower Level Employees (CADE), Student Employment Programs; position classification and management; special areas of pay administration, including grade and pay retention, premium pay, scheduling of work, performance management and recognition; training and employee development programs; incentive awards; benefits and retirement programs; personnel and payroll actions; insurance; worker's and unemployment compensation; employee orientation; retirement; accident reports; and consolidation of personnel/program efforts among offices.

(B) *Equal Employment Opportunity Records:* These are records of informal EEO complaints and discussions that have not reached the level of formal complaints. After 30 days these records are destroyed or incorporated in a formal complaint file. Formal complaints are handled by the Treasury Department's Regional Complaints Center. Copies of formal complaint documents are sometimes maintained by the Bureau of the Public Debt's EEO Office.

(C) *Administrative Services Records:* These records relate to administrative support functions including motor vehicle operation, safety and security, access to exterior and interior areas, contract guard records, offense/incident reports, accident reports, and security determinations.

(D) *Procurement Records:* These records relate to contractors/vendors if they are individuals; purchase card holders, including the name, social security number and credit card number for employees who hold Government-use cards; procurement integrity certificates, containing certifications by procurement officials that they are familiar with the Federal Procurement Policy Act.

(E) *Financial Management Records:* These records relate to government travel, vendor accounts, other employee reimbursements, interagency transactions, employee pay records, vendor registration data, purchase card accounts and transactions, and program payment agreements.

(F) *Retiree Mailing Records:* These records contain the name and address furnished by Bureau of the Public Debt

retirees requesting mailings of newsletters and other special mailings.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321.

PURPOSE(S):

These records are collected and maintained to document various aspects of a person's employment with the Bureau of the Public Debt and to assure the orderly processing of administrative actions within the Bureau.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) The Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority upon authorized request;

(2) Other Federal, State, or local agencies, such as a State employment compensation board or housing administration agency, so that the agency may adjudicate an individual's eligibility for a benefit, or liability in such matters as child support;

(3) Creditors, potential creditors, landlords, and potential landlords when they request employment data or salary information for purposes of processing the employee's loan, mortgage, or apartment rental application (when information is requested by telephone, only verification of information supplied by the caller will be provided);

(4) Next-of-kin, voluntary guardians, and other representative or successor in interest of a deceased or incapacitated employee or former employee;

(5) Unions recognized as exclusive bargaining representatives under 5 U.S.C. chapter 71, arbitrators, and other parties responsible for the administration of the Federal labor-management program if needed in the performance of their authorized duties;

(6) Private creditors for the purpose of garnishing wages of an employee if a debt has been reduced to a judgment;

(7) Authorized Federal and non-Federal entities for use in approved computer matching efforts, limited to those data elements considered necessary in making a determination of eligibility under particular benefit programs administered by those agencies or entities, to improve program integrity, and to collect debts and other monies owed to those agencies or entities or to the Bureau of the Public Debt;

(8) Contractors of the Bureau of the Public Debt for the purpose of processing personnel and administrative records;

(9) Other Federal, State, or local agencies in connection with the hiring or retention of an individual, the issuance of a security clearance, the conducting of a security or suitability investigation of an individual, the issuance of a license, contract, grant, or other benefit;

(10) Congressional offices in response to an inquiry made at the request of the individual to whom the record pertains;

(11) Other Federal agencies to effect salary or administrative offset for the purpose of collecting a debt, except that addresses obtained from the Internal Revenue Service shall not be disclosed to other agencies;

(12) Consumer reporting agencies, including mailing addresses obtained from the Internal Revenue Service to obtain credit reports;

(13) Debt collection agencies, including mailing addresses obtained from the Internal Revenue Service, for debt collection services;

(14) Appropriate Federal, State, local, or foreign agencies responsible for investigating or prosecuting the violations of, or for enforcing or implementing a statute, rule, regulation, order, or license, where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation;

(15) A court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena;

(16) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation; and

(17) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

In accordance with the Privacy Act (5 U.S.C. 552a(b)(12)), disclosures may be made from this system of records to "consumer reporting agencies" as defined in 31 U.S.C. 3701(a)(3). The purpose of the disclosure is to aid in the collection of outstanding debts owed to the Federal Government. After the prerequisites of 31 U.S.C. 3711 have been followed, the Bureau of the Public Debt may disclose information necessary to establish the identity of the individual responsible for the claim, including name, address, and taxpayer identification number; the amount, status, and history of the claim; and the agency or program under which the claim arose.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper, microform, or in electronic media.

RETRIEVABILITY:

By name, social security number, or other assigned identifier.

SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols that are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on computer have the same limited access as paper records.

RETENTION AND DISPOSAL:

Records are maintained in accordance with National Archives and Records Administration retention schedules. Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

(A) *Human Resources Records:* Assistant Commissioner, Office of Management Services, Human Resources Division, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312 and Executive Director, Administrative Resource Center, Human Resources Operations Division, Bureau of the

Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

(B) *Equal Employment Opportunity Records:* Assistant Commissioner, Office of Management Services, Equal Employment Opportunity, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

(C) *Administrative Services Records:* Assistant Commissioner, Office of Management Services, Administrative Services Division, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

(D) *Procurement Records:* Executive Director, Administrative Resource Center, Division of Procurement, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

(E) *Financial Management Records:* Executive Director, Administrative Resource Center, Accounting Services Division, 200 Third Street, Parkersburg, WV 26106–5312.

(F) *Retiree Mailing Records:* Executive Director, Administrative Resource Center, Division of Support Services, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

(G) *Travel Records:* Executive Director, Administrative Resource Center, Travel Services Division, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

(1) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the documents in accordance with 31 CFR 1.26(d)(2)(ii).

CONTESTING RECORD PROCEDURES:

Initial amendment requests: (1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records:

(1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Bureau of the Public Debt or the delegate of such officer. Appeals must be mailed or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239–0001 (or as otherwise provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by the subject of the record, authorized representatives, supervisor, employers, medical personnel, other employees, other Federal, State, or local agencies, and commercial entities.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

TREASURY/BPD.002

SYSTEM NAME:

United States Savings-Type Securities—Treasury/BPD.

SYSTEM LOCATION:

Bureau of the Public Debt, 200 Third Street, Parkersburg, WV; Bureau of the Public Debt, 799 9th Street, NW., Washington, DC; and Federal Reserve Banks and Branches in Minneapolis, MN and Pittsburgh, PA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present and former owners of, claimants to, persons entitled to, and inquirers concerning United States savings-type securities and interest on securities, including without limitation United States Savings Bonds, Savings Notes, Retirement Plan Bonds, and Individual Retirement Bonds.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) *Issuance:* Records relating to registration, issuance, and correspondence in connection with issuance of savings-type securities. This category includes records of current income savings bonds processed under an automated system that will permit access by selected Federal Reserve Banks and Branches.

(2) *Holdings:* Records documenting ownership, status, payments by date and account numbers, and inscription information; interest activity; correspondence in connection with notice of change of name and address; non-receipt or over- or underpayments of interest and principal; and numerical registers of ownership. Such records include information relating to savings-type securities held in safekeeping in conjunction with the Department's program to deliver such securities to the owners or persons entitled. This category includes records of current income savings bonds processed under an automated system that will permit access by selected Federal Reserve Banks and Branches.

(3) *Transactions (redemptions, payments, and reissues):* Records, which include securities transaction requests; interest activity; legal papers supporting transactions; applications for disposition or payment of securities and/or interest thereon of deceased or incapacitated owners; records of retired securities; and payment records. This category includes records of current income savings bonds processed under an automated system that will permit access by selected Federal Reserve Banks and Branches.

(4) *Claims:* Records including correspondence concerning lost, stolen, destroyed, or mutilated savings-type securities; bonds of indemnity; legal documents supporting claims for relief; and records of caveats entered.

(5) *Inquiries:* Records of correspondence with individuals who have requested information concerning savings-type securities and/or interest thereon.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 3101, *et seq.*

PURPOSES:

Information in this system of records is collected and maintained to enable the Bureau of the Public Debt and its agents to issue savings bonds, to process transactions, to make payments, and to identify owners and their accounts.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) Agents or contractors of the Department for the purpose of administering the public debt of the United States;

(2) Next-of-kin, voluntary guardian, legal representative or successor in interest of a deceased or incapacitated owner of securities and others entitled to the reissue, distribution, or payment for the purpose of assuring equitable and lawful disposition of securities and interest;

(3) Either co-owner for bonds registered in that form or to the beneficiary for bonds registered in that form, provided that acceptable proof of death of the owner is submitted;

(4) The Internal Revenue Service for the purpose of facilitating collection of the tax revenues of the United States;

(5) The Department of Justice when seeking legal advice or when

(a) The Department of the Treasury (agency) or

(b) The Bureau of the Public Debt, or

(c) Any employee of the agency in his or her official capacity, or

(d) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or

(e) The United States, where the agency determines that litigation is likely to affect the agency or the Bureau of the Public Debt, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation;

(6) The Department of Veterans Affairs and selected veterans' publications for the purpose of locating owners or other persons entitled to undeliverable bonds held in safekeeping by the Department;

(7) Other Federal agencies to effect salary or administrative offset for the purpose of collecting debts;

(8) A consumer reporting agency, including mailing addresses obtained from the Internal Revenue Service, to obtain credit reports;

(9) A debt collection agency, including mailing addresses obtained from the Internal Revenue Service, for debt collection services;

(10) Contractors conducting Treasury-sponsored surveys, polls, or statistical analyses relating to the marketing or administration of the public debt of the United States;

(11) Appropriate Federal, State, local, or foreign agencies responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license;

(12) A court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena;

(13) A Congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(14) Disclose through computer matching information on individuals owing debts to the Bureau of the Public Debt to other Federal agencies for the purpose of determining whether the debtor is a Federal employee or retiree receiving payments that may be used to collect the debt through administrative or salary offset;

(15) Disclose through computer matching information on holdings of savings-type securities to requesting Federal agencies under approved agreements limiting the information to that which is relevant in making a determination of eligibility for Federal benefits administered by those agencies;

(16) Disclose through computer matching, information on individuals with whom the Bureau of the Public Debt has lost contact, to other Federal agencies for the purpose of utilizing letter forwarding services to advise these individuals that they should contact the Bureau about returned payments and/or matured, unredeemed securities; and

(17) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

In accordance with the Privacy Act (5 U.S.C. 552a(b)(12)), disclosures may be made from this system of records to "consumer reporting agencies" as defined in 31 U.S.C. 3701(a)(3). The purpose of the disclosure is to aid in the

collection of outstanding debts owed to the Federal Government. After the prerequisites of 31 U.S.C. 3711 have been followed, the Bureau of the Public Debt may disclose information necessary to establish the identity of the individual responsible for the claim, including name, address, and taxpayer identification number; the amount, status, and history of the claim; and the agency or program under which the claim arose.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper, microform, or in electronic media.

RETRIEVABILITY:

Information can be retrieved alphabetically by name, address, and period of time the security was issued, by bond serial numbers, other assigned identifier, or, in some cases, numerically by social security number. In the case of securities, except Series G savings bonds, registered in more than one name, information relating to those securities can be retrieved only by the names, or, in some cases, the social security number of the registrants, primarily the registered owners or first-named co-owners. In the case of gift bonds inscribed with the social security number of the purchaser, bonds are retrieved under that number, or by bond serial number.

SAFEGUARDS:

Information is contained in secure buildings or in areas which are occupied either by officers and responsible employees of the Bureau of the Public Debt who are subject to personnel screening procedures and to the Treasury Department Code of Conduct or by agents of the Bureau of the Public Debt who are required to maintain proper control over records while in their custody. Additionally, since in most cases, numerous steps are involved in the retrieval process, unauthorized persons would be unable to retrieve information in meaningful form. Information stored in electronic media is safeguarded by automatic data processing security procedures in addition to physical security measures. Additionally, for those categories of records stored in computers with online terminal access, the information cannot be accessed without proper passwords and preauthorized functional capability.

RETENTION AND DISPOSAL:

Records of holdings, forms, documents, and other legal papers which constitute the basis for transactions subsequent to original issue are maintained for such time as is necessary to protect the legal rights and interests of the United States Government and the persons affected, or otherwise until they are no longer historically significant. Other records are disposed of at varying intervals in accordance with records retention schedules reviewed and approved by the National Archives and Records Administration (NARA). Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

Assistant Commissioner, Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

(1) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the documents in accordance with 31 CFR 1.26(d)(2)(ii).

(3) Requests by individuals about securities they own:

(a) For current income savings bonds: Individuals may contact the nearest Treasury Retail Securities Site as listed in the Appendix to this system of records or the Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312. If the Treasury Retail Securities Site cannot access the particular record, the individual will be advised to contact Retail Securities at the Bureau of the Public Debt. Individuals must provide sufficient information, including their address and social security number, to identify themselves as owner or co-owner of the securities. They should provide the complete bond serial numbers, including alphabetic prefixes and suffixes, if known. Otherwise, the series, approximate date, form of registration, and, except for Series G Savings Bonds registered in co-ownership form, the names and social security numbers of all persons named in the registration should be provided. If a Case Identification Number is known, that should be provided.

(b) For all other types of securities covered by this system of records: Individuals should contact the following: Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312. Individuals should provide sufficient information, including their address and social security number, to identify themselves as owner or co-owner of the securities. Individuals must provide sufficient information to identify the securities, such as type or series of security, approximate date of issue, serial number, form of registration, and the name and social security number of the first-named co-owner, or in the case of gift bonds the social security number of the purchaser if that number was used.

(4) Requests by anyone other than individuals named on securities must contain sufficient information to identify the securities; this would include type or series of securities, approximate date of issue, serial number, and form of registration. These requests will be honored only if the identity and right of the requester to the information have been established. Send requests to the addresses shown in (3)(a) or (3)(b) above, depending on the type of security involved.

(a) Requests by a beneficiary for information concerning securities registered in beneficiary form must be accompanied by the name and social security number of the owner and by proof of death of the registered owner.

(b) Requests for records of holdings or other information concerning a deceased or incapacitated individual must be accompanied either by evidence of the requester's appointment as legal representative of the estate of the individual or by a statement attesting that no such representative has been appointed and giving the nature of the relationship between the requester and the individual.

CONTESTING RECORD PROCEDURES:

Initial amendment requests: (1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records: (1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Public Debt or the delegate of such officer. Appeals must be mailed or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239–0001 (or as otherwise provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

Information on records in this system is furnished by the individuals or their authorized representatives as listed in "Categories of Individuals" and issuing agents for securities or is generated within the system itself.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Appendix of Treasury Retail Securities Sites

This appendix provides individuals contact information for inquiring about their securities.

Federal Reserve Bank, Pittsburgh Branch, P.O. Box 299, Pittsburgh, PA 15230–0299; Telephone 1–800–245–2804.

Federal Reserve Bank, Minneapolis Branch, P.O. Box 214, Minneapolis, MN 55480–0214; Telephone 1–800–553–2663.

Bureau of the Public Debt, Retail Securities, Parkersburg, WV 26106–5312.

TREASURY/BPD.003

SYSTEM NAME:

United States Securities (Other than Savings-Type Securities)-Treasury/BPD.

SYSTEM LOCATION:

Bureau of the Public Debt, 200 Third Street, Parkersburg, WV; Bureau of the Public Debt, 799 9th Street, NW., Washington, DC; and Federal Reserve Banks and Branches in Chicago, IL; Kansas City, MO; Minneapolis, MN; New York, NY; Philadelphia, PA; and Pittsburgh, PA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present and former owners of, subscribers to, claimants to, persons entitled to, and inquirers concerning United States Treasury securities (except savings-type securities) and interest on securities and such securities for which the Treasury acts as agents, including without limitation, Treasury Bonds, Notes, and Bills; Adjusted Service Bonds; Armed Forces Leave Bonds; and Federal Housing Administration Debentures.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) *Issuance:* Records relating to tenders, bids, subscriptions, advices of shipment, requests (applications) for original issue, and correspondence concerning erroneous issue and nonreceipt of securities.

(2) *Holdings:* Records of ownership and interest activity on registered or recorded United States securities (other than savings-type securities); records about fees for TreasuryDirect accounts exceeding a stipulated amount; change of name and address notices; correspondence concerning errors in registration or recordation; nonreceipt or over- and underpayments of interest and principal; records of interest activity; records of unclaimed accounts; and letters concerning the New York State tax exemption for veterans of World War I.

(3) *Transactions (redemptions, payments, reissues, transfers, and exchanges):* Records which include securities transaction requests; records about fees for definitive securities issued; legal papers supporting transactions; applications for transfer, disposition, or payment of securities of deceased or incompetent owners; records of Federal estate tax transactions; certificates of ownership covering paid overdue bearer securities; records of erroneous redemption transactions; records of retired securities; and payment records.

(4) *Claims:* Records including correspondence concerning lost, stolen, destroyed, or mutilated United States securities (other than savings-type securities) or securities for which the Treasury acts as agent and interest coupons thereon; bonds of indemnity; legal documents supporting claims for relief; and records of caveats entered.

(5) *Inquiries:* Records of correspondence with individuals who have requested information concerning

United States Treasury securities (other than savings-type securities) or securities for which the Treasury acts as agent.

(6) All of the above categories of records except "(4) Claims" include records of Treasury bills, notes, and bonds in the TreasuryDirect Book-entry Securities System.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 3101 *et seq.*

PURPOSE(S):

Information in this system of records is collected and maintained to enable the Bureau of the Public Debt and its agents to issue United States securities (other than savings-type securities), to process transactions, to make payments, and to identify owners and their accounts.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) Agents or contractors of the Department for the purpose of administering the public debt of the United States;

(2) Next-of-kin, voluntary guardian, legal representative or successor in interest of a deceased or incapacitated owner of securities and others entitled upon transfer, exchange, distribution, or payment for the purpose of assuring equitable and lawful disposition of securities and interest;

(3) Any of the owners if the related securities are registered or recorded in the names of two or more owners;

(4) The Internal Revenue Service for the purpose of facilitating the collection of the tax revenues of the United States;

(5) The Department of Justice when seeking legal advice or when

(a) The Department of the Treasury (agency) or

(b) The Bureau of the Public Debt, or

(c) Any employee of the agency in his or her official capacity, or

(d) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or

(e) The United States, where the agency determines that litigation is likely to affect the agency or the Bureau of the Public Debt, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation;

(6) The Department of Veterans Affairs when it relates to the holdings of Armed Forces Leave Bonds to facilitate the redemption or disposition of these securities;

(7) Other Federal agencies to effect salary or administrative offset for the purpose of collecting debts;

(8) A consumer reporting agency, including mailing addresses obtained from the Internal Revenue Service, to obtain credit reports;

(9) A debt collection agency, including mailing addresses obtained from the Internal Revenue Service, for debt collection services;

(10) Contractors conducting Treasury-sponsored surveys, polls, or statistical analyses relating to marketing or administration of the public debt of the United States;

(11) Appropriate Federal, State, local, or foreign agencies responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license;

(12) A court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena;

(13) A Congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(14) Disclose through computer matching information on individuals owing debts to the Bureau of the Public Debt to other Federal agencies for the purpose of determining whether the debtor is a Federal employee or retiree receiving payments that may be used to collect the debt through administrative or salary offset;

(15) Disclose through computer matching information on holdings of Treasury securities to requesting Federal agencies under approved agreements limiting the information to that which is relevant in making a determination of eligibility for Federal benefits administered by those agencies;

(16) Disclose through computer matching, information on individuals with whom the Bureau of the Public Debt has lost contact, to other Federal agencies for the purpose of utilizing letter-forwarding services to advise these individuals that they should contact the Bureau about returned payments and/or matured unredeemed securities; and

(17) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

In accordance with the Privacy Act (5 U.S.C. 552a(b)(12)), disclosures may be made from this system of records to "consumer reporting agencies" as defined in 31 U.S.C. 3701(a)(3). The purpose of the disclosure is to aid in the collection of outstanding debts owed to the Federal Government. After the prerequisites of 31 U.S.C. 3711 have been followed, the Bureau of the Public Debt may disclose information necessary to establish the identity of the individual responsible for the claim, including name, address, and taxpayer identification number; the amount, status, and history of the claim; and the agency or program under which the claim arose.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper, microform, or in electronic media.

RETRIEVABILITY:

Information can be retrieved by social security account number, other assigned identifier, or, in some cases, alphabetically by name or numerically by security serial number. In the case of securities registered in more than one name, information relating to those securities generally can be retrieved only by social security number or by the name of the first-named owner.

SAFEGUARDS:

Information is contained in secure buildings, Federal Records Centers, or in areas which are occupied either by officers and responsible employees of the Department who are subject to personnel screening procedures and to the Executive Branch and Treasury Department Standards of Conduct or by agents of the Department who are required by the Department to maintain proper control over records while in

their custody. Additionally, since in most cases, numerous steps are involved in the retrieval process, unauthorized persons would be unable to retrieve information in a meaningful form. Information stored in electronic media is safeguarded by automatic data processing security procedures in addition to physical security measures. Additionally, for those categories of records stored in computers with terminal access, the information cannot be obtained or modified without proper passwords and preauthorized functional capability.

RETENTION AND DISPOSAL:

Records of holdings, forms, documents, and other legal papers which constitute the basis for transactions subsequent to original issue are maintained for such time as is necessary to protect the legal rights and interests of the U.S. Government and the persons affected, or otherwise until they are no longer historically significant. Other records are disposed of at varying intervals in accordance with records retention schedules reviewed and approved by the National Archives and Records Administration (NARA). Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

Assistant Commissioner, Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

(1) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the documents in accordance with 31 CFR 1.26(d)(2)(ii).

(3) Requests by individuals about securities they own:

(a) For Treasury bills, notes, or bonds held in the Legacy Treasury Direct Book-entry Securities System: Individuals may contact the nearest Treasury Retail Securities Site listed in the Appendix to this system of records or contact Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312. Individuals should provide sufficient information, including their social security number, to identify themselves as owners of securities and sufficient information, including account number, to identify their TreasuryDirect account.

(b) *For all other categories of records in this system of records: Individual owners should contact:* Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312. Requests must contain information to identify themselves including name, address, and social security number; the type of security involved such as a registered note or bond, an Armed Forces Leave Bond, etc.; and, to the extent possible specify the loan, issue date, denomination, exact form of registration, and other information about the securities.

(4) Requests by individuals who are representatives of owners or their estates require appropriate authority papers. Write to: Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312, to obtain information on these requirements.

(5) *In all cases:* The request for information will be honored only if the identity and right of the requester to the information have been established.

CONTESTING RECORD PROCEDURES:

Initial amendment requests: (1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records: (1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Public Debt or the delegate of such officer. Appeals must be mailed to or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239–0001 (or as otherwise provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

Information contained in records in the system is furnished by the individuals or their authorized representatives as listed in "Categories of Individuals," or is generated within the system itself.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Appendix of Treasury Direct Contacts

This appendix lists the mailing addresses and telephone number of the places that individuals may contact to inquire about their securities accounts maintained in Legacy Treasury Direct. The toll-free telephone number 1–800–722–2678 is used to reach all the locations.

Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

Treasury Retail Securities Site, P.O. Box 567, Pittsburgh, PA 15230–0567.

Treasury Retail Securities Site, P.O. Box 9150, Minneapolis, MN 55480–9150.

TREASURY/BPD.004

SYSTEM NAME:

Controlled Access Security System—Treasury/BPD.

SYSTEM LOCATION:

Bureau of the Public Debt, Parkersburg, WV.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Bureau of the Public Debt employees, employees of contractors or service companies, and official visitors.

CATEGORIES OF RECORDS IN THE SYSTEM:

A record is created for each access to designated areas and contains the individual's name; card number; work shift; access level; time, date, and location of each use of the access card at a card reader.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. Sec. 321; 41 CFR 101–20.103.

PURPOSE(S):

Information in this system of records is collected and maintained to allow the Bureau of the Public Debt to control and verify access to all Parkersburg, West Virginia Public Debt facilities.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) Appropriate Federal, State, local, or foreign agencies responsible for investigating or prosecuting the violations of, or for enforcing or implementing a statute, rule, regulation, order, or license;

(2) A Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit;

(3) A court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, or in connection with criminal law proceedings, or in response to a subpoena;

(4) A Congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(5) Unions recognized as exclusive bargaining representatives under the Civil Service Reform Act of 1978, 5 U.S.C. 7111 and 7114, arbitrators and other parties responsible for the administration of the Federal labor-management program if needed in the performance of their authorized duties; and

(6) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper, microform, or in electronic media.

RETRIEVABILITY:

Information on individuals can be retrieved by name or card number or other assigned identifier.

SAFEGUARDS:

Both the central system and the peripheral system will have limited accessibility. Paper records and magnetic disks are maintained in locked file cabinets with access limited to those personnel whose official duties require access, such as the systems manager, Bureau security officials, and employee relations specialists. Access to terminals is limited through the use of passwords to those personnel whose official duties require access, as for paper records.

RETENTION AND DISPOSAL:

The retention period is for five years. Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

Assistant Commissioner, Office of Management Services, Division of Security and Emergency Preparedness, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

(1) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of

identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the documents in accordance with 31 CFR 1.26(d)(2)(ii).

CONTESTING RECORD PROCEDURES:

Initial amendment requests: (1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records: (1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Bureau of the Public Debt or the delegate of such officer. Appeals must be mailed to or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239–0001 (or as otherwise provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

The individual concerned, his/her supervisor, or an official of the individual's firm or agency.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

TREASURY/BPD.005

SYSTEM NAME:

Employee Assistance Records—Treasury/BPD.

SYSTEM LOCATION:

This system covers Bureau of the Public Debt employee assistance records that are maintained by another Federal, State, or local government, or contractor under an agreement with the Bureau of the Public Debt directly or through another entity to provide the Employee Assistance Program (EAP) functions. The address of the other agency or contractor may be obtained from the system manager below.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Bureau of the Public Debt employees and former employees who will be or have been counseled, either by self-referral or supervisory-referral regarding drug abuse, alcohol, emotional health, or other personal problems. Where applicable, this system also covers family members of these employees when the family member utilizes the services of the EAP as part of the employee's counseling or treatment process.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains records of each employee and, in some cases, family members of the employee who have utilized the Employee Assistance Program for a drug, alcohol, emotional, or personal problem. Examples of information which may be found in each record are the individual's name, social security number, date of birth, grade, job title, home address, telephone numbers, supervisor's name and telephone number, assessment of problem, and referrals to treatment facilities and outcomes.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 7361, 7362, 7904; 44 U.S.C. 3101.

PURPOSE(S):

To provide a history and record of the employee counseling session.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) An entity under contract with the Bureau of the Public Debt for the purpose of providing the EAP function;

(2) Medical personnel to the extent necessary to meet a bona fide medical emergency in accordance with the Confidentiality of Alcohol and Drug Abuse Patient Records regulations (42 CFR part 2);

(3) Qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, provided individual identifiers are not disclosed in any manner, in accordance with the Confidentiality of Alcohol and Drug Abuse Patient Records regulations (42 CFR part 2);

(4) A third party upon authorization by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore, in accordance with the Confidentiality of Alcohol and Drug Abuse Patient Records regulations (42 CFR part 2);

(5) The Department of Justice or other appropriate Federal agency in defending claims against the United States when the records are not covered by the Confidentiality of Alcohol and Drug Abuse Patient Records regulations at 42 CFR part 2; and

(6) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper, microform, or in electronic media.

RETRIEVABILITY:

These records are retrieved by the name and social security number or other assigned identifier of the individual on whom they are maintained.

SAFEGUARDS:

Records are maintained in a secure room in a locked file cabinet, safe, or similar container when not in use. Automated records are protected by restricted access procedures. Access to records is strictly limited to agency or contractor officials with a bona fide need for the records. When the Bureau of the Public Debt contracts with an entity for the purpose of providing the EAP functions, the contractor shall be required to maintain Privacy Act safeguards with respect to such records.

RETENTION AND DISPOSAL:

The retention period is three years after termination of counseling or until any litigation is resolved, after which the records are destroyed.

SYSTEM MANAGER AND ADDRESS:

Executive Director, Administrative Resource Center, Human Resources Division, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

After you contact the contractor, following are the steps that will be required:

(1) Submit requests to the contractor. For information about how to contact the contractor, write to the appropriate office as shown under "System Manager and Address" above.

(2) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The contractor reserves the right to require additional verification of an individual's identity.

(3) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the documents in accordance with 31 CFR 1.26(d)(2)(ii).

CONTESTING RECORD PROCEDURES:

Initial amendment requests: After you contact the contractor, following are the steps that will be required:

(1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The contractor reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the contractor. For information about how to contact the contractor, write to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records:

(1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Bureau of the Public Debt or the delegate of such officer. Appeals must be mailed to or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington DC 20239–0001 (or as otherwise provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from the individual to whom it applies, the supervisor of the individual if the individual was referred by a supervisor, or the contractor's staff member who records the counseling session.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

TREASURY/BPD.006

SYSTEM NAME:

Health Service Program Records—Treasury/BPD.

SYSTEM LOCATION:

Bureau of the Public Debt locations at 200 Third Street, Parkersburg, WV; and Avery Street Building, 320 Avery Street, Parkersburg, WV.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) Bureau of the Public Debt employees who receive services under the Federal Employee Health Services Program from the Bureau of the Public Debt Health Unit in Parkersburg, West Virginia.

(2) Federal employees of other organizations in the Parkersburg, West Virginia vicinity who receive services under the Federal Employee Health Services Program from the Bureau of the Public Debt Health Unit in Parkersburg, West Virginia.

(3) Non-Federal individuals working in or visiting the buildings, who may receive emergency treatment from the Bureau of the Public Debt Health Unit in Parkersburg, West Virginia.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system is comprised of records developed as a result of an individual's utilization of services provided under the Federal Government's Health Service Program. These records contain information such as: Examination, diagnostic, assessment and treatment data; laboratory findings; nutrition and dietetic files; nursing notes; immunization records; blood donor records; CPR training; First Aider; names, social security number, date of birth, handicap code, addresses, and telephone numbers of individual; name, address, and telephone number of individual's physician; name, address, and telephone number of hospital; name, address, and telephone number of emergency contact; and information obtained from the individual's physician; and record of requested accesses by any Bureau of the Public Debt employee (other than Health Unit personnel) who has an official need for the information.

Note: This system does not cover records related to counseling for drug, alcohol, or other problems covered by System No. Treasury/BPD.005–Employee Assistance Records. Medical records relating to a condition of employment or an on-the-job occurrence are covered by the Office of Personnel Management's System of Records No. OPM/GOVT–10–Employee Medical File System Records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 7901.

PURPOSE(S):

These records document an individual's utilization on a voluntary basis of health services provided under the Federal Government's Health Service Program at the Health Unit at the Bureau of the Public Debt in Parkersburg, West Virginia. Data is necessary to ensure proper evaluation, diagnosis, treatment, and referral to maintain continuity of care; a medical history of care received by the individual; planning for further care of the individual; a means of communication among health care members who contribute to the individual's care; a legal document of health care rendered; a tool for evaluating the quality of health care rendered.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) Medical personnel under a contract agreement with the Bureau of the Public Debt;

(2) A Federal, State, or local public health service agency as required by applicable law, concerning individuals who have contracted certain communicable diseases or conditions. Such information is used to prevent further outbreak of the disease or condition;

(3) Appropriate Federal, State, or local agencies responsible for investigation of an accident, disease, medical condition, or injury as required by pertinent legal authority;

(4) The Department of Justice when seeking legal advice or when

(a) The Department of the Treasury (agency) or

(b) The Bureau of the Public Debt, or

(c) Any employee of the agency in his or her official capacity, or

(d) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or

(e) The United States, where the agency determines that litigation is likely to affect the agency or the Bureau of the Public Debt, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation;

(5) A Federal agency responsible for administering benefits programs in connection with a claim for benefits filed by an employee;

(6) A Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual;

(7) A court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, or in response to a subpoena or in connection with criminal law proceedings; and

(8) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper, or in electronic media.

RETRIEVABILITY:

These records are retrieved by the name or other assigned identifier of the individual to whom they pertain.

SAFEGUARDS:

These records are maintained in a secured room with access limited to Health Unit personnel whose duties require access. Medical personnel under a contract agreement who have access to these records are required to maintain adequate safeguards with respect to such records.

RETENTION AND DISPOSAL:

Records are maintained in accordance with National Archives and Records Administration retention schedules. Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

Assistant Commissioner, Office of Management Services, Division of Administrative Services, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

(1) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the documents in accordance with 31 CFR 1.26(d)(2)(ii).

An individual who requests access to a Health Service Program Record shall, at the time the request is made, designate in writing the name of a responsible representative who will be willing to review the record and inform the subject individual of its content. This does not permit the representative to withhold the records from the requester. Rather, the representative is expected to provide access to the records while explaining sensitive or complex information contained in the records.

CONTESTING RECORD PROCEDURES:

Initial amendment requests: (1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records: (1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Bureau of the Public Debt or the delegate of such officer. Appeals must be mailed to or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239–0001 (or as otherwise provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from the individual to whom it applies; laboratory reports and test results; Health Unit physicians, nurses, and other medical technicians who have examined, tested, or treated the individual; the individual's personal physician; other Federal employee health units; and other Federal agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

TREASURY/BPD.007

SYSTEM NAME:

Gifts to Reduce the Public Debt—Treasury/BPD.

SYSTEM LOCATION:

Bureau of the Public Debt, 200 Third Street, Parkersburg, WV.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Donors of gifts to reduce the public debt.

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence; copies of checks, money orders, or other payments; copies of wills and other legal documents; and other material related to gifts to reduce the public debt, received on or after October 1, 1984, by the Bureau of the Public Debt either directly from the donor through the donor's Congressional or other representative.

Note: This system does not cover gifts to reduce the public debt received prior to October 1, 1984, when the Financial Management Service handled this function. This system of records does not cover gifts sent to other agencies, such as gifts sent with one's Federal income tax return to the Internal Revenue Service. This system does not include any other gifts to the United States.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 3113.

PURPOSE(S):

These records document the receipt from donors of gifts to reduce the public debt. They provide a record of correspondence acknowledging receipt, information concerning any legal matters, and a record of depositing the gift and accounting for it.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be used to:

(1) Disclose pertinent information to appropriate Federal, State, local, or foreign agencies responsible for investigating or prosecuting the violations of, or for enforcing or implementing a statute, rule, regulation, order, or license;

(2) Disclose information to a court, magistrate, or administrative tribunal in the course of presenting evidence including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, or in response to a subpoena, or in connection with criminal law proceedings;

(3) Provide information to a Congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(4) Disclose information to agents or contractors of the Department for the purpose of administering the public debt of the United States;

(5) Disclose information to a legal representative of a deceased donor for the purpose of properly administering the estate of the deceased;

(6) Disclose information to the Internal Revenue Service for the purpose of confirming whether a tax-deductible event has occurred;

(7) The Department of Justice when seeking legal advice or when

(a) The Department of the Treasury (agency) or

(b) The Bureau of the Public Debt, or

(c) Any employee of the agency in his or her official capacity, or

(d) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or

(e) The United States, where the agency determines that litigation is likely to affect the agency or the Bureau of the Public Debt, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation;

(8) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper, microform, or in electronic media.

RETRIEVABILITY:

These records are retrieved by the name of the donor; amount of gift; type of gift; date of gift; social security number of donor, if provided; control number; check number; State code; or other assigned identifier.

SAFEGUARDS:

These records are maintained in controlled access areas. Automated records are protected by restricted access procedures. Checks and other payments are stored in locked safes with access limited to personnel whose duties require access.

RETENTION AND DISPOSAL:

Records of gifts to reduce the public debt are maintained in accordance with National Archives and Records Administration retention schedules. Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

(A) Customer Service Records: Assistant Commissioner, Office of Retail Securities, Division of Accounting and Risk Management, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

(B) Accounting Records: Assistant Commissioner, Office of Public Debt Accounting, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

(1) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the

documents in accordance with 31 CFR 1.26(d)(2)(ii).

CONTESTING RECORD PROCEDURES:

Initial amendment requests: (1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records: (1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Bureau of the Public Debt or the delegate of such officer. Appeals must be mailed to or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239–0001 (or as otherwise provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from the individual to whom it applies, executors, administrators, and other involved persons.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

TREASURY/BPD.008

SYSTEM NAME:

Retail Treasury Securities Access Application—Treasury/BPD.

SYSTEM LOCATION:

Bureau of the Public Debt locations at 200 Third Street, Parkersburg, WV; Second and Avery Streets, Parkersburg, WV; 320 Avery Street, Parkersburg, WV; and 799 9th Street, NW., Washington, DC.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Records cover those individuals who provide information to create an account in TreasuryDirect for the purchase of United States Treasury securities through the Internet.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system collects and uses personal information to ensure the accurate identification of individuals who have an account in TreasuryDirect or to provide personalized service to these individuals. The types of personal information presently include or potentially could include the following:

(a) Personal identifiers (name, including previous name used; social security number; physical and electronic addresses; telephone, fax, and pager numbers);

(b) Authentication aids (personal identification number, password, account number, shared-secret identifier, digitized signature, or other unique identifier);

(c) Customer demographics (age, gender, marital status, income, number in household, etc.); and

(d) Customer preferences (favorite color, hobby, magazine, etc.; preferred sources for information, such as television, newspaper, Internet, etc.; or dates of importance to the customer, such as birth, anniversary, etc.).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 3101, *et seq.*

PURPOSE(S):

Information in this system of records is collected and maintained to identify the individuals doing electronic business with the Bureau of the Public Debt. The information is required for individuals who invest in Treasury securities by using the Internet to purchase securities and conduct related transactions. The records are also used to improve service to those individuals.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) Appropriate Federal, State, local, or foreign agencies or other public authority responsible for investigating or prosecuting the violations of, or for enforcing or implementing a statute, rule, regulation, order or license where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation;

(2) A court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, or in response to a court-ordered subpoena, or in connection with criminal law proceedings where relevant or potentially relevant to a proceeding;

(3) A Congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(4) Agents or contractors who have been engaged to assist the Bureau of the Public Debt in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity;

(5) The Department of Justice when seeking legal advice or when

(a) The Department of the Treasury (agency) or

(b) The Bureau of the Public Debt, or

(c) Any employee of the agency in his or her official capacity, or

(d) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or

(e) The United States, where the agency determines that litigation is likely to affect the agency or the Bureau of the Public Debt, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation; and

(6) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on electronic media, multiple client-server platforms that are backed up to magnetic tape, microform, or other storage media, and/or hard copy.

RETRIEVABILITY:

Records may be retrieved by name, alias names, social security number, account number, or other unique identifier.

SAFEGUARDS:

The Bureau of the Public Debt has sophisticated Internet firewall security via hardware and software configurations as well as specific monitoring tools. Records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords, sign-on protocols, and user authentication that are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records.

RETENTION AND DISPOSAL:

Records are disposed of at varying intervals in accordance with records retention schedules reviewed and approved by the National Archives and Records Administration (NARA). Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

Assistant Commissioner and Chief Information Officer, Office of Information Technology, 200 Third Street, Parkersburg, WV 26106–5312.

NOTIFICATION PROCEDURE:

Individuals may submit their requests for determination of whether the system contains records about them or for access to records as provided under "Records Access Procedures." Requests must be made in compliance with the applicable regulations (31 CFR part 1, subpart C). Requests that do not comply fully with these procedures may result in noncompliance with the request, but will be answered to the extent possible.

RECORD ACCESS PROCEDURES:

(1) A request for access to records must be in writing, signed by the individual concerned, identify the system of records, and clearly indicate that the request is made pursuant to the Privacy Act of 1974. If the individual is seeking access in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is seeking access by mail, identity may be established by presenting a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must state whether the requester wishes to be notified that the record exists or desires to inspect or obtain a copy of the record. If a copy of the record is desired, the requester must agree to pay the fees for copying the documents in accordance with 31 CFR 1.26(d)(2)(ii).

CONTESTING RECORD PROCEDURES:

Initial amendment requests: (1) A request by an individual contesting the content of records or for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that the request is made pursuant to the Privacy Act of 1974. If the request is made in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but instead showing a name and signature. If the request is made by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Submit requests to the appropriate office as shown under "System Manager and Address" above.

(3) The request must specify:

(a) The dates of records in question,

(b) The specific records alleged to be incorrect,

(c) The correction requested, and

(d) The reasons.

(4) The request must include available evidence in support of the request.

Appeals from an initial denial of a request for correction of records: (1) An appeal from an initial denial of a request for correction of records must be in writing, signed by the individual involved, identify the system of records, and clearly state that it is made pursuant to the Privacy Act of 1974. If the individual is making an appeal in person, identity may be established by the presentation of a single official document bearing the individual's photograph or by the presentation of two items of identification without the photograph but showing a name and signature. If the individual is making an appeal by mail, identity may be established by the presentation of a signature, address, and one other identifier such as a photocopy of an official document bearing the individual's signature. The Bureau of the Public Debt reserves the right to require additional verification of an individual's identity.

(2) Appellate determinations will be made by the Commissioner of the Bureau of the Public Debt or the delegate of such officer. Appeals must be mailed to or delivered personally to: Chief Counsel, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239–0001 (or as otherwise

provided for in the applicable appendix to 31 CFR part 1, subpart C), within 35 days of the individual's receipt of the initial denial of the requested correction.

(3) An appeal must be marked "Privacy Act Amendment Appeal" and specify:

(a) The records to which the appeal relates,

(b) The date of the initial request made for correction of the records, and

(c) The date the initial denial of the request for correction was received.

(4) An appeal must also specify the reasons for the requester's disagreement with the initial denial of correction and must include any applicable supporting evidence.

RECORD SOURCE CATEGORIES:

Information is provided by the individual covered by this system of records or, with their authorization, is derived from other systems of records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

TREASURY/BPD.009

SYSTEM NAME:

U.S. Treasury Securities Fraud Information System—Treasury/BPD.

SYSTEM LOCATION:

The system of records is located at the Bureau of the Public Debt in Parkersburg, WV and Washington, DC as well as the Federal Reserve Banks of Chicago, Philadelphia, Pittsburgh, and Minneapolis. This system also covers the Bureau of the Public Debt records that are maintained by contractor(s) under agreement. The system manager(s) maintain(s) the system location of these records. The address(es) of the contractor(s) may be obtained from the system manager(s) below.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals under investigation or who make inquiries or report fraudulent or suspicious activities related to Treasury securities and other U.S. obligations.

CATEGORIES OF RECORDS IN THE SYSTEM:

The types of personal information collected/used by this system are necessary to ensure the accurate identification of individuals who report or make fraudulent transactions involving Treasury securities and other U.S. obligations. The types of personal information potentially could include the following:

(1) Personal identifiers (name, including previous name used, and aliases; Social Security number; Tax Identification Number; physical and electronic addresses; telephone, fax, and pager numbers), and;

(2) Authentication aids (personal identification number, password, account number, credit card number, shared-secret identifier, digitized signature, or other unique identifier).

Supporting records may contain correspondence between the Bureau of the Public Debt and the entity or individual submitting a complaint or inquiry, correspondence between the Bureau of the Public Debt and the Department of Treasury, or correspondence between the Bureau of the Public Debt and law enforcement, regulatory bodies, or other third parties.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 321(a)(5), 31 U.S.C. 333, 31 U.S.C. 3101, *et seq.* 31 U.S.C. 5318, and 5 U.S.C. 301.

PURPOSE(S):

Records in this system are used to: (1) Identify and monitor fraudulent and suspicious activity related to Treasury securities and other U.S. obligations; (2) ensure that the Bureau of the Public Debt provides a timely and appropriate notification of a possible violation of law to law enforcement and regulatory agencies; (3) protect the Government and individuals from fraud and loss; (4) prevent the misuse of Treasury names and symbols on fraudulent instruments; and, (5) compile summary reports, that conform with the spirit of the USA Patriot Act's anti-terrorism financing provisions and the Bank Secrecy Act's anti-money laundering provisions, and submit the reports to the Financial Crimes Enforcement Network (FinCEN).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be disclosed to:

(1) Congressional offices in response to an inquiry made at the request of the individual to whom the record pertains;

(2) Appropriate Federal, State, local, or foreign agencies responsible for investigating or prosecuting the violations of, or for enforcing or implementing a statute, rule, regulation, order, or license;

(3) A court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena;

(4) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(5) Agents or contractors who have been engaged to assist the Bureau of the Public Debt in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity;

(6) The Department of Justice when seeking legal advice or when

(a) The Department of the Treasury (agency) or

(b) The Bureau of the Public Debt, or

(c) Any employee of the agency in his or her official capacity, or

(d) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or

(e) The United States, where the agency determines that litigation is likely to affect the agency or the Bureau of the Public Debt, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation; and

(7) To appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on electronic media, multiple client-server platforms that are backed-up to magnetic tape or other storage media, and/or hard copy.

RETRIEVABILITY:

Records may be retrieved by (name, alias name, Social Security number, Tax Identification Number, account number, or other unique identifier).

SAFEGUARDS:

These records are maintained in controlled access areas. Identification

cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols that are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on computer have the same limited access as paper records.

RETENTION AND DISPOSAL:

Records are maintained in accordance with National Archives and Records Administration retention schedules. Paper and microform records ready for disposal are destroyed by shredding or maceration. Records in electronic media are electronically erased using accepted techniques.

SYSTEM MANAGER AND ADDRESS:

(1) Assistant Commissioner, Office of Information Technology, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312

(2) Assistant Commissioner, Office of Retail Securities, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312

(3) Office of the Chief Counsel, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–5312

NOTIFICATION PROCEDURE:

This system of records is exempt from the Privacy Act provision on notification procedures. (See "Exemptions Claimed for the System," below.) An individual wishing to be notified if he or she is named in non-exempt records maintained in this system must submit a written request to the Disclosure Officer. See 31 CFR part 1, Subpart C, appendix I.

Identification Requirements: An individual seeking notification through the mail must establish his or her identity by providing a signature and an address as well as one other identifier bearing the individual's name and signature (such as a photocopy of a driver's license or other official document). An individual seeking notification in person must establish his or her identity by providing proof in the form of a single official document bearing a photograph (such as a passport or identification badge) or two items of identification that bear both a name and signature.

Alternatively, identity may be established by providing a notarized statement, swearing or affirming to an individual's identity, and to the fact that the individual understands the penalties provided in 5 U.S.C. 552a(i)(3) for requesting or obtaining information under false pretenses. Additional documentation establishing identity or qualification for notification may be required, such as in an instance where a legal guardian or representative seeks notification on behalf of another individual.

RECORD ACCESS PROCEDURES:

This system of records is exempt from the Privacy Act provision on record access procedures. (See "Notification Procedure" above.)

CONTESTING RECORD PROCEDURES:

This system of records is exempt from the Privacy Act provision on contesting record procedures. (See "Notification Procedure" above.)

RECORD SOURCE CATEGORIES:

This system of records is exempt from the Privacy Act provision that requires that record source categories be reported. (See "Exemptions Claimed for the System," below.)

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records maintained in this system have been designated as exempt from 5 U.S.C. 552a(c)(3), (d)(1), (2), (3), and (4), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). See 31 CFR 1.36.

[FR Doc. E8–16794 Filed 7–22–08; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (10–21087)]

Agency Information Collection Activities (Deployment Risk and Resilience Inventory (DRRI)) Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), 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 August 22, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or 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–New (10–21087)" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–New (10–21087)."

SUPPLEMENTARY INFORMATION:

Title: Deployment Risk and Resilience Inventory (DRRI), VA Form 10–21087.

OMB Control Number: 2900–New (10–21087).

Type of Review: New collection.

Abstract: The primary goal of the DRRI project is to provide a suite of scales that will be useful to researchers and clinicians to study factors that increase or reduce risk for Post Traumatic Stress Disorder (PTSD) and other health problems that Operation Enduring Freedom/Operation Iraqi Freedom veterans experienced before, during, and after deployment.

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 May 14, 2008 at pages 27896–27897.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,383.

Estimated Average Burden per Respondent: 50 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,000.

Dated: July 15, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–16798 Filed 7–22–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (VA Form 4939)]

Agency Information Collection (Complaint of Employment Discrimination) Activities Under OMB Review

AGENCY: Office of Human Resources and 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 Office of Human Resources and Administration (OHR&A), 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; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before *August 22, 2008.*

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or 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–New (VA Form 4939)" in any correspondence.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–New (VA Form 4939)."

SUPPLEMENTARY INFORMATION:

Title: Complaint of Employment Discrimination, VA Form 4939.

OMB Control Number: 2900–New (VA Form 4939).

Type of Review: Existing collection in use without an OMB control number.

Abstract: VA employees, former employees and applicants for employment who believe they were denied employment based on race, color, religion, gender, national origin, age, physical or mental disability and/or reprisal for prior Equal Employment Opportunity activity complete VA Form 4939 to file complaint of discrimination.

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 May 14, 2008, at page 27896.

Affected Public: Individuals or households.

Estimated Annual Burden: 162 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 324.

Dated: July 15, 2008.

By direction of the Secretary.

Denise McLamb,

Records Management Service.

[FR Doc. E8–16801 Filed 7–22–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0545]

Agency Information Collection (Report of Medical, Legal, and Other Expenses Incident to Recovery for Injury or Death) 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. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit 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; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before August 22, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or 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. 2900–0545" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–0545."

SUPPLEMENTARY INFORMATION:

Title: Report of Medical, Legal, and Other Expenses Incident to Recovery for Injury or Death, VA Form 21–8416b.

OMB Control Number: 2900–0545.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 21–8416b to report compensation awarded by another entity or government agency for personal injury or death. Such award is considered as countable income; however, medical, legal or other expenses incident to the injury or death, or incident to the collection or recovery of the compensation may be deducted from the amount awarded or settled. The information collected is used to determine the claimant's eligibility for income based benefits and the rate payable.

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 May 14, 2008, at pages 27895–27896.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,125 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1,500.

Dated: July 15, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–16803 Filed 7–22–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (21–2680)]

Proposed Information Collection (Exam for Housebound Status or Permanent Need for Regular Aid and Attendance) Activity; 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 new collection, and allow 60 days for public comment in response to the notice. This notice solicits comment on information needed to determine eligibility for aid and attendance and/or housebound benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before September 22, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *nancy.kessinger@va.gov*. Please refer to "OMB Control No. 2900–New (21–2680)" in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 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.

Title: Exam for Housebound Status or Permanent Need for Regular Aid and Attendance, VA Form 21–2680.

OMB Control Number: 2900–New (21–2680).

Type of Review: New collection.

Abstract: VA will use VA Form 21–2680 to gather medical information that is necessary to determine beneficiaries or claimants receiving treatment from private doctors or physicians, eligibility for aid and attendance or housebound benefit.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 7,000 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 14,000.

Dated: July 15, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–16805 Filed 7–22–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0108]

Agency Information Collection (Report of Income From Property or Business) 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. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit 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; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before August 22, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or 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. 2900–0108" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–0108."

SUPPLEMENTARY INFORMATION:

Title: Report of Income from Property or Business, VA Form 21–4185.

OMB Control Number: 2900–0108.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 21–4185 to report income and expenses that derived from rental property and/or operation of a business. VA uses the information to determine whether the claimant is eligible for VA benefits and, if eligibility exists, the proper rate of payment.

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 May 14, 2008, at pages 27894–27895.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,500 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,700.

Dated: July 15, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–16807 Filed 7–22–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0556]

Agency Information Collection (Living Will and Durable Power of Attorney for Health Care) Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit 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 August 22, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or 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. 2900–0556" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–0556."

SUPPLEMENTARY INFORMATION:

Title: VA Advance Directive: Living Will and Durable Power of Attorney for Health Care, VA Form 10–0137.

OMB Control Number: 2900–0556.

Abstract: Claimants admitted to a VA medical facility complete VA Form 10–0137 to appoint a health care agent to make decisions about his or her medical treatment and to record specific instructions about their treatment preferences in the event they no longer can express their preferred treatment. VA's health care professionals use the data to carry out the claimant's wish.

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 May 14, 2008 at page 27894.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 171,811 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 343,622.

Dated: July 15, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–16809 Filed 7–22–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Special Medical Advisory Group; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Special Medical Advisory Group will meet on September 23, 2008, in Room 830, from 8:30 a.m. to 2:30 p.m., at VA Central Office, 810 Vermont Avenue, NW., Washington, DC. The meeting is open to the public.

The purpose of the Group is to advise the Secretary of Veterans Affairs and the Under Secretary for Health on the care and treatment of disabled veterans, and other matters pertinent to the Department's Veterans Health Administration (VHA).

The agenda for the meeting will include discussions of the evolving relationship between VA and the Department of Defense, an update on mental health services, academic affiliations, safety/quality initiatives, the political climate, and VHA's public relations campaign.

Any member of the public wishing to attend should contact Juanita Leslie, Committee Manager, Office of Administrative Operations (10B2), Veterans Health Administration, Department of Veterans Affairs at (202) 461–7019. No time will be set aside at this meeting for receiving oral presentations from the public. Statements, in written form, may be submitted to Juanita Leslie before the meeting or within 10 days after the meeting.

Dated: July 16, 2008.

By direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E8–16932 Filed 7–22–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
July 23, 2008

Part II

Department of the Interior

Bureau of Land Management

43 CFR Parts 3900, 3910, 3920 et al.
Oil Shale Management—General; Proposed Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3900, 3910, 3920, and 3930

[WO–320–1310–OSHL]

RIN 1004–AD90

Oil Shale Management—General

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM) is proposing regulations to set out the policies and procedures for the implementation of a commercial leasing program for the management of federally-owned oil shale and any associated minerals located on Federal lands. The Energy Policy Act of 2005 (EP Act) directs the Secretary of the Interior to: Make public lands available for conducting oil shale research and development activities; complete a Programmatic Environmental Impact Statement (PEIS) for a commercial leasing program for both oil shale and tar sands resources on the BLM administered lands in Colorado, Utah, and Wyoming; and issue regulations establishing a commercial oil shale leasing program.

These proposed regulations would incorporate specific provisions of the Mineral Leasing Act of 1920 (MLA) and the EP Act relating to: Maximum oil shale lease size; maximum acreage limitations; rental; and lease diligence.

These proposed regulations would also address the diligent development requirements of the EP Act by establishing work requirements and milestones to ensure diligent development of leases. The proposed rule would also provide for other standard components of a BLM mineral leasing program, including lease administration and operations.

DATES: Send your comments to reach the BLM on or before September 22, 2008. The BLM will not necessarily consider any comments received after the above date during its decision on the proposed rule.

ADDRESSES: *Mail*: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 401 LS, 1849 C St., NW., *Attention:* 1004–AD90, Washington, DC 20240.

Personal or messenger delivery: 1620 L Street, NW., Room 401, Washington, DC 20036.

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions at this Web site.

You may also send comments on the information collection aspects of this proposed rule directly to: Interior Desk Officer (1004–AD90), Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), (202) 395–6566 (facsimile); *e-mail: oira_docket@omb.eop.gov.* Please also send a copy to the BLM.

FOR FURTHER INFORMATION CONTACT: Mitchell Leverette, Chief, Division of Solid Minerals at (202) 452–5088 for issues related to the BLM's commercial oil shale leasing program or Kelly Odom at (202) 452–5028 for regulatory process issues. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on the proposed rule?

If you wish to comment, you may submit your comments by any one of several methods:

- You may mail comments to U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 401 LS, 1849 C St., NW., *Attention*: 1004–AD90, Washington, DC 20240.
- You may deliver comments to Room 401, 1620 L Street, NW., Washington, DC 20036.
- You may access and comment on the proposed rules at the Federal eRulemaking Portal by following the instructions at that site (see **ADDRESSES**).

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing.

The BLM may not necessarily consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**: Personal or messenger delivery during regular hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays. The comments are also available for public review on *http://www.regulations.gov.*

Before including your address, telephone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

II. Background

The BLM is proposing these regulations to implement the EP Act (42 U.S.C. 15927), which became law on August 8, 2005. Section 369 of the EP Act addresses oil shale development and authorizes the Secretary of the Interior to establish regulations for a commercial leasing program. The MLA of 1920 (30 U.S.C. 241(a)) provides the authority for the BLM to allow for the exploration, development, and utilization of oil shale resources on the BLM-managed public lands. Additional statutory authorities for these proposed regulations are:

(1) The Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351–359); and

(2) The Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1701 *et seq.*, including 43 U.S.C. 1732).

Oil shale is a fine-grained sedimentary rock containing organic matter from which shale oil may be produced. Oil shale is a marlstone and contains no oil; rather, it contains un-decayed algae called kerogen (not oil). In fact, the word kerogen is a Greek word interpreted to mean "to produce wax"—"kero" (wax), "gen" to produce. The waxy substance produced from oil shale rock is not the same as conventional crude oil. The kerogen only has a market value as an energy source after it has been refined and converted to synthetic crude oil.

Oil shale is a solid rock and must be mined or treated in place to release the kerogen oil from the rock. Energy companies and petroleum researchers have, over the past 60 years, developed

and tested a variety of technologies on a small scale for recovering shale oil from oil shale and processing it to produce fuels and byproducts. Both surface processing and in-situ technologies have been examined. Generally, surface processing consists of three major steps: (1) Oil shale mining and ore preparation; (2) pyrolysis of oil shale to produce kerogen oil; and (3) processing kerogen oil to produce refinery feedstock and high-value chemicals. This sequence is illustrated below.

Conversion of Oil Shale to Products (Surface Process) Resource —>Ore Mining—>Retorting—>Oil Upgrading—>Fuel and Chemical Markets

For deeper, thicker deposits, not as amenable to surface- or deep-mining methods, the shale oil can be produced by in-situ technology. In-situ processes minimize or, in the case of true in-situ, eliminate the need for mining and surface pyrolysis by heating the resource in its natural depositional setting. This sequence is illustrated below.

Conversion of Oil Shale to Products (True In-Situ Process) Resource —>In-Situ Pyrolysis—>Oil Upgrading—>Fuel and Chemical Markets

The American Association of Petroleum Geologists estimates that the total world oil shale resources contain the equivalent of 2.6 trillion barrels of oil. According to estimates by the U.S. Geological Survey, the United States holds more than 50 percent of the world's oil shale resources.

The largest known deposits of oil shale in the world are located in a 16,000 square mile area in the Green River formation in Colorado, Utah, and Wyoming (underlying the Piceance, Uinta, Green River, and Washakie Basins), which is estimated to contain the equivalent of between 1.5 and 1.8 trillion barrels of oil. Federal lands comprise 72 percent of the total surface of oil shale acreage and 82 percent of the oil shale resources in the Green River formation.

As stated in the June 9, 2005 call for nominations for the research, development, and demonstration (R, D and D) (70 FR 33753) leases, the BLM opted for a staged oil shale leasing program. The first stage is the research and development program followed by these proposed commercial leasing regulations.

BLM oil shale initiatives since 1983.

In 1973, four leases were issued in the oil shale prototype leasing program. During the 1973–74 oil shale prototype program, there were expectations of an economic boom in western Colorado which never materialized. The oil shale industry collapsed on May 2, 1982, commonly referred to as Black Sunday.

In 1983, the BLM established an Oil Shale Task Force to address:

(1) Access to unconventional energy resources (such as oil shale) on public lands;

(2) Impediments to oil shale development on public lands;

(3) Industry interest in research and development and commercial opportunities on public lands; and

(4) Secretarial options to capitalize on these opportunities.

On February 11, 1983, the BLM published a proposed rule for an oil shale leasing program (48 FR 6510). Due to apparent lack of interest in the development of oil shale, the BLM withdrew the proposed rule, effective September 25, 1985 (50 FR 38867).

In order to be better able to expand and diversify domestic energy production, on November 22, 2004, the BLM published a notice in the **Federal Register** (69 FR 67935) requesting public comments on the potential for oil shale development within the Piceance Creek Basin in Colorado, the Uinta Basin in Utah, and the Green River and Washakie Basins in Wyoming. The **Federal Register** notice also requested comments on a proposed draft oil shale R, D and D lease form. Comments received were incorporated, as appropriate, into the final R, D and D lease form.

On June 9, 2005, the BLM published a notice in the **Federal Register** (70 FR 33753) which initiated a R, D and D leasing program by soliciting nominations of 160-acre parcels of public land to be leased in Colorado, Utah, and Wyoming for conducting oil shale recovery technologies. In response to the 19 nominations of parcels that the BLM received, the BLM issued 6 R, D and D leases—5 in Colorado that were effective January 1, 2007, and an additional R, D and D lease in Utah that was effective on July 1, 2007. Each of the R, D and D leases contains a preference right for conversion to a commercial lease of additional acreage upon demonstration of a successful method of producing oil from shale rock.

One of the purposes of the R, D and D leases, as stated in the notice was to provide the BLM, state and local governments, and the public with important information that could be utilized as the BLM works with communities, states, and other Federal agencies to develop strategies for managing the environmental effects of production. The R, D and D lease form was published as an attachment (Appendix A) to the June 9, 2005, **Federal Register** notice.

The PEIS and National Environmental Policy Act (NEPA) Compliance

On December 13, 2005, the BLM published in the **Federal Register** a notice of intent (NOI) to prepare a PEIS (70 FR 73791) for oil shale and tar sands resources leasing on lands administered by the BLM in Colorado, Utah, and Wyoming. The NOI alerted the public that the BLM was intending to amend several resource management plans (RMPs) to open lands for oil shale and tar sands resources leasing in Colorado, Utah, and Wyoming. The NOI also informed the public of the development of the oil shale regulations required by Section 369(d)(2) of the EP Act. The RMPs are BLM planning documents prepared under Section 202 of the FLPMA that present guidelines for making resource management decisions.

The draft PEIS evaluates the following RMPs for possible amendment:

(1) *Wyoming*: Green River, Great Divide, and Kemmerer;

(2) *Utah*: Price River, San Juan, San Rafael, Henry Mountain, Book Cliffs, and Diamond Mountain; and

(3) *Colorado*: Grand Junction, White River, and Glenwood Springs.

Although the PEIS covers planning for tar sands, these proposed regulations do not address tar sands leasing since the BLM has regulations in place that address tar sands leasing (see 43 CFR part 3140).

On December 21, 2007, the BLM published the notice of availability for the draft PEIS and has made the draft PEIS available for public comment (72 FR 72751). The BLM intends to finalize the PEIS before these regulations are final. The PEIS is primarily intended to analyze the impacts of land use allocation and not site specific oil shale leasing.

Advance Notice of Proposed Rulemaking

The BLM recognizes that the creation of the rules governing the development of oil shale would need to address different possible technologies that have different associated impacts and costs. Therefore, to increase public participation and to aid in the development of oil shale regulations, the BLM published in the **Federal Register** an advance notice of proposed rulemaking (ANPR) (71 FR 50378) on August 25, 2006. The ANPR requested public comments on the following five

key components of the proposed regulations:

(1) What should be the royalty rate and point of royalty determination?

(2) Should the regulations establish a process for bid adequacy evaluation,i.e., Fair Market Value (FMV) determination, or should the regulations establish a minimum acceptable lease bonus bid?

(3) How should diligent development be determined?

(4) What should be the minimum production requirement?

(5) Should there be provisions for small tract leasing?

On September 26, 2006, the BLM published a **Federal Register** notice reopening the comment period for the ANPR and extending the comment period until October 25, 2006 (71 FR 56085). In response to the ANPR, the BLM received 48 comments.

Comments were received from individuals, public interest groups, and industry representatives. Although the ANPR focused on the 5 areas previously identified, commenters addressed a variety of topics, including whether or not they were supportive of a commercial oil shale leasing program. Below is a discussion of the ANPR organized by topic. Public comments BLM received on the ANPR are discussed in this preamble at the appropriate section of this rule.

Royalty Rate and Point of Royalty Determination—Section 369(o) of the EP Act does not prescribe a royalty rate, but does provide that the royalty rate for oil shale should encourage development of the resource and should ensure a fair return to the United States. The ANPR comments received were extremely varied and recommended a wide range of royalty rates. Discussion of the ANPR royalty comments can be found in the discussion of section 3903.52 of this rule.

Bid Adequacy Evaluation (Fair Market Value)—It is the policy of the United States, stated in Section 102(a) of FLPMA (43 U.S.C. 1701(a)(9)) and Section 369(o)(2) of the EP Act, that the United States receive FMV for the issuance of Federal mineral leases. The BLM's purpose for requesting comments on the FMV it should receive for lease tracts was to solicit ideas on how FMV would be determined for a resource that has little or no history of comparable sales. The public comments received on the ANPR are discussed in section 3924.10 of this rule.

Diligent Development—Section 369(f) of the EP Act requires that the BLM establish work requirements and milestones to ensure diligent development of Federal oil shale leases. The BLM requested public comment on diligent development to assist us in determining lease diligence requirements for an industry that has yet to be successfully established. A discussion of the ANPR comments we received on diligence can be found in section 3927.50 of this proposed rule.

Minimum Production Requirement—The BLM specifically asked in the ANPR for suggestions from the public about what the minimum production requirement should be to assist us in determining lease production requirements for an industry that has yet to be successfully established. A discussion of the public comments we received on minimum production requirements can be found in section 3903.51 of this proposed rule.

Small Tract Leasing—In the ANPR the BLM requested comments on whether there should be small tract leasing or leasing small acreages of land for oil shale development. A discussion of the public comments we received on small tract leasing can be found in section 3927.20 of this proposed rule.

We also received several comments unrelated to the five questions in the ANPR. Those comments are discussed in the respective section discussions for the rule.

Listening Sessions With Governor's Representatives From Colorado, Utah, and Wyoming

The BLM, in coordination with the Minerals Management Service (MMS), held three "listening sessions" with representatives of the governors of the States of Colorado, Utah, and Wyoming. The BLM and the MMS met with these representatives in Denver, Colorado (December 14, 2006), Salt Lake City, Utah (April 26, 2007), and Cheyenne, Wyoming (August 8, 2007). The purpose of the listening sessions was to provide the governors' representatives the opportunity to share their ideas, issues, and concerns relating to the proposed commercial oil shale leasing regulations.

Section 369(e) of the EP Act requires the Department of the Interior to consult with the governors of Colorado, Utah, and Wyoming, representatives of local governments, interested Indian tribes, and the public to determine the level of support for conducting oil shale lease sales. The BLM plans to consult with the affected states prior to conducting the first oil shale lease sale, and following publication of the final rule.

Consolidated Appropriations Act of 2008

A provision in section 433 of the Consolidated Appropriations Act of 2008 (Pub. L. 110–161) prohibits the use of funds for the preparation or publication of final oil shale regulations, but does not apply to a proposed rule. Therefore, the BLM is publishing this proposed rule and will analyze comments received on the proposed rule, but will not prepare or publish a final rule using fiscal year 2008 funds as provided by this Congressional directive.

III. Discussion of the Proposed Rule

Part 3900—Oil Shale Management—General

This part would contain regulations on the general management of the oil shale program, including discussions of the descriptions and acreage in oil shale leases, qualifications requirements, fees, rentals, royalties, bonds and trust funds, and lease exchanges.

Subpart 3900—Oil Shale Management—Introduction

This subpart would establish competitive oil shale leasing administrative procedures for implementing a long-term commercial oil shale leasing program.

The proposed rule would contain specific provisions required by Section 369 of the EP Act. Many of the sections of the proposed rule contain regulatory requirements similar to the regulations in the BLM's existing mineral programs namely, coal, non-energy leasable minerals, and oil and gas. In creating a regulatory framework for this proposed oil shale commercial leasing program, the BLM proposes to adopt certain basic components and processes common to the BLM's leasing programs. Most of the BLM's leasing programs are governed by the MLA. The regulations governing those programs and this program would include the following types of provisions: Pre-lease exploration; leasing processes; bonding; operations (including plan of development); reclamation; and inspection and enforcement.

Section 3900.2 would contain the definitions and terms used in these proposed regulations. Many of the terms and definitions found in this section would be similar to terms and definitions in the regulations of other BLM mineral leasing programs. Because most of the terms and concepts in this section are well-established, this section of the preamble does not address each of the definitions, but focuses only on definitions for certain terms that directly affect the reader's understanding of the regulatory framework of the oil shale leasing program or that are unique to these regulations.

The term "commercial quantities" means production of shale oil quantities in accordance with the approved Plan of Development for the proposed project through the research, development, and demonstration activities conducted on the lease, based on and at the conclusion of which a reasonable expectation exists that the expanded operation would provide a positive return after all costs of production have been met, including the amortized costs of the capital investment.

The term "infrastructure" means all support structures necessary for the production or development of shale oil. The definition lists examples of the different types of support structures that the BLM would consider to be infrastructure. This term is defined in these proposed regulations because it is critical to the BLM's review of lease applications. Infrastructure impacts are a key component of the plan of operations that the BLM will review when undertaking various analyses such as those required by NEPA. Furthermore, the BLM believes that a detailed itemization of examples is necessary since installation of infrastructure is one of the proposed diligent development milestones.

The term "oil shale" means a fine-grained sedimentary rock containing:

(1) Organic matter which was derived chiefly from aquatic organisms or waxy spores or pollen grains, which is only slightly soluble in ordinary petroleum solvents, and of which a large proportion is distillable into synthetic petroleum; and

(2) Inorganic matter, which may contain other minerals. This term is applicable to any argillaceous, carbonate, or siliceous sedimentary rock which, through destructive distillation, will yield synthetic petroleum.

The BLM defined the term "production" to acknowledge the various technologies associated with operations for extraction of shale oil, shale gas, or shale oil by-products.

Section 3900.5 would leave a place holder for the information collection requirements in parts 3900–3930 under 44 U.S.C. 3501 et seq. The BLM will add the OMB form number once we receive OMB's approval for information collection in the final regulations. The table in paragraph (d) of this section lists the subparts in the rule requiring the information and its title and summarizes the reasons for collecting the information and how the BLM would use the information.

Section 3900.10 would identify which lands would be subject to leasing under parts 3900 through 3930. Section 21 of the MLA authorizes the issuance of oil shale leases (30 U.S.C. 241(a)).

Section 3900.20 would address the right to appeal the BLM decisions issued under these regulations to the Interior Board of Land Appeals under 43 CFR part 4. This section would adopt standard appeals language found in the regulations of other BLM mineral programs.

Section 3900.30 would contain standard language providing that documents (i.e., applications, statements of qualification, plans of development and supporting information, etc.) required by these proposed regulations be filed in the proper BLM office with the required fees. The term "proper BLM office" is defined in the definitions section of this rule.

Section 3900.40 would address the multiple use mandate of FLPMA, by providing that the BLM's issuance of an exploration license or lease for the development or production of oil shale would not preclude the issuance of other exploration licenses or leases on the same lands for deposits of other minerals or other resource uses. This provision is similar to regulatory provisions in the BLM's other leasing programs, which also promote multiple use of the public lands.

Section 3900.50 would clarify the relationship of land use plans and NEPA to the BLM's proposed commercial oil shale leasing program. This section would provide that any lease or exploration license issued under these regulations would be issued under the decisions, terms, and conditions of a comprehensive land use plan. The land use planning process is the key tool used by the BLM to protect resources and designate uses for BLM-administered lands. Compliance with NEPA and land use planning is required prior to the BLM's issuing a lease or exploration license.

Section 3900.61 would address the procedures the BLM would follow concerning consent and consultation where the surface of public land is administered by other Federal agencies outside of the Department of the Interior and procedures for particular situations where the U.S. has conveyed title to or transferred control of the surface. Paragraphs (a) and (b) would address those procedures the BLM would follow concerning consent and consultation where the surface of public lands is administered by other agencies outside of the Department of the Interior. Paragraph (c) would provide procedures an applicant may pursue in challenging a decision issued by a particular agency outside of the Department of the Interior relating to special stipulations or refusal of consent. Paragraph (d) would not allow the BLM to issue a lease or license on National Forest Service lands without the consent of the Forest Service. Under paragraph (d), the BLM's decision whether to issue the lease or license is based on a determination as to whether the interests of the United States would best be served by issuing the lease or license. The provisions of this section closely mirror BLM regulations for oil and gas, coal, and non-energy leasable minerals. Paragraph (e) would provide that the BLM make the final decision as to whether to issue a lease or license in those cases not involving a Federal agency, where the United States has conveyed title to any state or political subdivision or agency, including a college or any other educational corporation or association, to a charitable or religious corporation or association, or to a private entity.

Section 3900.62 would address situations where the BLM may require lease or exploration license stipulations to protect lands and resources. Stipulations are site specific provisions that the BLM may add to standard lease or license terms prior to issuance for the purpose of protecting Federal resource values and mitigating impacts to other values identified in a NEPA document. Stipulations frequently restrict operations on the lease or permit by limiting surface disturbance for the purpose of protecting the environment. This includes the protection of wildlife, plants, and cultural or other resources. This provision is similar to those found in the BLM's other mineral leasing programs.

Subpart 3901—Land Descriptions and Acreage

Section 3901.10 would contain the BLM's requirements for land descriptions in applications or documents submitted to the BLM. This section is similar to the regulatory provisions addressing land descriptions found in other BLM leasing programs and would establish consistent standards for land descriptions in applications submitted to the BLM.

Sections 3901.20 and 3901.30 would incorporate the provisions of Section 369(j)(2) of the EP Act that 50,000 acres would be the maximum acreage of oil shale leases on public lands that any entity may hold in any one state and that the oil shale lease acreage would not count toward acreage limitations associated with oil and gas leases. Another 50,000 acres may be held on acquired lands. Since the provisions in this section relating to maximum acreage holdings are statutory, the BLM

does not have the authority to revise the requirements in this section.

Subpart 3902—Qualification Requirements

Sections under this subpart would detail the various statutory requirements under Section 27 of the MLA relating to who can hold Federal oil shale leases and interests. These proposed regulations would mirror many of the qualification provisions of the BLM's other mineral leasing regulations, namely oil and gas (43 CFR subpart 3102), geothermal (43 CFR subpart 3202), coal (43 CFR subpart 3425), and non-energy leasable minerals (43 CFR subpart 3502).

Section 3902.10 would enumerate the requirements of the MLA relating to who is authorized to hold leases or interests in leases (30 U.S.C. 181, 352). These requirements have a longstanding statutory and regulatory history and are found in the regulations for the BLM's mineral leasing programs.

Sections 3902.21 and 3902.22 would explain the filing procedures for qualification documents, including when and where to file documents. Section 3902.21 would also require that all documentation submitted to the BLM as evidence of qualifications be current, accurate, and complete.

Sections 3902.23 through 3902.29 would detail the type of qualifications documentation that the BLM would require from:

(1) Individuals (section 3902.23);

(2) Associations, including partnerships (section 3902.24);

(3) Corporations (section 3902.25);

(4) Guardians or trustees (section 3902.26);

(5) Heirs and devisees (section 3902.27);

(6) Attorneys-in-fact (section 3902.28); and

(7) Other parties in interest (section 3902.29).

The requirements proposed in these sections are similar to the standard requirements of other BLM regulations to show evidence of qualifications to hold a lease under the MLA.

Subpart 3903—Fees, Rentals, and Royalties

For payments of required rental and royalties, sections 3903.20 and 3903.30 would address the acceptable forms of payment (section 3903.20) and where to submit payment for processing or filing fees, rentals, bonus payments, and royalties (section 3903.30). The acceptable forms of payment listed in section 3903.20 would mirror the forms of payment accepted in the BLM's other mineral leasing regulations.

Section 3903.40 would incorporate the requirement of Section 369(j) of the EP Act that the annual rental rate for an oil shale lease would be $2.00 per acre. Since the statute sets the rental rate, the BLM has no discretion to revise it.

Section 3903.51 would address the minimal annual production requirement that would apply to every lease. It also would discuss payments in lieu of production beginning with the 10th lease year. The BLM would determine the payment in lieu of annual production, but in no case would it be less than $4 per acre. Payments in lieu of production are not unique to this proposed rule. They are a requirement of other BLM mineral leasing regulations and the BLM believes they provide an incentive to maintain production.

Setting the payment in lieu of production at no less than $4 per acre should be an adequate payment to the Federal government to justify allowing the lessee to continue holding a lease absent production, but should not be high enough to cause the lessee to relinquish the lease. A payment in lieu of production of $4 per acre for the maximum lease size of 5,760 acres equals a payment of $23,040 per year.

In response to the ANPR, the BLM received comments expressing various ideas concerning minimum production amounts and requirements. The comments are summarized as follows:

(1) Minimum production should be 1,000 barrels a day;

(2) Minimum production should be based on the viability of the operation;

(3) Minimum production levels should be based on resource potential and production levels identified in the plan of development;

(4) Minimum royalties should be assessed at the end of the primary term;

(5) Minimum production should be based on a percentage of the projected resource base; and

(6) There should not be a minimum production requirement.

We agree with several of the commenter's suggestions. The suggestions to base minimum production on the approved plan of development and the specifics of the operation were incorporated into proposed sections 3930.30(c) and 3930.30(d). The suggestions related to defining the minimum production on a percentage of the resource base were not incorporated into the proposed rule because of the difficulties associated with defining the recoverable resource, the variables associated with the different development technologies, and the differing kerogen content of the shales. We consider the suggestion that identified 1,000 barrels a day as the correct minimum production requirement too inflexible a standard because it does not allow for differences in shale quality and differences in extraction technology.

Section 3903.52—Royalty Rates on Oil Shale Production

Section 3903.52 would establish a royalty rate for all products that are sold from or transported off of the lease area. The BLM recognizes that encouraging oil shale development presents some unique challenges compared to BLM's traditional role in managing conventional oil and gas operations. We received a wide range of comments presenting alternative royalty approaches as part of the ANPR process, and we address those comments below. However, while we have narrowed the range of options based on the ANPR comments, we have not yet settled on a single royalty rate for this proposed rule. Instead, we are presenting two royalty rate alternatives in the proposed rule (as outlined later in this section), and requesting public comment on those specific alternatives. In addition, we are considering a third alternative, a sliding scale royalty rate (also outlined in this preamble), and we are seeking public comment on the appropriate parameters for the sliding scale royalty rate should the BLM choose to adopt this alternative. We anticipate adopting one of these alternatives, or variations on one of these alternatives, at the final rule stage.

EP Act (Section 369(o)) directs the agency to establish royalties and other payments for oil shale leases that "shall—

(1) Encourage development of the oil shale and tar sands resources; and

(2) Ensure a fair return to the United States."

The market demand for oil shale resources based on the price of competing sources (e.g., crude oil) of similar end products is expected to provide the primary incentive for future oil shale development. Additional encouragement for development may be provided through the royalty terms employed for oil shale relative to conventional oil and gas royalty terms, but we recognize that such incentives must be balanced against the objective of providing a fair return to taxpayers for the sale of these resources. Through the ANPR process, the BLM initially examined a wide range of royalty options, including:

(1) 12.5 percent royalty rate on the first marketable product;

(2) 12.5 percent royalty rate on the value of the mined oil shale rock, as proposed in 1983;

(3) 8 percent royalty rate on products sold for 10 years with optional increases of 1 percent per year up to a maximum of 12.5 percent, similar to the rates established by the State of Utah in 1980;

(4) Initial 2 percent royalty to encourage production and a 5 percent maximum upon establishment of infrastructure;

(5) Sliding scale royalty rate tied to timeframes up to a maximum of 12.5 percent;

(6) Sliding scale royalty rate tied to production amounts up to a maximum of 12.5 percent;

(7) Sliding scale royalty rate with royalty rates tied to the price of crude oil;

(8) Royalty rate of 1 percent of gross profit before payout and royalty rate of 25 percent net profit after payout—(Canadian oil sands model);

(9) Royalty based on cents per ton as proposed in the 1973 oil shale prototype program; and

(10) Royalty based on British Thermal Unit (Btu) content as compared to crude oil.

In evaluating an appropriate royalty rate system for oil shale that would meet the dual EP Act objectives of encouraging development and ensuring a fair return to the government, the BLM also reviewed other Federal royalty rates for Federal minerals set by statute and under existing regulations administered by Department of the Interior bureaus, and royalty rates applied to oil shale production in other countries.

The royalty rates for other Federal energy minerals vary. Specifically, current royalty rates for Federal energy minerals under Department of the Interior leasing programs include:

(1) Onshore oil and gas (12.5 percent);

(2) Offshore oil and gas (16.67 percent), Gulf of Mexico Region (18.75 percent);

(3) Underground coal (8 percent);

(4) Surface coal (12.5 percent) and

(5) Geothermal (for new leases: 1.75 percent for the first 10 years and 3.5 percent thereafter. For leases issued prior to the EP Act, 10 percent on net proceeds after deductions).

Many of these programs allow for royalty rate relief under certain circumstances.

The BLM also looked at royalty applications for oil shale and similar unconventional fuels in other countries, including:

(1) For oil sands, Canada applies a royalty rate of 1 percent of the gross revenue before payout (before companies have recouped investment costs) with a 25 percent net profit royalty rate applied after payout;

(2) Australia has a 10 percent gross royalty on the value of the shale oil produced;

(3) Brazil applies a 3 percent gross royalty rate;

(4) Estonia does not have a royalty; and

(5) No information on a royalty rate for shale oil produced in China was available.

It should be noted that Canada produces oil from oil sands, not oil shale. The oil in the sands is the same as crude oil, but dispersed in sand. Extraction and processing is more expensive than for conventional crude oil production, but less expensive than is anticipated for oil shale. Canadian operators have never reached the payout point due to the continued capital expenditures in new equipment, so to date, Canada has received a 1 percent royalty on oil sands production.

Australian operations are using the Alberta Taciuk Process, which is the same type of technology currently used by the Oil Shale Exploration Company (OSEC) in Utah. Despite their 10 percent royalty rate, the Australian oil shale project (the Stuart Project) was heavily subsidized by the Australian government through other means (tax incentives). Even the government subsidies could not sustain oil shale operations in Australia. The last three operators went into bankruptcy after brief operations. Suncor, the founder of the Stuart Project and a successful developer of the Canadian tar sands, exited the Australian oil shale business after losing approximately one hundred million dollars.[1] For its Utah demonstration project, OSEC is also expected to test the Petrosix horizontal retort process, which is currently being used by Petrobras, Brazil, for oil shale operations.

Australia and Brazil are the only other known countries that are producing or have produced oil shale using the same technologies as in the U.S. Oil shale developmental efforts in China and Estonia are owned by their respective governments. Because no other country has yet achieved successful commercial oil shale operations and because of the wide variety of oversight and revenue structures employed in each country, the BLM's review of these systems did not identify a useful model for a royalty system to be used for oil shale development on Federal lands in the U.S.

[1] Environmental News Service. July 22, 2005, *http://www.ens-newswire.com.*

In the ANPR, the BLM solicited public input on the royalty rate and point of royalty determination. The BLM's purpose for requesting comments was to solicit ideas on these royalty issues for a resource that has little or no history of commercial development.

There were approximately thirty-one entities that provided comments through the ANPR process that were specific to royalty rate and royalty point of determination. The comments suggested royalty rates that ranged from a royalty rate of zero to a royalty rate of 12.5 percent. Of the royalty-related comments, three suggested that the royalty be set at 12.5 percent, the same rate as in BLM's oil and gas program, while some comments described a 12.5 percent royalty rate as unreasonable. It is contemplated that the primary products produced from oil shale will compete directly with those from onshore oil and gas production, which has a 12.5 percent royalty rate. However, the BLM recognizes that the nature of potential oil shale operations differs from that of conventional oil and gas operations and that these differences may suggest the need for a royalty system other than the traditional flat rate of 12.5 percent used for conventional onshore oil and gas operations.

In determining the royalty rate for oil shale, it should be noted that there is a significant difference between oil shale mineral deposits and a conventional crude oil reservoir. As discussed in the Background section of this preamble, oil shale is a marlstone that contains no oil, but kerogen, that needs to be refined and converted to synthetic crude oil.

Currently, proposed processes to extract kerogen from an oil shale deposit are also considerably different, as well as labor and capital intensive. Oil shale is a solid rock that must be mined or treated in place to release the kerogen. Two of these processes are discussed in the Background section of this preamble.

Seven of the comments recommended that a "very low royalty rate" be established until after companies have recouped the costs of their investments (debt service and capital investment). Many among the seven recommended that a 1 percent royalty rate be the starting point, and they used the Canadian oil sands royalty scheme as an example. As discussed above, the BLM looked at royalty applications for oil shale and similar unconventional fuels in other countries. The Canadian tar sand model presents two challenges. First, because of the continual infusion of capital to acquire new equipment the payout point is never being reached.

Secondly, because of the complexity of determining when payout may occur, such a royalty scheme is subject to easy manipulation and higher administrative costs. Therefore, the BLM considered the investment payout scheme as inconsistent with the premise of "a fair return" to the taxpayers as mandated in EP Act.

Three of the ANPR comments recommended that "royalties must be high enough" to support local communities and infrastructure; however, these comments did not provide specific royalty rates. Oil shale royalties are not designated for community and infrastructure support, but by statute are required to be split between the Federal Treasury and the states (30 U.S.C. 191). Presumably states could choose to direct a portion of the royalty revenues they receive to local community and infrastructure support, but that would be a state choice, and for the purposes of this rulemaking, these comments were not considered because they assume a use of royalty revenues not available under current law.

Three comments suggested that royalties should not be charged on hydrocarbons unavoidably lost or used on the lease for the benefit of the lease, but did not directly address the royalty rate issue.

One comment suggested the royalty be "based on the material as it exists naturally in the land, and as it is removed from the land." This comment seems to suggest that royalty should be based on mined raw shale. While the BLM acknowledges the inherent differences between an oil shale deposit and other deposits from which similar products can be produced, this suggestion was not considered because there is no known value for raw oil shale since there is no oil shale industry or an established market for raw oil shale. However, it should be noted that in 1983 the BLM proposed a rule to establish a royalty rate equivalent to 12.5 percent of the value of oil shale after mining or resource extraction and before processing, as determined by the BLM. The 1983 proposed rule was published on February 11, 1983 (48 FR 6510). The 1983 proposed rule provided that "the derivation methodology for this value shall be announced prior to the solicitation of bids." The proposed rule further stated that "the royalty rate shall, to the extent practicable, not be levied on any value added by the production process after the point of resource extraction." It would be unreasonable to adopt such a proposal today, due to the changes in extraction methodology (in situ versus ex situ). It would also be challenging to develop a fair and transparent process to calculate the royalty equivalent in today's economic environment, and no values were assigned to the mined or unprocessed rock and tonnage in the 1983 proposed rule. As noted, the 1983 proposed rule deferred the determination of those parameters to a later date.

In addition to ANPR comments received on royalty rates, the BLM looked at an initial 2 percent royalty to encourage production and a maximum 5 percent rate upon establishment of infrastructure. This method recognizes the high costs involved in producing shale oil. However, we dismissed this approach because of the difficulty involved in determining when necessary infrastructure is in place.

The BLM also considered the 8 percent royalty rate established by the State of Utah for state oil shale leases. It was determined that this rate represents the historic base royalty rate for solid fuel minerals on the State of Utah School and Institutional Trust Lands Administration lands—including asphaltic sands, uranium, and coal. To date, none of the state leases in Utah have been developed. Based on these facts, the BLM determined that there is not currently a sufficient basis for simply adopting the State of Utah's royalty rate for oil shale on Federal lands.

After examining the basis for setting rates, as suggested in the ANPR comments, the BLM determined that a flat 12.5 percent royalty rate for all future production may not allow oil shale to become competitive with traditional oil and gas development and therefore could be viewed as inconsistent with the requirements of EP Act. The BLM has decided to consider other alternatives in this proposed rule that may provide some additional incentive beyond that of a flat 12.5 percent royalty rate while also meeting the EP Act objective of providing a fair return to taxpayers.

Royalty Rate Alternatives Proposed for Further Consideration

As noted previously, we are not proposing a single royalty system in the proposed rule. Based on the information the BLM has reviewed to date and considering the unique challenge of trying to set a royalty rate on oil shale production in light of the many uncertainties regarding the economics and technology of a potential future oil shale industry, we are instead presenting two different royalty rate alternatives in the proposed rule text:

1. A flat 5 percent royalty rate; and

2. A 5 percent royalty rate on a specific volume of initial production beginning within a prescribed timeframe, with a 12.5 percent rate applied thereafter.

In addition, we are seeking comment on the appropriate parameters for a third option: A two-three tiered sliding scale royalty based on the market price of competing products (e.g., crude oil and natural gas). A further explanation of each of these proposals is presented below. We are requesting the public to comment on these specific options.

Option 1. Flat 5 Percent Royalty

Although mitigated somewhat by the much greater geographic concentration of oil shale resources, there is a significant difference between the energy value of oil shale and crude oil. On a per-pound basis, very high quality oil shale rock generates 4,300 Btu, coal generates an average of 10,600 Btu, while crude oil generates 19,000 Btu. Even wood has more heating capacity than oil shale rock, generating an average of 6,500 Btu. Applying the relative Btu value of oil shale to crude oil would result in a 2.6 percent royalty for oil shale. Using the same comparison to the royalty rate for underground coal would result in a 3.2 percent royalty rate for oil shale. In other words, it would require almost 5 times as much oil shale to produce the Btu value of crude oil and more than 2 times as much oil shale to produce the equivalent Btu value of coal.

The BLM looked at royalty rates on leases issued under Interior's 1973 Prototype Leasing Program. The prototype leases provided for royalties of $.12 per ton for oil shale with a quality of 30 gallons of oil per ton (30 g/t) with the addition of $.01 for every increase in gallon per ton of oil shale. In 1973, the average price of a barrel of oil was $3.89. At $.24 per ton of 42 g/t or one barrel/ton of oil shale, the royalty per barrel of oil would have been 5 percent. This rate is similar to the rate derived by comparing production costs to royalty rates as recommended by these proposed regulations.

The BLM also estimated what royalty rates for shale oil might be, based on comparisons of production costs for similar products. The cost of removing oil from shale rock is currently estimated to be two to three times higher than the current cost of producing conventional crude oil from onshore operations. The current estimated production cost for shale oil ranges from about $37.75–$65.21 a barrel. The production cost for conventional onshore crude is

approximately $19.50 a barrel.[2] The table below compares the estimated cost of shale oil production for different technologies with the estimated cost of current onshore U.S. conventional oil production. The table also estimates what royalty rates for oil shale production might be, for the different production methods, compared to a 12.5 percent royalty rate for conventional oil production, if the higher anticipated production costs for oil shale are taken into account.

Technology	Estimated shale oil production costs per barrel	Royalty calculation based on difference in production cost of a barrel of conventional oil versus shale oil	Adjusted royalty for shale oil (percent)
Surface mining	$44.24	$19.50/$44.24 = 44.07% × 12.5% = 5.51%	5.5
Underground mining	54.00	$19.50/$54 = 36.11% × 12.5% = 4.51%	4.5
Fracturing and heating in place	65.21	$19.50/$65.21 = 29.90% × 12.5% = 3.74%	3.75
Heating only in place	37.75	$19.50/$37.75 = 51.65% × 12.5% = 6.46%	6.5

Adjusting royalty rates based on higher anticipated production cost for oil from oil shale is not a new concept and is similar to the situation in the coal program where underground coal operations compete with surface coal operations, which have lower production costs. Congress addressed this disparity in production costs by allowing for different royalty rates for coal mined underground versus coal mined at the surface.

Please specifically comment on whether or not the anticipated costs of producing oil shale should be considered in establishing the royalty rate for all oil shale products and whether the BLM has chosen appropriate reference points for this production cost comparison.

Therefore, one alternative that considers the decreased energy content and increased production costs, while encouraging production and ensuring an appropriate return to the government is to set a flat royalty rate of 5%. This alternative assumes that oil shale will continue to be more expensive to produce for many years when compared to new conventional oil.

Option 2. A 5 Percent Royalty on Initial Production, With 12.5 Percent Thereafter

This alternative would provide a reduced royalty rate of 5% as a temporary incentive for early production of oil shale (similar to royalty incentives offered to spur initial Outer Continental Shelf (OCS) deepwater production), but with the standard 12.5% onshore oil and gas royalty rate applying to all oil shale production after a set timeframe and a set amount of production has taken place. Like the other royalty options, this option would require oil shale lessees to pay royalties on the amount or value of all products of oil shale that are sold from or transported off of the lease. This section would explain that the standard royalty rate for the products of oil shale is 12.5 percent of the amount or value of production. However, under this option, for leases that begin production of oil shale within 12 years of the issuance of the first oil shale commercial lease, the royalty rate would be 5 percent of the amount or value of production on the first 30 million barrels of oil equivalent produced.

The advantage of this alternative over a flat 5% royalty (Option 1) is that it provides a better return to taxpayers on later production if oil prices remain high and oil shale production becomes competitive with new conventional oil projects. At $60/barrel, this would amount to roughly $1.8 billion in production allowed per lease at the lower 5% royalty rate, providing roughly a $135 million in savings per lease compared to using the standard onshore oil and gas royalty rate of 12.5%.

One potential downside to this alternative is that offering royalty incentives without regard to oil prices increases the likelihood that, if oil prices remain high, the government will sacrifice revenue without affecting actual oil shale development. For example, at $120/barrel, the savings would be worth $270 million, even though oil shale operations would be more profitable than at oil prices of $60/barrel.

Therefore, we are also requesting comment on whether, if this proposal were adopted in the final rule, the temporary 5% royalty on initial production should also be conditioned on crude oil and natural gas prices (similar to OCS deepwater royalty incentives) and if so, what oil and gas price level would trigger payment at the higher 12.5% rate if prices exceeded the threshold. We would also like comments on the 12 year timeframe for reduced royalty.

Option 3. Sliding Scale Royalty Based on the Market Price of Oil

Two comments suggested a sliding scale royalty format. One comment specifically suggested a sliding scale royalty scheme based on a royalty schedule that varies with the price of conventional crude, as follows:

At $10 per barrel of conventional crude, the royalty rate should be zero;

At $15 per barrel, royalty should be 0.25 percent and should increase by 0.25 percent for every $5 per barrel increase up to $35 per barrel;

At $40 per barrel, the royalty rate should be 2 percent and should increase by 0.5 percent for every $5 per barrel increase in the price of conventional crude oil until the price of conventional crude reaches $100 per barrel; and

At $100 per barrel, royalty rate should be 8 percent and should remain at 8 percent at prices above $100 per barrel.

Another comment suggested two approaches to calculating royalty. The first part of the comment suggested that a simple way to accomplish royalty rates would be to index the value of barrels of oil equivalent to some percentage of NYMEX futures (say, 30 day average front month) prices. The commenter suggested that the index should be some fraction of the price, such as 50 to 65 percent. In the second part of the comment, the commenter suggested that, as an alternative to indexing, the BLM use a sliding royalty rate that is calculated on the difference between product price and the highest-cost production in the industry. The commenter cautioned that "there need to be provisions that deferred portions of the royalty do not reduce mineral lease payments to the States, if an escalating royalty rate is used."

[2] Energy Information Administration, Crude Oil Production, dated July 3, 2008. *http://www.eia.doe.gov/neic/infosheets/crudeproduction.html* and *http://www.eia.doe.gov/emeu/perfpro/tab_12.htm*. The production cost at the time of analysis was approximately $18 per barrel.

The BLM, in consultation with the MMS, evaluated these variable royalty options, but decided that as presented, they would be highly complex, and therefore, cumbersome to administer. With price volatility in the crude oil market, an intricate sliding scale royalty scheme could make enforcing compliance very difficult for the MMS. In addition, there is uncertainty about the types of products that would be derived from oil shale refining. Royalties based on oil shale quality would also be difficult for the BLM to administer when attempting to verify production quantities. For instance, if oil shale is extracted in an underground heating system, it would be extremely difficult for the BLM to determine how much oil or other product came from a particular volume or area of in-place oil shale.

While the BLM and MMS are concerned about the complexity of administering some of the proposed sliding scale royalty proposals, we recognize that there is some merit to the sliding scale concept, and in a simpler form, a sliding scale royalty may prove useful in meeting the dual goals of encouraging production and ensuring a fair return to taxpayers from future oil shale development.

One of the concerns that has been expressed regarding oil shale development is that potential oil shale developers may be reluctant to make the large upfront investments required for commercial operations if they believe there is a chance that crude oil prices might drop in the future below the point at which oil shale production would be profitable (i.e., competitive with new conventional oil production). A sliding scale royalty system could allow the government to at least partially mitigate this development risk by providing for a lower royalty rate if crude oil prices fall below a certain price threshold. The basic concept is that in return for the government accepting a greater share of the price risk that an operator faces when prices are low (in the form of a lower royalty), the government would receive a greater share of the rewards (through a higher royalty) when prices are high.

The BLM has not decided on the specific parameters of a sliding scale royalty system, but is considering a simplified, two- or three-tiered system based on the current royalty rates already in effect for conventional fuel minerals and with a 5 percent royalty rate (Option 1) representing the first tier. The applicable royalty rate would be determined based on market prices of competing products (e.g., crude oil and natural gas) over a certain time period. If prices remain below a certain point during the applicable period, the royalty rate on oil shale products would be 5 percent for that period. If prices are above that range for the period, a higher royalty would be charged. In a three-tiered system, a third royalty rate would apply if prices rise above a second price threshold during the applicable period.

The BLM seeks comment on the specific parameters that could be applied to a sliding scale royalty system, should the BLM choose to adopt such a system in the final rule. More specifically, the BLM would like feedback on the following questions:

1. Should a sliding scale system include two or three tiers? Assuming a 5 percent royalty for the first tier, what would be appropriate royalty rates for the second and/or third tiers?

2. What are appropriate price thresholds to apply to each tier? Should the thresholds be fixed (in real dollar terms), or should they float relative to a published index?

3. Should the sliding scale apply to all products, or should nonfuel products pay a traditional flat rate?

4. Are there other ways to simplify a sliding scale royalty to reduce the administrative costs for BLM, MMS, and producers?

Under a sliding scale system, if prices fall below the lower range, producers would have a "safety net" in the form of the lower 5% royalty rate. Whether or not the lower royalty kicks in at some point, simply having it in place provides some added certainty for investors that would help encourage oil shale production. In return for this "safety net" that conventional oil and gas producers do not enjoy, oil shale producers would be required to pay a higher royalty rate(s) when crude oil and/or natural gas prices are high (and where oil shale is expected to be substantially more profitable).

There are a couple of advantages of this alternative. It reduces the risk for oil shale operators that oil prices might fall below the point that continued oil shale production would be economic. However, it also ensures an improved return to the government if prices remain within one of the higher expected ranges at which oil shale may be profitable. One disadvantage is that taxpayers accept a greater risk of lower returns if prices fall and remain well below the lowest threshold. However, with the lowest royalty rate step set at 5 percent, this risk is no greater than under a flat 5 percent royalty system (Option #1).

Other Royalty Issues

The BLM also received 5 comments specific to the royalty point of determination. Two of the comments suggested that royalty should be determined "at the point at which the oil product exits a process facility in a marketable state." One comment suggested that "the point of royalty determination be at the earliest point of liquid or gaseous product marketability." Another comment suggested that "the oil produced should be measured at the point at which the oil product exits a processing facility in a marketable state." The last comment did not provide a specific suggestion; rather, it stated that the BLM "must set the royalty rate and point of royalty determination with reference to the economic cost of emissions that would be created from developing, and then burning, the oil shale resource." After a careful evaluation of these comments and consultation with the MMS, under the proposed rule the royalty would be assessed on all products of oil shale that are sold from or transported off of the lease. This proposed point of royalty determination is similar to points of royalty determination for other Interior Department minerals programs.

The BLM received three ANPR comments relating to the oil shale research, development, and demonstration (R, D and D) program. One comment encouraged the BLM to "continue the existing BLM R, D and D leasing program for access to oil shale for companies wishing to test unproven technologies." Another comment suggested that the BLM "should let several 'boutique' small companies with large R, D and D budgets to develop a small number of sites," on the condition that those companies "would have to agree to allow their findings to be shared." The last comment specifically requested that the "commercial leasing regulations make clear that the BLM will not hold a commercial lease sale for Federal oil shale resources until successful technologies have been developed and demonstrated on R, D and D leases." These proposed regulations do not address the first comment. The Secretary has discretion under the EP Act to offer additional tracts for R, D and D leasing. These regulations do not decide whether additional R, D and D leasing is necessary. Although the BLM could require that proprietary information be made public as a condition of further R, D and D leasing, we believe that the industry would not be interested in leasing under such conditions.

Furthermore, as previously explained, these regulations do not address any new R, D and D leases. The BLM could not incorporate the third comment, because it suggested a limitation that is inconsistent with the terms of the EP Act. Sections 369(c) and 369(e) of the EP Act authorize the commercial leasing of oil shale following promulgation of regulations and consultation with interested parties without the limitations sought by the comment.

Finally, it is important to note that the proposed rule allows the Federal Government to readjust royalty rates on leases after the first 20-year term.

Currently, there is no oil shale industry and the oil shale extractive technology is still in its rudimentary stages; as such, commercial oil shale production does not exist anywhere in the world. As research and development of oil shale technology progresses, the BLM will have adequate time to reexamine and readjust royalty rates for oil shale production, either up or down. Please specifically comment on the time necessary to develop an oil shale industry.

The BLM is proposing alternatives for the royalty rate and the products on which the royalties will be collected. The BLM anticipates selecting one of these alternatives, or based on public comment and further analysis, variations on these alternatives in the final rule in order to provide predictability for the industry and ease of administration both for the United States and for payers. However, the Department is not proposing corresponding MMS valuation regulations at this time. Because the oil shale industry is still in the research and development phase, it would be speculative to predict whether the industry as it matures would predominantly sell from its leases mined solid oil shale, shale oil, synthetic petroleum, shale gas, natural gas, or products in several different forms or stages of processing. It is also difficult to predict whether or when multi-buyer/multi-seller markets would develop that would provide FMV pricing for products of oil shale. Therefore, the MMS will promulgate royalty valuation regulations before oil shale leases are required to begin paying production royalties under this rule.

To the extent possible, the MMS will ensure that any oil shale valuation regulation is consistent with other valuation regulations and will incorporate principles of simplicity, early certainty, and reduced administrative costs in the oil shale valuation regulations it promulgates. For example, the MMS could promulgate regulations similar to the current Federal oil valuation regulation to value crude oil produced from oil shale. Under this regulation, the value of oil sold at arm's-length would be based on gross proceeds less allowable costs of transporting oil to the point of sale. The value of oil not sold at arm's-length would be based on a market index price or the affiliate's arm's-length resale price. In both arm's-length and non-arm's-length situations, the regulations provide for adjustments for location, quality, and transportation allowances. Further, lessees also can petition for alternate valuation agreements that are situation specific when regulatory provisions do not apply.

Royalties would not be payable on potentially valuable minerals or inorganic matter that are not sold or transported off the lease for commercial purposes. Those materials would be considered waste, and would be subject to management and reclamation requirements as provided in the lease or in an approved plan of development.

The Department seeks comments on what future royalty valuation regulations need to contain. In particular, the Department is seeking comments on the potential types of oil shale products, the most equitable and practical point and method to determine the value on which to apply the royalty rate, and whether there are or should be opportunities to determine value by market proxy or indices. The Department also seeks comments on alternative approaches to valuation and royalty rates.

In the economic analysis for this rule, the BLM analyzed the royalty implications of a range of royalty rates. Specifically, the BLM conducted a simulation-based analysis to estimate the revenue, profit, and royalty implication of a production scenario [3] using three discount rates (7 percent, 3 percent, and 20 percent), three world crude oil price projections (EIA's 2007 reference, high, and low price projections [4]), and six different royalty rates (1 percent, 3 percent, 5 percent, 7 percent, 9 percent, and 12.5 percent). The likelihood of a company, in the face of numerous technological challenges, having the incentive to develop Federal oil shale reserves and experiencing economic success will depend on a number of factors. However, because the simulated scenario analysis is based on a given production scenario and set production costs, the analysis did not assist in determining the project(s) economic viability due to the royalty rate applied. The analysis did, however, clearly identify world oil price as a critical variable determining a project's economic viability. Under EIA's 2007 low oil price projection all operations are assumed to be uneconomic based on the set production costs used in the analysis of the rule.

Section 3903.53 would require the filing of documentation of all overriding royalties associated with a lease and would require that the filing must occur within 90 days of the date of execution of the assignment. This section is similar to that of the BLM's other mineral leasing programs.

Section 3903.54 would contain the requirements for filing an application for waiver, suspension, or reduction of rental or payment in lieu of production, or a reduction in royalty, or waiver of royalty in the first 5 years of the lease. As with the BLM's other mineral leasing programs, this section is intended to encourage the maximum ultimate recovery of the mineral(s) under lease. This section is similar to the BLM's coal leasing regulations and similarly includes a case-by-case processing fee under 43 CFR 3000.11.

Section 3903.60 would provide that late payments or underpayment charges would be assessed under MMS regulations at 30 CFR 218.202.

Subpart 3904—Bonds and Trust Funds

Sections in this subpart would address the requirements associated with bonding and trust funds, including the:

(1) Types of bonds the BLM requires and when bonds would be required (section 3904.10);

(2) When and where bonds would be filed (sections 3904.11 and 3904.12);

(3) Acceptable types collateral for personal bonds (section 3904.13);

(4) Individual lease, exploration license, and reclamation bonds (section 3904.14);

(5) Amount of bond coverage (section 3904.15);

(6) Default (section 3904.20); and

(7) Long-term water treatment trust funds (section 3904.40).

Since all of the BLM's mineral leasing programs require bonds, the requirements in subpart 3904 would be similar to the regulatory provisions in the BLM's other mineral leasing programs. The bonding requirements in this rule are consistent with the bonding

[3] America's Strategic Unconventional Fuels Resources, Volume III Resource and Technology Profiles, Task Force on Strategic Unconventional Fuels, September 2007, page III–17, Table III–4. Potential Oil Shale Development Schedule—Base Case, (*http://www.unconventionalfuels.org*).

[4] Department of Energy, Energy Information Administration, Annual Energy Outlook 2007, Report #: DOE/EIA–0383(2007), February 2007.

requirements under the BLM's mining law program. Both programs require that bonds cover the full cost of reclamation. Both programs also allow for the use of long-term trust funds as a mechanism to address potential long-term water issues.

Bonding ensures performance at a cost up to the bond amount in the event of default by a lessee or licensee. Sections of this subpart would establish that the BLM would require two types of bonds; a lease or exploration license bond and a reclamation bond. This subpart would also explain that reclamation bonds would be required to be in an amount sufficient to cover the entire cost of reclamation of the disturbed areas as if they were to be performed by a contracted third party.

Section 3904.10 would provide that prior to lease or an exploration license issuance, the BLM would require a lease or exploration license bond for each lease or exploration license to cover all liabilities on a lease, except reclamation, and all liabilities on a license. The bond would be required to cover all record title owners, operating rights owners, operators, and any person who conducts operations on or is responsible for making payments under a lease or license. This section would also require the lessee or operator to file a reclamation bond to cover all costs the BLM estimates would be necessary to cover reclamation on a lease. This is similar to the requirement found in other BLM mineral regulations.

Section 3904.11 would require the lessee or operator to file a lease bond prior to issuance of a lease, file a reclamation bond prior to approval of a plan of development, and file an exploration bond prior to exploration license issuance. This section is similar to other BLM bonding regulations as it would require the filing of a bond before liabilities may accrue.

Section 3904.12 would require that a copy of the bond with original signatures be filed in the proper BLM office and section 3904.13 would describe the different types of bonds that the BLM would accept. These sections are similar to the bonding regulations in other BLM mineral leasing programs.

Section 3904.13 would address the types of personal and surety bonds the BLM would accept. Personal bonds would be limited to pledges of cash, cashier's check, certified check, or U.S. Treasury bond. The BLM state offices would list qualified sureties for bonds.

Section 3904.14 would provide that the BLM will establish bond amounts on a case-by-case basis. These regulations would set the minimum lease bond amount at $25,000. Although the minimum lease bond amount is greater than that required in other BLM mineral leasing programs, the BLM believes that it is justified because the potential liability may be greater and there are still some unknowns. Reclamation and exploration bond amounts would be established to cover the costs of reclamation as if it were to be performed by a contracted third party.

Past oil shale operations have required extensive reclamation, and this has demonstrated the need to have a reclamation bond that covers the full cost of reclamation. By requiring that the bond equal the estimated costs of having a third party perform the reclamation, the BLM anticipates that the cost of reclamation would be covered.

This section would provide that the BLM may enter into agreements with states to accept a state-approved reclamation bond to satisfy the BLM's reclamation requirements and protect the BLM to the extent the bond is adequate to cover all the operator's liabilities on Federal, state, and private lands. This would avoid duplicate procedures and the inconvenience and cost of filing separate bonds with both the state and the BLM. Such agreements were recommended by state representatives at the BLM listening sessions and are also addressed in regulatory provisions of other BLM mineral leasing programs.

Section 3904.15 would explain that under this proposed rule the BLM may increase or decrease the bond amount if it determines that a change in coverage is warranted to cover the costs and obligations of complying with the requirements of the lease or license and these proposed regulations. This section would also explain that the BLM would not decrease the bond amount below the minimum established in section 3904.14(a). This section would require the lessee or operator to submit a revised cost estimate of the reclamation costs to the BLM every three years after reclamation bond approval. If the current bond would not cover the revised estimate of the reclamation costs, the lessee or operator would be required to increase the reclamation bond amount to meet or exceed the revised cost estimate. This section is consistent with the bonding regulations that currently exist for other BLM minerals programs.

Section 3904.20 would describe what actions the BLM would take in the event of a default payment from a lease, exploration, or reclamation bond to cover nonpayment of any obligations that were not met. It also would require the bond to be restored to the pre-default level. This section is similar to sections in the other BLM mineral regulations regarding default.

Section 3904.21 would allow the termination of the period of liability of a bond. The BLM will not consent to the termination of the period of liability under a bond unless an acceptable replacement bond has been filed or until all of the terms and conditions of the license or lease have been fulfilled. Termination of the period of liability of a bond would end the period during which obligations continue to accrue, but would not relieve the surety of the responsibility for obligations that accrued during the period of liability.

Section 3904.40 would establish trust funds or other funding mechanisms to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term, post-mining maintenance requirements. Experience in other mineral programs has shown the need for a mechanism to ensure the long-term treatment of water. This provision is similar to regulations in the BLM's mining law program under 43 CFR 3809.552 and is designed to address similar long-term water protection issues. In determining whether a trust fund will be required, the BLM will consider the following factors:

(1) The anticipated post-mining obligations (PMO) that are identified in the environmental document and/or approved plan of development;

(2) Whether there is a reasonable degree of certainty that the treatment will be required based on accepted scientific evidence and/or models;

(3) The determination that the financial responsibility for those obligations rests with the operator; and

(4) Whether it is feasible, practical, or desirable to require separate or expanded reclamation bonds for those anticipated long-term PMOs.

The determination that a trust fund is needed and the amount needed in the fund may be made during review of the proposed plan of development or later as a result of further inspections or reviews of the operations.

Subpart 3905—Lease Exchanges

This subpart would allow the BLM to approve oil shale lease exchanges.

Section 3905.10 would explain that the BLM would approve a lease exchange if it would facilitate the recovery of oil shale and it would consolidate mineral interests into manageable areas. It also states that oil shale lease exchanges would be governed by the regulations under 43 CFR part 2200. Section 206 of FLPMA

authorizes land exchanges of interests in Federal lands for non-Federal lands (43 U.S.C. 1716).

Part 3910—Oil Shale Exploration Licenses

The regulations proposed under this part would address exploration licenses. An exploration license would allow a licensee to enter the Federal land covered by an exploration license and explore for minerals, but it would not authorize the licensee to extract any minerals, except for experimental or demonstration purposes. Since regulatory provisions for the issuance and approval of exploration licenses are common to the BLM mineral leasing programs, this part would contain similar regulatory provisions, particularly with respect to:

(1) Lands that are subject to exploration (section 3910.21);

(2) Lands managed by agencies other than the BLM (section 3910.22);

(3) Requirements for conducting exploration activities (section 3910.23);

(4) Application procedures (section 3910.31);

(5) Environmental analysis (section 3910.32);

(6) License requirements (section 3910.40);

(7) Issuance, modification, relinquishment, termination, and cancellation (section 3910.41);

(8) Limitations on exploration licenses (section 3910.42);

(9) Collection and submission of data (section 3910.44); and

(10) Surface use (section 3910.50).

Section 3910.21 would authorize the issuance of oil shale exploration licenses on all Federal lands subject to leasing under section 3900.10, except lands within an existing oil shale lease or in preference right lease areas under the R, D and D program. This type of limitation on which lands the BLM may issue an exploration license is consistent with that of other BLM minerals exploration regulations.

Section 3910.22 would make it clear that the consent and consultation procedures under section 3900.61 that apply to leases also apply to exploration licenses. The BLM would issue these licenses under the terms and conditions prescribed by the surface managing agency concerning the use and protection of the nonmineral interests in those lands. Section 3910.22 is similar to regulations for BLM's other mineral leasing regulations requiring consent and consultation for exploration licenses.

Section 3910.23 would require the operator to have a lease or license before conducting any exploration activities on Federal lands. This section would also allow that under an exploration license small amounts of material may be removed for testing purposes only; however, any material removed cannot be sold. This is similar to regulations in other BLM mineral programs that recognize that some removal of material is necessary for testing purposes.

Section 3910.31 would identify specific requirements for filing an application for an exploration license. Application requirements under this section would include:

(1) Submission of a nonrefundable filing fee;

(2) Description of lands covered by the application;

(3) An exploration plan;

(4) Compliance with maximum acreage limitations for an exploration license; and

(5) Submission of information to prepare a notice of invitation for other parties to participate in exploration.

Mirroring the coal regulations, this section would establish an acreage limit of 25,000 acres as the maximum size allowable for an exploration license. As is the case for other BLM leasing programs which provide for exploration licenses, there would be no required application form. The $295 filing fee for an exploration license is based on the current filing fee for a coal exploration license. The BLM anticipates that the time required to process an oil shale exploration license would be similar to that for a coal exploration license, and therefore believes the same filing fee is justified.

Section 3910.32 would require the BLM to perform the appropriate NEPA analysis before issuing an exploration license. The section also explains that the BLM would include in an exploration license terms and conditions to mitigate impacts to the environment analyzed in a NEPA document and to protect Federal resource values of the area and to ensure reclamation of the lands disturbed by exploration activities.

Section 3910.40 would provide that a licensee must comply with all applicable Federal laws and regulations and the terms and conditions of the license and approved exploration plan as well as applicable state and local laws not otherwise preempted by Federal laws, such as FLPMA.

Section 3910.41 would explain provisions relating to the administration of the exploration license, including the license term, the effective date of an exploration license, conditions for approval, and provisions relating to the modification, relinquishment, and cancellation of an exploration license. Like exploration licenses for other BLM mineral leasing programs, the term of an exploration license would be 2 years. The requirements proposed here for oil shale exploration licenses are similar to existing requirements in regulations relating to exploration licenses in other BLM minerals programs, particularly coal.

Section 3910.42 would provide that issuance of an exploration license would not preclude the issuance of a Federal oil shale lease for the same area. This section would also make it clear that if an oil shale lease is issued for an area covered by an exploration license, the BLM would cancel the exploration license effective the date of lease issuance.

Section 3910.44 would address collection and submission of data relating to an exploration license and would include provisions relating to confidentiality of data. This section is similar to provisions in other BLM minerals programs.

Section 3910.50 would address the issue of surface damage resulting from exploration operations and would require that exploration activities not unreasonably interfere with or endanger any other lawful activity on the same lands or damage any surface improvements on the lands. This is similar to other BLM minerals regulations that address surface use.

Part 3920—Oil Shale Leasing

The foundation for the proposed oil shale leasing program would be a competitive leasing process similar to the BLM's coal leasing program. Prior to making areas available for consideration for leasing through a competitive lease sale, the BLM is proposing a 2-step process that would begin with a call for expressions of leasing interest (section 3921.30), to be followed by a call for applications (section 3921.60) if the BLM determines that there is interest in a competitive lease sale. In addition to contributing to the orderly development of the resource, this process would facilitate compliance with NEPA by focusing the analysis on areas in which there is active interest in obtaining a lease.

Subpart 3921—Pre-Sale Activities

The sections under this subpart would contain regulatory provisions relating to pre-leasing activities. Many of the sections would be similar to existing provisions of other BLM mineral leasing programs, particularly coal.

Section 3921.10 would explain that a BLM State Director may announce in the **Federal Register** a call for

expressions of interest for those areas identified in the land use plan as available for oil shale leasing.

Section 3921.20 clarifies that the appropriate NEPA analysis must be prepared for the proposed leasing area under the Council on Environmental Quality's regulations at 40 CFR parts 1500 through 1508 and Department of the Interior methods and procedures developed pursuant to NEPA.

Section 3921.30 would provide that the notice announcing calls for expressions of leasing interest would be published in the **Federal Register** and in at least 1 newspaper of general circulation in the affected state. The notice would allow a minimum of 30 days to submit expressions of leasing interest, including a legal land description and other specified information.

Section 3921.40 would require that the BLM notify the appropriate state governor's office, local governments, and interested Indian tribes of their opportunity, after the BLM receives responses to the call for expression of leasing interest, to provide comments regarding the responses and other issues related to oil shale leasing. The BLM included this requirement in the proposed rule in response to discussion at the three listening sessions with the governors' representatives.

Section 3921.50 would explain that after analyzing expressions of leasing interest, the BLM would determine a geographic area for receiving applications to lease. This section would also explain that the BLM may add lands to those areas identified by the public in the expressions of leasing interest.

Under proposed section 3921.60, the BLM's call for applications would be published in the **Federal Register** and would identify the geographic area available for application under proposed subpart 3922. Under this section, the public would have at least 90 days to submit applications for lease.

Subpart 3922—Application Processing

The sections under this subpart would contain regulatory provisions relating to application requirements, including:

(1) A nonrefundable case-by-case processing fee (section 3922.10);

(2) Content of application (section 3922.20);

(3) Additional information (section 3922.30); and

(4) Tract delineation (section 3922.40).

These provisions are similar to existing regulations of other BLM mineral leasing programs.

Section 3922.10 would require an applicant nominating a tract for competitive leasing to pay a cost recovery or processing fee that the BLM will determine on a case-by-case basis as described in 43 CFR 3000.11 and as modified by provisions of section 3922.10. The section would provide that the applicant who nominates a tract will pay to the BLM the processing costs that the BLM incurs up to the publication of the competitive lease sale notice. That fee amount would be included in the sale notice. If the applicant is the successful bidder, the applicant would then also pay all processing costs the BLM incurs after the date of the sale notice. Payment of all cost recovery fees is required prior to lease issuance.

If the successful bidder is someone other than the original applicant, the successful bidder would be required to submit an application under section 3922.20 within 30 days after the lease sale and would be responsible for paying to the BLM the fee amount included in the sale notice. In such circumstances, the BLM will refund the fees the original applicant paid to the BLM. The successful bidder would also be responsible for any processing costs the BLM incurs after the date of the sale notice. If there is no successful bidder, the applicant would be responsible for processing costs, and there would be no refund.

With respect to costs incurred relating to the NEPA analysis to support a competitive lease sale, the BLM processing fees noted in the sale notice would include, if applicable, the BLM's costs associated with preparation of the NEPA analysis, which may include BLM costs incurred in contracting with a third party to perform the NEPA analysis. In cases where there are several applications that have been filed for the same area, it is likely that the BLM would prepare a single NEPA analysis, which would address issues related to environmental impacts identified in all applications that were filed in response to the call for applications.

In the case where the successful bidder for a tract is not the original applicant, the successful bidder would be responsible for paying the fee noted in the sale notice and any additional BLM processing costs, including any additional NEPA analysis.

For example, in the case where a successful high bidder is not the original applicant and the technology that the successful bidder proposes to use was not previously analyzed in the NEPA analysis, the successful bidder would be responsible for paying for the cost of that NEPA analysis and any additional NEPA analysis that would be necessary.

It should be noted that an applicant would not be reimbursed for moneys the applicant (and not the BLM) may pay directly to third persons to perform studies, including any required analyses under NEPA.

Under section 3922.10, the BLM is proposing adopting case-by-case processing fees for applications that would mirror case-by-case fee requirements applicable to the leasing of coal and non-energy leasable minerals offered through competitive lease sales. The BLM's minerals material sales regulations also contain case-by-case processing fees. Case-by-case fees would allow the BLM to recoup its processing costs by charging an applicant the reasonable costs the BLM incurs in processing a particular application. Cost recovery is authorized under the Independent Offices Appropriation Act of 1952, as amended, 31 U.S.C. 9701, which states that Federal agencies should be "self-sustaining to the extent possible" and authorizes agency heads to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." The BLM also has specific authority to charge fees for processing applications and other documents relating to public lands, including Environmental Impact Statements (EISs), under Section 304(b) of FLPMA (43 U.S.C. 1734(b)). Cost recovery policies are explained in Office of Management and Budget Circular A–25 (Revised), entitled "User Charges." The general Federal policy stated in Circular A–25 (Revised) is that a charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public.

Additionally, this section states that the BLM will not issue a lease offered by competitive sale without having first received an application from the successful bidder under section 3922.20. Under section 3922.10(b)(5) a successful bidder at a competitive lease sale who was not an applicant must file an application within 30 calendar days after the lease sale.

Section 3922.20 would identify specific information that an applicant would be required to include in a lease application to enable the BLM to have sufficient information to prepare the appropriate NEPA analysis to evaluate the impacts of proposed leasing. The amount of information requested as part of an oil shale lease application differs from other mineral leasing programs because the methodology for recovering oil shale is not as standardized as it is for more conventional fuels. The NEPA

compliance documents at this stage in the leasing process are necessary because the PEIS addresses land use planning decisions and not leasing decisions and was unable to anticipate with any certainty the effects of oil shale leasing development due to the newness of the industry.

The possible oil shale development technologies are very different from conventional mining methods associated with other BLM minerals programs, as are the impacts associated with each. The technologies are yet to be proven, or commercially viable and their associated impacts are unknown. Because the BLM is presently uncertain of the mining methods (and associated impacts) that may be used for oil shale development, additional NEPA analysis will be performed during the application and leasing process. When required by applicable law, the BLM will conduct site-specific NEPA analysis, including a period of public review, to evaluate the impacts on known resource values on the lands in any application. Although no specific form is required, information the applicant would be required to provide includes, but is not limited to:

(1) Proposed extraction method (including personnel requirements, production levels, and transportation methods) and estimate of the maximum surface area to be disturbed at any one time;

(2) Sources and quantities of water to be used and treatment and disposal methods necessary to meet applicable water quality standards;

(3) Air emissions;

(4) Anticipated noise levels from proposed development;

(5) How proposed lease development would comply with all applicable statutes and regulations governing management of chemicals and disposal of waste;

(6) Reasonably foreseeable social, economic, and infrastructure impacts of the proposed development on the surrounding communities and on state and local governments;

(7) Mitigation of impacts on species and habitats; and

(8) Proposed reclamation methods.

Section 3922.30 would provide that the BLM could request additional information from the applicant, and explain that failure to provide the best available and most accurate information might result in suspension or termination of processing of the application or in a decision to reject the application. The BLM's ability to obtain additional information at this stage is essential to the NEPA analysis to support leasing. Failure to provide the needed information would have a direct impact on the adequacy of the NEPA analysis and therefore could greatly impact the BLM's decision to proceed with a lease sale.

Section 3922.40 would make it clear that the purpose of tract delineation for a competitive lease sale is to provide for the orderly development of the oil shale resource. This section would also clarify that in addition to adding or deleting lands from an area covered by an application, where lands covered by applications overlap, the BLM may delineate those lands that overlap as separate tracts. The BLM may delineate tracts in any area acceptable for further consideration for leasing, regardless of whether it received expressions of interest or applications for those areas. The need to delineate tracts for adequate development of the mineral resource is recognized in all the BLM mineral leasing programs, and provisions similar to this are contained in the other BLM mineral leasing regulations.

Subpart 3923—Minimum Bid

Section 3923.10 would implement the policy of the United States under Section 102(a) of FLPMA (43 U.S.C. 1701(a)(9)) that the Federal government should receive a FMV for leasing its minerals. Also, Section 369(o) of the EP Act which requires that payments for leases under that section must ensure a fair return to the United States. Under section 3924.10 of the proposed rule, the BLM sales panel would determine if the high bid reflects the FMV of the tract, which we equate to fair return. We anticipate that the sales panel will analyze the bids and make a determination, taking into account, among other things, the geology, market conditions, mining methods, and industry economics.

The BLM recognizes the difficulty in determining a value for a resource (oil shale) that has tremendous potential, but has not yet been proven to be economic to develop. The risk of setting pre-sale FMVs that are too high and would discourage development of a commercial leasing program is very real. The BLM is also aware that the oil shale industry is presently in the research and development stage and comparable lease sales might be rare or unavailable when leasing first occurs under these regulations, but this will not always be the case. Competitive lease sales of Federal oil shale leases in the 1970s resulted in bids of $10,000 per acre, or higher, indicating that even though development risks are high, the potential reward is also high. Both the economic and the technological circumstances have changed since the 1970s, but the vast quantities of oil shale within the Federal acreage weigh in favor of high minimum bid amounts. For comparison purposes, the coal program has a minimum bid amount of $100 per acre and the oil and gas program has a minimum bid amount of $2 per acre. This section would set a minimum bid of $1,000 per acre, but the BLM invites comments supporting reasonable alternative minimum bid amounts.

Subpart 3924—Lease Sale Procedures

Provisions of this subpart would identify the process by which tracts of land would be made available for competitive lease sale. The BLM proposes to lease oil shale through a competitive bidding leasing procedure that would mirror competitive lease sales procedures currently in place for other solid minerals leasing programs, particularly coal.

Section 3924.5 would detail the contents of the sale notice that the BLM would publish in the **Federal Register** and newspapers of general circulation in the area of the proposed lease. The purpose of the notice is to alert the public that the BLM will be holding an oil shale lease sale and to provide enough of the details about the proposed lease terms and conditions, lease area, and leasing limitations for the public to make an informed decision whether to participate in the lease sale. This section would be similar to other BLM mineral leasing regulations that require notification of the lease sale and is a necessary part of the oil shale leasing program.

Section 3924.10 would detail competitive lease sale procedures, including receipt and opening of sealed bids, submission of the one-fifth of the amount of the bonus bid, requirements for future submission of remaining installments of the bonus bid, and post-sale procedures for determining the successful bidder. This section would also address the actions of the sale panel in determining whether or not to accept the high bid, including a FMV determination. This section is similar to the BLM's competitive leasing regulations for coal and non-energy leasable minerals. The BLM is proposing to adopt this process because it has been successful in these other mineral leasing programs and because we believe this process is appropriate for oil shale leasing.

The BLM will rely on the appraisal process to estimate the fair market value (FMV) for commercial oil shale leases under the proposed regulations. An appraisal is an unbiased estimate of the value of property. The appraisal process

is a systematic approach to property valuation. It consists of defining data requirements, assembling the best available data, and applying an appropriate appraisal method. The principles of property valuation are presented in the Uniform Appraisal Standards for Federal Land Acquisitions and in The Appraisal of Real Estate. The term "fair market value" is defined in the Uniform Appraisal Standards for Federal Land Acquisitions as the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing, but not obligated, to sell to a knowledgeable purchaser who desired, but is not obligated, to buy.

In ascertaining that figure, consideration should be given to all matters that might be brought forward and substantial weight given in bargaining by persons of ordinary prudence. Factors that will affect the market value of an oil shale lease include the lease terms which encompass rental and royalty obligations. The bonus bid for the lease must be equal or greater than the lease FMV.

There are three methodologies generally used in appraising real property: the comparable sales approach, income approach, and replacement cost approach. Normally, the replacement cost approach is not applied to appraisals involving property such as mineral leases.

In the comparable sales approach, the value of a property is estimated from prior sales of comparable properties. The basis for estimation is that the market would impute value to the subject property in the same manner that it determines value of comparable competitive properties. When reliable comparable sales data are available, it generally is assumed that the comparable sales approach will provide the best indication of value.

In the income approach, the value assigned to the property is derived from the present worth of future net income benefits. If sufficiently similar sales are not available, the FMV determination will generally rely on the income approach.

The FMV determination follows a pre-existing valuation standard, which utilizes the circumstances of place, time, the existence of comparable precedents, and the evaluation principles of each involved party. In determining the FMV under this rule, our determination would be based on comparison with identical or similar past, actual, or expected services and goods relating to oil shale. It is the policy of the United States, stated in Section 102(a) of FLPMA (43 U.S.C. 1701(a)(9)) and Section 369(o)(2) of the EP Act, that the United States receive FMV for the issuance of Federal mineral leases.

In the ANPR, the BLM solicited public input on the process for bid adequacy evaluation and minimum acceptable lease bonus bid. The BLM's purpose for requesting comments on the FMV it should receive for lease tracts was to solicit ideas on how FMV would be determined for a resource that has little or no history of comparable sales.

The public comments received were primarily concerned with the need to receive an appropriate value for the lease. The BLM received comments from 6 entities related to this question, specifically mentioning that: a FMV determination needs to reflect private sector valuations; competitive bidding should establish a lease's FMV; the process for establishing FMV should be modeled after the Federal coal leasing program; bonus payments are needed to stop speculation; and sealed bidding ensures the most competitive bonus bid. The comments also posed arguments for and against using a minimum acceptable bonus bid. In addition, the BLM received comments that bonus bids should be high and suggested that the 1974 bonus bid amounts pertaining to 4 oil shale leases that were offered in Colorado and Utah, with bonus bids that ranged from $74 million to $210 million, were indicative of expected bonus bid amounts.

In response to the ANPR comments and other considerations, the BLM proposes to establish oil shale lease FMV using a process similar to that used in the Federal coal leasing program. This proposed process relies on the appraisal process in an attempt to estimate the market value for those leases. As such, the proposed process relies on many of the procedures used in private sector valuations, and where available, will rely on private sector transactions to establish the market value for Federal oil shale leases. The Federal coal leasing program and this proposed rule, utilize competitive bidding, specifically sealed bidding, for determining who receives the lease.

In the rule, the BLM is proposing to establish a minimum acceptable bonus bid for Federal oil shale leases. The amount is not a reflection of FMV, but is intended to establish a floor value to limit or dissuade nuisance bids. The proposed rule requires a minimum acceptable bonus bid of $1,000 per acre. The assumption is that such an amount will not exceed FMV or be a deterrent to companies interested in bidding for the lease tracts. At the same time, the BLM has requested further comments on the value proposed.

As per comments on specific values, the proposed rule does not attempt to establish actual FMV for future Federal oil shale leases. Values received in the 1970's may not be an accurate indicator for future values.

Subpart 3925—Award of Lease

Section 3925.10 would provide that the lease would ordinarily be awarded to the qualified bidder submitting the highest bid which exceeds the minimum bid amount. It also contains requirements for the submission of the necessary lease bond, the first year's rental, any unpaid cost recovery fees, including costs associated with the NEPA analysis, and the bidder's proportionate share of the cost of publication of the sale notice. The provisions in this section are similar to regulations in the BLM's competitive leasing regulations for coal and non-energy leasable minerals.

Subpart 3926—Conversion of Preference Right for Research, Demonstration, and Development Leases

Section 3926.10 would provide application procedures or requirements to convert R, D and D leases and preference rights acreages to commercial leases. Under this section, a lessee of any of the R, D and D lease would be required to apply for conversion to a commercial lease no later than 90 days after the BLM determines that commencement of production in commercial quantities had occurred. As stated in Section 23 of the R, D and D leases (issued in response to the BLM's call for nominations of parcels for R, D and D leasing (70 FR 33753 and 33754, June 9, 2005) R, D and D lessees can acquire contiguous acreage of the remaining preference right lease area up to a total of 5,120 acres. In order to acquire the contiguous acreage and convert to a commercial lease, the lessee would be required to demonstrate to the BLM that the technology tested in the original lease would have the ability to produce shale oil in commercial quantities. In addition, the lessee, as required in R, D and D leases, would be required to submit to the BLM:

(1) Documentation that there have been commercial quantities of oil shale produced from the lease, including the narrative required by Section 23 of R, D and D leases;

(2) Documentation that the lessee consulted with state and local officials to develop a plan for mitigating the socioeconomic impacts of commercial

development on communities and infrastructure;

(3) A bid payment no less than that specified in section 3923.10 and equal to the FMV of the lease; and

(4) Bonding as required by section 3904.14.

The BLM would approve the conversion application, in whole or in part, if it determined that:

(1) There have been commercial quantities produced from the lease;

(2) The bid payment for the lease met or exceeded FMV;

(3) The lessee consulted with state and local officials to develop a plan for mitigating the socioeconomic impacts of commercial development on communities and infrastructure;

(4) The bond provided is consistent with section 3904.14; and

(5) Commercial scale operations can be conducted, subject to mitigation measures to be specified in stipulations or regulations, without unacceptable environmental consequences.

Subpart 3927—Lease Terms

Sections in this subpart would address lease form, lease size, lease duration, dating of leases, diligent development, and production.

Section 3927.10 would provide that the BLM would issue oil shale leases on a standard form approved by the BLM Director. This section mirrors similar requirements in other BLM mineral leasing regulations.

Section 3927.20 would set the maximum oil shale lease size at 5,760 acres, which is the maximum size authorized under Section 369(j) of the EP Act. Several comments received in response to the BLM's ANPR included lease size recommendations varying from 500 acres to 10 square miles as the appropriate maximum lease size. Of those comments, one commenter supported a maximum lease size of 5,760 acres, which is consistent with the EP Act. One commenter stated that "Leases need to be large enough to encourage development yet not outlandishly large to allow for speculation." The maximum lease size contained in this section is not discretionary since it was established by statute (see Section 369(j) of the EP Act).

Although the EP Act does not establish a minimum lease size, in keeping with the size restrictions of the oil shale R, D and D leases, section 3927.20 would also establish 160 acres as the minimum size of an oil shale lease. The BLM received several comments relating to whether the BLM's commercial oil shale leasing regulations should include provisions for small tract leasing, all of which generally were in favor of making small lease tracts available. One comment suggested that smaller tracts would be particularly appropriate in the early years of the commercial leasing program in light of new technologies, and it recommended a minimum tract size of 1,280 acres. Recommendations relating to a minimum tract size stated in other comments ranged from over 320 acres to one square mile. Two comments suggested that there should be restrictions for small tract leasing. Of those comments, one commenter stated that small tract leasing should not be a mechanism to thwart potential development. Another commenter recommended that small tracts should only be allowed in cases where "the tracts have been orphaned, in between larger leases, basin edge or other fee-owned lands." Although section 3927.20 would not formally establish small tract leasing, the 160-acre minimum lease size set by this section would provide a lessee the opportunity to develop a relatively small-scale leasehold, identical to the lease size authorized under the BLM's oil shale R, D and D program. Thus, rather than the BLM incorporating small tract leasing as a separate component of the commercial oil shale leasing program, establishing a minimum lease size of 160 acres provides an opportunity for a lessee to utilize a preferred technology on a relatively small tract that is consistent with the size of existing R, D and D leases. For this reason, the BLM did not adopt ANPR comments that recommended a larger minimum lease size. With respect to the comment expressing concern that small tract leasing could thwart potential development and the comment recommending that small tract leasing should be allowed only in limited situations as stated above, it is the policy of the BLM, when delineating tracts to be offered through competitive lease sale, to make efforts to ensure that the configuration of any small acreage tracts would likely promote development of oil shale. The BLM believes that configuration of tracts in this manner would not impede development on any existing oil shale leases located in the vicinity of smaller tracts. As is the case in other BLM mineral leasing programs, the tract delineation process for a competitive lease sale includes the gathering of detailed information on tracts and conducting various analyses. Because the steps customarily included in the tract delineation process are designed to promote or encourage development of mineral resources, the BLM maintains that establishing a minimum lease size of 160 acres will not thwart potential development of oil shale resources. Likewise, the competitive leasing process and the required minimum bonus bids would discourage speculation.

One comment endorsing small tract leasing also recommended that a small tract lease should include a preference right for additional adjoining acreage. The BLM is not adopting this recommendation since it maintains that the concept of a preference right for the future leasing of additional acreage—a key component of the R, D and D leasing program—is not a necessary provision in a commercial leasing program in light of lease modification provisions under proposed subpart 3932. In the event that a lessee of a small tract has interest in obtaining additional acreage adjacent to its lease, under the proposed rule the lessee could apply for a lease modification to include Federal lands adjacent to the lease, but not to exceed the maximum lease size (see section 3932.10).

Two comments received in response to the ANPR contained recommendations relating to consolidation of leases into larger development units. One of the comments suggested that oil shale commercial leasing regulations should include a provision to allow for consolidation of multiple contiguous leases for individual leaseholders as long as there remains one operator. The BLM interprets these comments as a recommendation to establish a mechanism similar to a logical mining unit that exists in BLM's coal leasing program. As defined in the coal leasing regulations at 43 CFR 3480(a)(19), "Logical mining unit (LMU) means an area of land in which the recoverable coal reserves can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of recoverable coal reserves and other resources." Due to the fact that the commercial oil shale leasing regulations proposed here today are aimed at establishing a new mineral leasing program; a program that does not have any history of oil shale development in the U.S., does not require any standardized extraction methods, and also adopts different diligence requirements than those of the coal leasing program, it is the BLM's position that establishing a mechanism similar to a LMU is not warranted at this time. After the promulgation of final regulations and after the oil shale industry is more well-established, if the BLM determines that the creation of a mechanism similar to an LMU is

warranted, then the BLM would pursue rulemaking to adopt this recommendation. Please specifically comment on whether or not the final rule should include provisions for the establishment of LMUs for oil shale leases.

Section 3927.30 would provide that an oil shale lease will be for a period of 20 years and so long thereafter as the condition of annual minimum production is met. Section 21 of the MLA (30 U.S.C. 241(a)(3)) authorizes issuance of oil shale leases for "indeterminate periods." The BLM chose a 20-year period for the original lease term for ease of administration because Section 21 of the MLA (30 U.S.C. 241(a)(4)) specifies that leases should be subject to readjustment at the end of each 20-year period. Lease readjustment is common to other BLM mineral leasing programs, including coal and certain non-energy leasable minerals.

Section 3927.40 would identify the effective date of the lease and the process used to determine the effective date of the lease. This section is similar to regulations on the effective dating of leases under the BLM's coal program.

Diligent development is a component of other mineral leasing programs such as coal and oil and gas and is required under Section 369(f) of the EP Act.

Section 3927.50 would require lessees to meet diligent development milestones and annual minimum production requirements. The BLM considers continued minimum annual production a necessary part of diligent development of the lease. This requires that a company continue to produce the minimum annual requirement or make payments in lieu of production in order to hold the lease.

Part 3930—Management of Oil Shale Exploration Licenses and Leases

Sections in this part would address the requirements for exploration and leases, including general performance standards, operations, diligent development milestones, plans of development and exploration plans, lease modifications and readjustments, assignments and subleases, relinquishments, cancellations and terminations, post-mining and development hazards, production and sale records, and inspection and enforcement.

Sections 3930.10 through 3930.13 would explain the performance standards for exploration, development, production, and the preparation and the handling of oil shale under Federal leases and licenses. Additional standards may be required at the time of lease issuance and as operations proceed. The BLM used the coal program as basis of many of the performance standards for these sections because of the similarity of the mining and exploration methods and the possible impacts associated with those methods. The performance standards for in situ operations were derived from aspects of the standards used for exploration and standards applicable to the BLM's oil and gas program.

Section 3930.20 would establish the various standard operating requirements associated with development of an oil shale lease, including requirements concerning the maximum economic recovery (MER) of the resource, how to report new geologic information, and compliance with Federal laws. The section would also address disposal and treatment of solid wastes. This section provides operational requirements that are common to other BLM mineral leasing programs.

The BLM received 6 comments regarding diligent development in response to the ANPR. The comments received primarily expressed the view that diligent development requirements are necessary to prevent speculation, but that they should not be so onerous as to prevent investment in oil shale development. Most of the comments concerning the diligence provisions were related to either plan of development requirements or production requirements and requiring payment of a minimum royalty in lieu of production. The comments received suggested:

(1) Making diligence a requirement of operations;

(2) Not starting the diligence requirement until after the needed infrastructure is in place;

(3) Requiring submittal of a plan of development;

(4) Staging the permitting process to essentially define diligence as accomplishing necessary sequential steps in the development process;

(5) Escalating minimum royalty;

(6) Requiring minimum production levels; and

(7) Requiring production of a percentage of the resource base.

The BLM incorporated the following commenter's suggestions into the proposed rule:

(1) Diligent development and staged development requirements (section 3930.30 (a));

(2) Requirements for a plan of development (section 3930.30(a)(1)); and

(3) Requirements for minimum production (section 3930.30(d)).

The BLM's proposed diligent development requirements are based on fulfilling tasks necessary to reach production, such as applying for permits, submitting plans of development, and installing needed infrastructure within specified timeframes. Comments related to basing diligence on production of a percentage of the reserve base were considered, but rejected based on the difficulty of administering such a scheme with varying technologies, recovery rates, and shale characteristics. The comment regarding infrastructure was incorporated into the proposed rule as a diligence development step towards production.

Section 3930.30 would list the milestones for diligent development of an oil shale lease. The requirement for establishing milestones is in Section 369(f) of the EP Act. The BLM considered many options when determining how to establish milestones that would ensure diligent development of the lease. The BLM considered requiring production based on a percentage of the resource similar to coal and requirements for minimum dollar expenditures per year similar to the BLM's geothermal program. Because the oil shale mining technology that is being tested is new, and there is little experience to rely on, it would be difficult to base milestones on production or monetary expenditures. Ultimately, the BLM determined that the milestones should be the series of steps necessary for the development of the oil shale. Defining milestones this way is logical because the steps are necessary to begin production and the BLM believes the requirement would encourage development. This section would require a lessee to meet the following five diligent development milestones:

(1) Within 2 years of lease issuance, submit to the BLM a proposed plan of development which would meet the requirements of subpart 3931;

(2) Within 3 years of lease issuance, submit a final plan of development;

(3) Within 2 years after the BLM approves the plan of development, apply for all required permits and licenses;

(4) Before the end of the 7th lease year, begin infrastructure installation, as described by the BLM approved plan of development; and

(5) Begin production by the end of the 10th lease year.

Each of the milestones in this section would be an opportunity for the lessee or operator to fulfill the statutory requirements and would provide

evidence of its commitment to diligent development of the resource.

The requirement to maintain production under an approved plan of development is also in this section. Although it is not a milestone, the BLM would require yearly production as part of the diligent development of the lease. This section also would allow payments in lieu of production to meet the requirement of yearly production. Minimum annual production is required starting the 10th year of the lease. Payment in lieu of production in year 10 of the lease satisfies the milestone requiring production by the end of the 10th year of the lease.

Section 3930.40 would identify the penalties for not achieving the required milestones. The BLM views these penalties as incentives for maintaining development of the resource and prevent speculation. Under this proposed rule, the BLM would assess a penalty of $50 per acre for each missed diligence milestone for each year until the operator or lessee complies with the diligence milestone. The BLM believes that this penalty process would provide operators incentive for diligent development of the resource, and also that the dollar amount of the penalties is high enough to be a deterrent to speculation.

Subpart 3931—Plans of Development and Exploration Plans

Sections in this subpart would provide requirements for submission of a plan of development (section 3931.10), required contents of a plan of development (section 3931.11), reclamation of all disturbed areas (section 3931.20), suspending operations and production on a lease (section 3931.30), exploration on a lease prior to plan of development approval (section 3931.40), information to be included in the exploration plan (section 3931.41), modification of exploration or development plans (section 3931.50), maps of underground and surface mining workings and in situ surface operations (3931.60), production reporting (section 3931.70), geologic information (section 3931.80), and boundary pillars (section 3931.100).

Section 3931.10 would require submission of a plan of development that details all aspects of development of the resource and protection of the environment, including reclamation. It would also identify the need for a similar plan for exploration activities. The plan of development is a key document that would detail the specifics of all activities associated with developing or exploring the lease.

Section 3931.11 would list and describe the contents of a plan of development. Some of the contents include a general description of geologic conditions and mineral resources, maps or aerial photography, proposed methods of operation and development, public protection, well completion reports, quantity and quality of the oil shale resources, environmental aspects, reclamation plan, and the method of abandonment of operations. The information in the plan of development is necessary so that the BLM can review the plan and ensure that operations, production, and reclamation will occur consistent with Federal law and regulation and to ensure the protection of the resource and the environment.

Section 3931.20 would describe the requirements for reclamation of all disturbed areas under a lease or exploration license. This section is similar to requirements in other BLM mineral program regulations requiring prompt reclamation of disturbed areas.

Section 3931.30 would detail the requirements for suspending operations and production on a lease. Under this section, if the BLM determined it was in the interest of conservation, it may order or agree to a suspension of operations and production. If the BLM approved the suspension, the lessee or operator would be relieved of the obligation to pay rental, to meet upcoming diligent development milestones, or to meet minimum annual production, including payments in lieu of production. The term of the lease would be extended by the amount of time the lease is suspended. The need to suspend operations is well established and similar provisions are found in other BLM mineral leasing regulations.

Section 3931.40 would provide the requirements necessary for the BLM to authorize exploration on an exploration license or on a lease prior to plan of development approval. Often, exploration is necessary after lease issuance to acquire the geologic information necessary to prepare a plan of development.

Section 3931.41 would list the information required for an exploration plan. The information required is similar to that required in other BLM mineral regulations and is necessary to adequately evaluate the proposed exploration activities and the measures to protect or limit environmental impacts in accordance with applicable laws.

Section 3931.50 would explain how the operator or lessee may apply for a modification of exploration or development plans to address changing conditions and situations that might develop during the course of normal exploration activities or to correct an oversight. This section would also explain that the BLM may, on its own initiative, require modification of a plan. Finally, this section would explain that the BLM may approve a partial exploration plan or plan of development in circumstances where operations are dependent on factors that would not be known until exploration or development progresses. These modification provisions are similar to those in other BLM minerals programs.

Section 3931.60 would contain information relating to the format and certification of required maps of underground and surface mining workings and in situ surface operations. These maps are necessary for the BLM to properly assess the potential impacts associated with exploration and mining.

Section 3931.70 would explain the requirements for production reporting, the associated maps and surveys for mining operations, and maps showing the measurement systems for in situ operations. This section would require accurate maps and production reports and would explain the requirements for production reporting. These are necessary requirements for the Federal government to track lease production accurately.

Section 3931.80 would address requirements for handling geologic information resulting from exploration activities. Additional requirements related to abandonment operations, well conversions, and blow-out prevention equipment would also be addressed in this section. This section contains requirements similar to those in the BLM's oil and gas operations regulations.

Section 3931.100 would detail the standards for boundary pillars and provisions to protect adjacent lands. This section would allow for the recovery of the pillars if the operator provided evidence to the BLM that the recovery activities would not damage the Federal resource or those of the adjacent lands. These provisions are similar to those in the BLM's coal program.

Subpart 3932—Lease Modifications and Readjustments

Sections in this subpart would provide requirements for lease size modification, (section 3932.10), availability of lands for a lease modification (section 3932.20), terms and conditions of a modified lease (section 3932.30), and the readjustment of lease terms (section 3932.40).

Section 3932.10 would provide the requirements for lease size

modifications and is similar to sections in the other BLM mineral program regulations. This section would explain that the lands in the modified lease must not exceed the acreage limitation in section 3927.20. The section also would explain what items are necessary for a complete application, including the filing fee and qualifications statements.

Section 3932.20 would provide the land availability criteria for lease modifications. The language in this section is similar to language used in other BLM mineral program regulations and is necessary to facilitate effective development of the resource. This section would explain the conditions under which the BLM would grant a lease modification, and that the BLM may approve the modification (adding lands to the lease) if there is no competitive interest in the lands. This section would explain that before the BLM will approve a modification application, the applicant must pay the FMV for the interest to be conveyed. This section would also make it clear that the BLM will not approve a lease modification prior to conducting the appropriate NEPA analysis and receipt of the processing costs.

Section 3932.30 would provide that the terms and conditions of any modified lease will be adjusted so that they are consistent with law, regulations, and land use plans applicable at the time the lands are added by the modification. Under this proposed section, the royalty rate of the modified lease would be the same as that in the original lease. Bonding and lessee acceptance requirements would also be addressed in this section. This section is similar to those in other BLM minerals program regulations.

Section 3932.40 would provide that all oil shale leases are subject to readjustment of lease terms, conditions, and stipulations, except royalty rates, at the end of the first 20-year period (the primary term of the lease) and at the end of each 10-year period thereafter. Royalty rates would be subject to readjustment at the end of the primary term and every 20 years thereafter. The procedures for the readjustment of the lease would be detailed in this section. Under this section, the BLM would provide the lessee with written notification of the readjustment. This section would also allow lessees to appeal the readjustment of lease terms.

Subpart 3933—Assignments and Subleases

Sections in this subpart would address various requirements related to assignments or subleases of record title (section 3933.31) and overriding royalty interests (section 3933.32). This subpart would also address requirements for:

(1) Assigning or subleasing leases in whole or part (section 3933.10);

(2) Filing fees (section 3933.20);

(3) Lease account status and assumption of liability (section 3933.40);

(4) Bonding (sections 3933.51);

(5) Continuing responsibility (section 3933.52);

(6) Effective date (section 3933.60); and

(7) Extensions (section 3933.70).

The sections in this subpart would be similar to the regulatory requirements of BLM's other mineral leasing programs.

Section 3933.10 would provide that all leases may be assigned or subleased in whole or in part to any person, association, or corporation as long as the qualification requirements are met. Section 30 of the MLA requires an assignee to obtain BLM approval for an assignment.

Section 3933.20 would require payment of a $60 non-refundable filing fee for processing an assignment, sublease of record title, or overriding royalty. The filing fee would be the same fee required by the coal regulations for filing an assignment. The BLM anticipates that lease assignment, sublease of record title, or overriding royalty activities associated with an oil shale lease would be similar to the same activities in the BLM's coal program, and therefore believes the same filing fee is justified.

Section 3933.31 would require that assignment applications be filed with the BLM within 90 days of the date of final execution of the assignment, and would list what must be included in the assignment application, including the filing fee. This section also explains that the assignment of all interests in a specific portion of a lease would create a separate lease.

Section 3933.32 would explain that overriding royalty interests do not have to be approved by the BLM, but would be required to be filed with the BLM. The filing of overriding royalty interests provides a more complete record of the financial transaction affecting the Federal lease. The BLM has found this information to be useful in other mineral leasing programs, especially in making rent and royalty reduction determinations.

Section 3933.40 would require that the lease account be in good standing before the BLM would process a lease assignment.

Section 3933.51 would require that assignees have sufficient bond coverage before the BLM will approve the assignment. This is a necessary component of the bonding program and is similar to requirements of other BLM solid mineral leasing programs.

Section 3933.52 would address the responsibilities, obligations, and liabilities of the assignor and assignee. In addition to stating expressly that an assignor is responsible after an assignment for accrued obligations, this section addresses joint and several liabilities of the lessee and operating rights owner. After the effective date of the sublease, the sublessor and sublessee are jointly and severally liable for the performance of all lease obligations, notwithstanding any term in the sublease to the contrary.

Section 3933.60 would explain that the effective date of an assignment and sublease would be the first day of the month following the BLM's final approval, or if the assignee requested it in advance, the first day of the month of the approval. This is the customary effective date for an assignment in other BLM leasing programs.

Consistent with other BLM mineral leasing programs, section 3933.70 would provide that the BLM's approval of an assignment or sublease does not extend the readjustment period of the lease.

Subpart 3934—Relinquishments, Cancellations, and Terminations

Sections in this subpart would contain requirements for relinquishments (section 3934.10), termination of leases and cancellation and/or termination of exploration licenses (section 3934.30), written notice of cancellation (section 3934.21), cause and procedures for lease cancellations (section 3934.22), payments due (section 3934.40), and bona fide purchasers (section 3934.50). Sections in this subpart are similar to sections found in regulations for other BLM mineral leasing programs.

Section 3934.10 would provide that the record title holder of a lease may relinquish all or part of the lease if the requirements in this section are met. This section would also contain provisions for the relinquishment of an exploration license. Prior to relinquishment, the licensee must give any other parties participating in the exploration license an opportunity to take over operations under the exploration license.

Section 3934.21 would require the BLM to notify the lessee or licensee in writing of any default, breach, or cause of forfeiture, and the corrective actions that could be taken to avoid defaulting on the lease terms and lease cancellation.

Section 3934.22 would explain the procedure for the BLM to cancel a lease. Section 31 of the MLA requires that lease cancellation take place in the United States District Court for the district in which all or part of the lands covered by the lease are located.

Section 3934.30 would provide the reasons that the BLM may cancel a license, including:

(1) The BLM issued it in violation of law or regulation;

(2) The licensee is in default of the terms and conditions of the license; and

(3) The licensee has not complied with the exploration plan.

Unlike leases, the BLM may cancel an exploration license administratively.

Section 3934.40 would provide that if a lease is canceled or relinquished for any reason, all bonus, rentals, royalties, or minimum royalties paid would be forfeited and any amounts not paid would be immediately payable to the United States.

Section 3934.50 would address the rights of bona fide purchasers and provide that the BLM would not immediately cancel a lease or an interest in a lease if, at the time of purchase, the purchaser could not reasonably have been aware of a violation of the regulations, legislation, or lease terms.

Subpart 3935—Production and Sale Records

Section 3935.10 would address books of account. Operators and lessees must maintain accurate records. This section would explain what records must be maintained, and that the records must be made available to the BLM during normal business hours.

Subpart 3936—Inspection and Enforcement

Like other BLM minerals inspection and enforcement (I and E) programs, the objective of BLM's oil shale I and E program would be to:

(1) Ensure the protection of the resource;

(2) Ensure that Federal oil shale resources are properly developed in a manner that would maximize recovery while minimizing waste; and

(3) Ensure the proper verification of production reported from Federal lands.

The BLM would also be responsible for lease inspections to determine compliance with applicable statutes, regulations, orders, notices to lessees, plans of development, and lease terms and conditions. These terms and conditions would include those related to drilling, production, and other requirements related to lease administration.

This subpart would address inspection of underground and surface operations and facilities (section 3936.10), issuance of notices of noncompliance and orders (section 3936.20), enforcement of notices of noncompliance and orders (section 3936.30), and appeals (section 3936.40).

Section 3936.10 would require operators or lessees to allow the BLM to inspect underground or surface mining and exploration operations at any time both to determine compliance with the plan of development and to verify oil shale production.

Section 3936.20 would advise the operator, licensee, or lessee of the procedures the BLM would follow when issuing orders and notices of noncompliance. The section would also address delivery of notices and verbal orders.

Section 3936.30 would explain the procedures the BLM would follow when enforcing notices of noncompliance. This section explains the action the BLM may take in cases of noncompliance, including orders to cease operations and the initiation of lease or license cancellation or termination procedures. An example of the type of non-compliance that might warrant the BLM issuing a cease operations order would be noncompliance with the BLM approved plan of development and refusal to comply with the notice of noncompliance.

Section 3936.40 would allow a lessee or operator to appeal BLM decisions under 43 CFR part 4. This section would also provide that the BLM decisions and orders remain in full force and effect pending appeal, unless the BLM or the Interior Board of Lands Appeals decides otherwise. Appeals language in this section mirrors regulatory provisions in other BLM minerals programs.

IV. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

This document is a significant rule and the Office of Management and Budget has reviewed this rule under Executive Order 12866. We have made the assessments required by E.O. 12866 and the results are available by writing to the address in the **ADDRESSES** section.

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

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule addresses the issuance and administration of Federal oil shale leases, which by statute is under the jurisdiction of the Department of the Interior. The BLM worked closely with the MMS in drafting the royalty provisions of this rule, but the rule should have no effect on other agencies.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The rule would not impact any of these except that the rule institutes certain fees (discussed earlier in the preamble to this rule and in the economic and threshold analyses for the rule) in a manner that is consistent with BLM and Departmental policy.

(4) This rule does not raise novel legal or policy issues. As stated earlier in this preamble, the legal and policy issues addressed by this rule are already dealt with in a similar manner in other BLM regulations currently in effect, therefore they are not novel.

Executive Order 12866 requires agencies to assess, where practical, the anticipated costs and benefits of proposed regulatory actions to determine if the regulation is significant. As has been noted above, there is no domestic oil shale industry to help substantiate or form the basis for the projections and assumptions concerning what the future might hold for the leasing and development of oil shale resources on Federal lands. In addition, the assumption is that any significant production of shale oil is not likely to occur for a number of years. The potential events described, if they occur at all, may be in the distant future. As such, future costs and benefits must be discounted. The OMB's Circular A–94 states that a real discount rate of 7 percent should be used as a base-case for regulatory analysis. In addition to analyzing the potential future costs and benefits using a 7 percent discount rate, the BLM also used a discount rate of 20 percent to reflect these substantial risks and associated uncertainties in the opportunity costs that would not be reflected in the historic industry average of 7 percent. We also analyzed the future costs and benefits using a 3 percent discount rate.

The proposed regulations have the potential to generate net economic benefits to the Nation by allowing for the development of our vast domestic oil shale resources, though there is substantial uncertainty about the magnitude and timing of these benefits. The most significant direct benefit of this regulatory action is to provide a vehicle for the leasing and development of Federal oil shale resources. Operators

will have the opportunity to obtain leases with the right to develop the oil shale and ultimately produce shale oil in an environmentally sound manner. Companies' willingness to take advantage of the leasing and development opportunities provided by this rule would determine the level of production of shale oil, exploration, development and production costs incurred, and conceivably the profits (or losses) to be enjoyed.

The lack of a domestic oil shale industry makes it speculative to project the demand for oil shale leases, the technical capability to develop the resource, and the economics of producing shale oil. Projections that have been prepared vary significantly in not only the potential volume of shale oil that could be produced, but also the assumptions used to generate those projections. The recent report prepared by the Strategic Unconventional Fuels Task Force (Task Force) provided shale oil production projections under three scenarios. For our simulation-based analysis, we focused on the Task Forces' base case as a plausible scenario. This scenario presents a future without any subsidies in the form of tax credits or cost-sharing. The base case production of 0.5 million barrels per day is approximately 182.50 million barrels per year, all from true in-situ projects. The Task Force's base case scenario assumes production commencing in 2015, with full production reached by 2020. Please comment on the uncertainty surrounding the quantity and quality of recoverable oil shale, specifically as it relates to potential production of shale oil.

The Task Force estimates that resulting production could reduce the cost of oil imports by $0.41 billion per year in 2015 to $4.21 billion per year in 2035. This estimate is based on EIA's 2006 oil price projection. In their report, the Task Force also provides estimates of oil shale development's contribution to Gross Domestic Product (GDP). In the base case, annual direct contributions to GDP for the oil shale industry activity rises from $0.65 billion per year in the early years, to $5.72 billion per year in 2035.

We estimated the revenue, profit, and royalty implication of the Task Force's base case production scenario using three discount rates (7 percent, 3 percent, and 20 percent), three world crude oil price projections (EIA's 2007 reference, high, and low price projections) and 6 different royalty rates (1 percent, 3 percent, 5 percent, 7 percent, 9 percent, and 12.5 percent). The following summarizes the findings based on the 7 percent discount rate and a 5 percent royalty rate. The full range of calculations is presented in the Economic Analysis.

We estimate the value of the forecasted production, using EIA's 2007 reference case assumptions, could be approximately $9.5 billion for 2020, up to $11 billion by 2035. The gross present value, using a 7 percent discount rate, of all shale oil produced for the period of analysis (2007 to 2035) is estimated at about $50 billion. The gross present value of production for the year 2020 is estimated at about $3.9 billion using a 7 percent discount rate. The gross present value of the shale oil produced in 2035 would be approximately $1.7 billion with a 7 percent discount rate.

Oil shale development is characterized by high capital investment and long periods of time between expenditure of capital and the realization of production revenues and return on investment. The Task Force estimated the breakeven price for true in-situ operations at $37.75 per barrel. Using the base case production projection, the cost to produce 182.50 million barrels annually would be almost $6.9 billion. The present value of the production costs for 2020 would be about $2.9 billion using a 7 percent discount rate. For production occurring in 2035, the present value of those production costs would be about $1 billion. For the period of analysis (2007 to 2035), the present value of all production costs is estimated at about $34 billion using a 7 percent discount rate. Please specifically comment on the state of technology necessary to recover or produce oil from shale and the associated production costs.

With the opportunity to lease and ultimately develop Federal oil shale resources, companies would be expected to generate profits from their commercial activities. Using the base case production scenario, cost projection assumptions, and EIA's reference oil price, by the year 2020 lessees/operators could see profits from oil shale development of over $2.6 billion per year, with a net present value of $1 billion with a 7 percent discount rate. For 2035, we estimate the present value of the potential profit could be approximately $670 million using a 7 percent discount rate. The net present value of shale oil produced in the period of analysis (2007 to 2035) is estimated at approximately $16.2 billion.

Using EIA's high crude oil price scenario, calculated profits were substantially high. Total undiscounted profits for the period of analysis were $187 billion, with a present value of $50.6 billion using a 7 percent discount rate. For EIA's low oil price projection all operations are uneconomic regardless of the discount rate and/or royalty rate applied. In addition to these monetary costs and benefits associated with potential oil shale development, there could be significant environmental and socioeconomic costs and benefits. These potential costs and benefits could affect a wide range of resources, including groundwater quality and quantity, air quality, cultural resources, wildlife habitat, competing land uses, and local employment and infrastructure.

Impacts on livestock grazing activities are generally the result of activities that affect forage levels, of the ability to construct range improvements, and of human disturbance or harassment of livestock within grazing allotments. Using the Task Force's base case scenario of three in-situ operations, with total maximum lease acreage of 17,280, and some fairly significant simplifying assumptions, there could be a loss of approximately 5,700 animal unit months (AUMs).

Recreational use of BLM-administered lands within the three-state study area (Colorado, Utah, and Wyoming) is varied and dispersed. Impacts on recreation would be considered significant if potential oil shale development results in long-term elimination or reduction of recreation opportunities, activities, or experience, or they compromise public health and safety. As such, the significant of potential impacts from oil shale development could have on recreational opportunities will depend on the location of potential development.

In addition to oil shale, the study area contains a wide range of energy and mineral resources. Mineral resource development conflicts may occur with oil shale development. The issuance of oil shale exploration licenses and leases does not preclude the BLM from issuing licenses and leases for other minerals. However, the BLM generally attempts to avoid issuing conflicting authorizations on the same lands.

Many multiple use outputs from BLM land are not traded in markets and might not have measurable onsite expenditures associated with them. The absence of market price does not, however, mean an absence of value to society. Please specifically comment on the uses that oil shale production may displace under the base case scenario and the associated value of the displaced uses.

In addition to land use conflicts, water consumption is a major concern in the arid intermountain region. Certain types of oil shale development

are anticipated to consume significant quantities of water. Increasing the demand for water resources in the arid West must be considered a major opportunity cost to society associated with oil shale development and fully analyzed before commercial development is allowed to proceed. Demand for reliable, long-term water supplies to support oil shale development could lead to the conversion of water rights from current uses. While it is not presently known how much surface water will be needed to support future development of an oil shale industry, or the role that groundwater would play in future development, it is likely that additional agricultural water rights could be acquired. Depending on the locations and magnitude of such acquisitions, there could be a noticeable reduction in local agricultural production and use.

Prospective oil shale developers would need to employ appropriate control technologies to reduce potential air emissions which otherwise could result from construction and operation of surface facilities. In addition to the emissions associated with the operations themselves, extraction of oil from shale could consume immense quantities of electricity. This would necessitate the building of new power plants, which could further contribute air emissions. Impacts on air quality would be limited by applicable local, state, Tribal, and Federal regulations, standards, and implementation plans established under the Clean Air Act and administered by the applicable air quality regulatory agency, with EPA oversight.

Using the assumption of 3 in-situ projects, solid waste generated would be the drill cuttings and those would be handled as they are for oil and gas, which is to bury them on-site, in compliance with the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act and the Hazardous Solid Waste Amendments of 1984 (42 U.S.C. 6901 *et seq.*).

Aquatic habitats include perennial and intermittent streams, springs, and flat-water (lakes and reservoirs) that support fish or other aquatic organisms through at least a portion of the year.

The wildlife species that may be associated with any particular project would depend on the specific location of the project and on the plant communities and habitats present at the site.

A total of 210 plant and animal species are either federally (U.S. Fish and Wildlife Service (USFWS) and BLM) or state-listed (Colorado, Utah, and Wyoming) and occurs or could occur in counties within oil shale basins. In the study areas, 32 species are listed or candidates for listing by the USFWS under the Endangered Species Act (ESA); 78 species are listed as sensitive by the BLM; 24 are listed by the State of Colorado; 33 are listed by the State of Utah; and 121 are listed by the State of Wyoming. Species listed by the USFWS under the ESA have the potential to occur in all oil shale basins. The likelihood of occurrence in study areas cannot be fully determined at this time because actual project locations and footprints will not be determined until some later date. A complete evaluation of listed species in the study areas will be made at that time, before project activities begin. Project-specific NEPA assessments, ESA consultations, and coordination with state natural resource agencies will address project specific impacts more thoroughly. These assessments and consultations will result in required actions to avoid or mitigate impacts on protected species.

Oil shale development, initially in the western states of Colorado, Wyoming, and Utah, requires infrastructure to support industry development and operation, including refining capacity, pipelines, and sources of natural gas and electricity.

The socioeconomic environment potentially affected by the development of oil shale resources includes a region of influence in each state (Colorado, Utah, and Wyoming), consisting of the counties and communities most likely impacted by development of oil shale resources. Construction and operation of oil shale facilities could have a major affect on the local communities, impacting the economy and the social and demographic make-up of the affected communities. For example, oil shale industry development could result in the addition of thousands of new, high-value, long-term jobs in the construction, manufacturing, mining, production, and refining sectors of the domestic economy. Construction and operations could result in a direct loss of recreation employment in the recreation sectors and indirect effects such as declining recreation employee wage and salary spending and expenditures by the recreation section on materials equipment and services.

The Task Force provided employment projections for their production scenarios, including their base case. Direct employment could range from 120 to 9,700 personnel in the base case. The total number of petroleum sector jobs (including indirect employment), estimated by the Task Force, ranges from 2,930 employees in 2015 to 20,830 in 2035 for their base case.

A resource commitment is considered irreversible when direct and indirect impacts from its use limit future use options. Irreversible and irretrievable commitments of resources could occur as a result of future commercial oil shale projects that are authorized, constructed, and operated. The nature and magnitude of these commitments would depend on the specific location of the project development as well as its specific design and operational requirements. The construction of future commercial oil shale projects could result in the consumption of sands, gravels, and other geologic resources, as well as fuel, structural steel, and other materials. Water resources could also be consumed during construction, although water use would be temporary and largely limited to on-site concrete mixing and dust abatement activities. In general, the impact on biological resources from future project construction and operation would not constitute an irreversible and irretrievable commitment of resources. During project construction and operation, individual animals would be impacted.

The potential effects of developing the oil shale resources are likely to be quite significant; however, at this point, with the significant unknowns as to what may be developed and how it may be developed, plus where and when development may occur, there is no practical way to quantify the potential environmental and socioeconomic consequences, much less put a monetary value on them.

Before oil shale development could occur, additional project-specific NEPA analyses would be performed at two points in time: (1) Prior to leasing; and (2) Prior to plan of development approval. These analyses would address environmental impacts of oil shale production including impacts to livestock grazing, recreation uses, energy and mineral resources, water use, air, aquatic habitat, and wildlife and would be subject to public and agency review and comment.

The Act requires the Secretary to establish royalties, fees, rentals, bonus, or other payments for oil shale leases that encourage development of the resource, but also ensuring a fair return to the government. As a result of any leasing and development, the Federal and state governments will benefit from the revenue generated through the bonuses, rents, and eventually royalties. These bid, rental, and royalty payments are revenue to the public, but a cost to the lessee/operator of obtaining,

holding, and producing from the Federal leases. Monetary payments, such as rents, royalties, and bonus bids, from the lessee to the government, do not affect total resources available to society and in the context of a benefit-cost analysis are considered transfer payments.

The bonus is the amount paid by the successful high bidder when a parcel is offered for lease. By statute the parcel must be leased for fair market value. At this juncture there is no practical way to generate a meaningful estimate of the potential bonus bids or fair market values for potential lease parcels.

Until the operation starts paying a production royalty, the lessee is required to pay the government a rental. The proposed regulations include a rental rate of $2 per acre. Maximum lease acreage is 5,760 acres for a maximum annual rental payment per lease of $11,520 (constant-dollars) per year until an operation commences shale oil production. Based on the Task Force's base case of three in-situ operations, with total maximum lease acres of 17,280 acres, those three leases could generate a rental income of $34,560 per year.

Producing leases will be required to pay a production royalty. One alternative in the proposed regulations calls for a production royalty of 5 percent on all products of oil shale that are sold from or transported off of the lease. Using the production projections and other assumptions presented in the economic analysis, royalty payments for the period of analysis (2007 to 2035) could be almost $9.1 billion, with a net present value of $2.5 billion (7 percent discount rate). We also analyzed the Federal revenue implications of alternative royalty rates given constant production and production cost assumptions. These alternative royalty revenue calculations are presented in the economic analysis.

Beginning in the 10th lease year, for leases that have not commenced production, the lessee is subject to a payment in lieu of production of no less than $4 per acre. For an operation with 5,760 acres under lease and no production by the end of the eleventh lease year, the payment in lieu of production would be $23,040 (constant-dollars) per year. Based on the Task Force's base case of three in-situ operations, with total maximum lease acres of 17,280 acres, should operations on those three leases not commence production, the payment in lieu of production could generate payments to the Federal Government of $69,120 per year.

The proposed regulations require license and lease bonds for exploration licenses and oil shale leases. These bonds are intended to guarantee payments (rents, royalties, and deferred bonuses) the lessee may owe the government. The bond amount will be determined on a case-by-case basis. The minimum lease bond is proposed at $25,000. The operator is also obligated to provide the BLM with a reclamation bond. The amount of these bonds will be based on the estimated cost for the government to contract with a third party to reclaim the operation should the operator be unable or unwilling to fulfill their reclamation obligations. The amounts of these reclamation bonds are likely to be quite significant; however, at this point there is no practical way to estimate the amount of these reclamation bonds.

There will be increases in BLM administrative costs associated with the issuance of leases and licenses and review and approval of operational plans. Most of these costs are relatively minor and will be subject to cost recovery that will be paid for by the benefiting party. There will be some BLM actions that will not be subject to cost recovery, including increased costs associated with ongoing inspection and enforcement responsibilities.

Above are various costs and benefits associated with the proposed rule. Some effects are directly tied to the provisions found in the proposed regulations, such as royalty rates of 5 or 12.5% percent of the value of the amount or value of production removed or sold from the lease. Other costs and benefits are tied to companies' ability and willingness to take advantage of the opportunities provided by the leasing regulations. The most significant of these costs and benefits include the value of shale oil that may be produced, the cost to produce the shale oil, and the environmental and socioeconomic consequences of resource development. The present values of the quantified monetary effects are expected to be in excess of the $100 million annual threshold.

We estimate the net present value of the potential monetary costs and benefits considered in this analysis to be approximately $13.6 billion using a 7 percent discount rate, $28.5 billion using a 3 percent discount rate, and $1.8 billion using a 20 percent discount rate. This conclusion is based on the calculated present value of the profit from shale oil produced from our analysis period (2007 to 2035) using EIA's reference oil price.

This conclusion includes one significant caveat. The socioeconomic and environmental costs and benefits associated with oil shale development are likely to be quite large. As has been noted above, we have no reasonable way to generate meaningful scenarios to quantify the potential impacts for an industry that does not exist or technologies that have not been deployed. As such, the net present value of the benefits of the proposed rule may be significantly larger or smaller than the estimates presented in this analysis.

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed regulations clearly stated?

(2) Do the proposed regulations contain technical language or jargon that interferes with their clarity?

(3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

(4) Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "§" and a numbered heading, for example (§ 3902.24 Associations, including partnerships.)

(5) Is the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand?

Please send any comments you have on the clarity of the regulations to the address specified in the **ADDRESSES** section.

Small Business Regulatory Enforcement Fairness Act (SBREFA).

This rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(1) Has an annual effect on the economy of $100 million or more. Please see the discussion of Executive Order 12866, above.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. Should production from Federal oil shale resources occur, it is anticipated that if there is any impact to costs or prices as a result of

additional production entering the market, it would be to decrease them.

(3) Does 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. The issuance of Federal oil shale leases and production of oil shale resources from those Federal leases would not lead to adverse effect on any of the above because an increase in products from oil shale would tend to lead to a decrease in prices and potentially lead to increased competition, employment, investment, productivity, and innovation and the ability of U.S.-based enterprises to compete with foreign-based enterprises.

National Environmental Policy Act

The BLM has prepared an environmental assessment (EA) and has found that the proposed rule would not constitute a major Federal action significantly affecting the quality of the human environment under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). A detailed statement under NEPA is not required. The BLM has placed the EA on file in the BLM Administrative Record at the address specified in the **ADDRESSES** section. The BLM invites the public to review these documents and suggests that anyone wishing to submit comments in response to the EA do so in accordance with the Public Comment Procedures section above.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The RFA establishes an analytical process for determining how public policy goals can best be achieved without erecting barriers to competition, stifling innovation, or imposing undue burdens on small entities. Executive Order 13272 reinforces executive intent that agencies give serious attention to impacts on small entities and develop regulatory alternatives to reduce the regulatory burden on small entities. To meet these requirements, the agency must either conduct a regulatory flexibility analysis or certify that the final rule will not have "a significant economic impact on a substantial number of small entities."

Section 369 of the EP Act requires the Department of the Interior to establish regulations for a commercial oil shale leasing program. Although this rule would only affect entities that choose to explore and develop oil shale resources from land administered by the BLM, there is no way to determine which firms would hold exploration licenses or leases or operate on Federal lands in the future. The extent to which the proposed rule would have an actual impact on any firm depends on whether the firm would hold exploration licenses or leases or would operate on Federal lands.

Currently, active oil shale research and development on Federal lands is limited to a few firms. Chevron, EGL Resources, Oil Shale Exploration Company, and Shell Oil Company hold R, D and D leases and are the only companies currently conducting operations on Federal oil shale leases. Of the four companies holding R, D and D leases, two are major oil companies and two are small research and development firms.

With implementation of these regulations, technological advances, and favorable market conditions that would support oil shale development, the BLM anticipates an increase in the number of firms involved in oil shale development. However, the number of firms, large or small, involved in oil shale development on Federal lands would likely remain quite limited. Given the likely size of the industry that may eventually be involved in the leasing and development of Federal oil shale resources, it is reasonable to conclude that this rule would not significantly impact a "substantial number of small entities."

This rule would provide for the leasing and management of oil shale resources on Federal lands. Provisions covered in this proposed rule include exploration license and competitive leasing procedures, requirements and terms, and plan of development and operational requirements.

To explore on Federal lands, the operator would have to have an exploration license or an oil shale lease. The proposed process to obtain an exploration license would be relatively straightforward and would not entail significant fees, e.g., $295 nonrefundable filing fee. As proposed, commercial oil shale leases would primarily rely on a process of leasing parcels nominated by industry. The BLM may also choose to offer certain lands for lease. All leases would be offered competitively. The BLM would not collect an application or nomination fee; however, the successful high bidder would be required to pay certain costs associated with the BLM offering the tract for lease, in addition to the bonus bid. At the time of lease sale, the high bidder would be required to submit a payment of one fifth of the amount of the bonus bid. Leases would also be subject to a $2.00 per acre rental.

The proposed terms and conditions for operating under an exploration license or commercial lease are those needed to protect the environment and resource values of the area and to ensure reclamation of the lands disturbed by the activities. Exploration and development plans must be submitted to the BLM for approval. All operations, whether under an exploration license or a commercial oil shale lease, are required to provide the BLM with a license or lease bond. In addition, operators are required to provide the government with a bond to cover the cost of site reclamation and closure.

Production from commercial oil shale leases will be subject to a Federal royalty. A royalty on the amount or value of production removed or sold from the lease would apply to commercial production from these leases.

The ability to obtain an exploration license and/or to compete for a commercial oil shale lease is not affected by the size of the company. Exploration licenses require a nominal filing fee ($295 per filing) and have no minimum acreage. Leases have minimum tract acreage of 160 acres; lease processing costs are paid by the successful bidder; and bonus bids may be deferred over a 5-year period. These aspects of the proposed licensing and leasing procedures allow small entities to better compete for Federal oil shale licenses and leases with larger, well capitalized companies. As required by the EP Act, all royalties, rentals, bonus bids, and other payments proposed in this rule are to encourage development of the oil shale resources while ensuring a fair return to the government. The proposed regulatory provisions, including filing fees, rentals, and production royalties, will not have a significant economic impact on lessees or operators, regardless of the firm's size.

Therefore, the BLM has determined that under the RFA this proposed rule would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) the proposed rule would not impose an unfunded mandate on state,

local, or tribal governments or the private sector, in the aggregate, of $100 million or more per year; nor would this rule have a significant or unique effect on state, local, or tribal governments. The rule would impose no requirements on any of those entities. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act.

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

The proposed rule is a not a government action capable of interfering with constitutionally protected property rights. A takings implication assessment is not required. The proposed rule does not authorize any specific activities that would result in any effects on private property. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The proposed rule 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 levels of government. It would not apply to states or local governments or state or local governmental entities. The management of Federal oil shale leases is the responsibility of the Secretary of the Interior and the BLM. This rule does not alter any lease management or revenue sharing provisions with the states, nor does it impose any costs on the states. Therefore, in accordance with Executive Order 13132, the BLM has determined that this proposed rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, the BLM determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have found that this rule may include policies that have Tribal implications. The proposed rule would make changes in the Federal oil shale leasing and management program, which does not apply on Indian Tribal lands. At present, there are no oil shale leases or agreements on Tribal or allotted Indian lands. If tribes or allottees should ever enter into any leases or agreements with the approval of the Bureau of Indian Affairs, the BLM would then likely be responsible for the approval of any proposed operations on Indian oil shale leases and agreements. In light of this possibility, and because Tribal interests could be implicated in oil shale leasing on Federal lands, the BLM has begun consultation with potentially affected Tribes on the proposed oil shale regulations, and will continue to consult with Tribes during the comment period on the proposed rule.

Information Quality Act

In developing this proposed rule, we did not conduct or use a study, experiment or survey requiring peer review under the Information Quality Act (Section 515 of Pub. L. 106–554).

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

In accordance with Executive Order 13211, the BLM has determined that the proposed rule is not likely to have a substantial direct effect on the supply, distribution, or use of energy. Executive Order 13211 requires an agency to prepare a Statement of Energy Effects for a proposed rule that is:

A significant regulatory action under Executive Order 12866 or any successor order; and

Likely to have a significant adverse effect on the supply, distribution, or use of energy.

As discussed earlier in this preamble, the BLM believes that the rule will likely increase energy production and would not have an adverse effect on the supply, distribution, or use of energy, and therefore has determined that the preparation of a Statement of Energy Effects is not required.

Executive Order 13352, Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, the BLM has determined that this proposed rule would not impede facilitating cooperative conservation; would take appropriate account of and consider the interests of persons with ownership or other legally recognized interest in the land or other natural resources; properly accommodates local participation in the Federal decision-making process; and provide that the programs, projects, and activities are consistent with protecting public health and safety. State and local governments were cooperating agencies in the preparation of the PEIS. The BLM, in coordination with the MMS, held three "listening sessions" with representatives of the governors of the states of Colorado, Utah, and Wyoming. The purpose of the "listening sessions" was to provide the governor's representatives the opportunity to share their ideas, issues, and concerns relating to the proposed commercial oil shale leasing regulations. Section 369(e) of the EP Act requires that not later than 180 days after the publication of the final regulations, the Secretary (as delegated to the BLM), is to consult with the governors of the states with significant oil shale and tar sands resources on public lands, representatives of local governments in such states, interested Indian tribes, and other interested persons to determine the level of support and interest in the states in the development of oil shale resources. In addition, the proposed regulations contain a section providing for comments from state governors, local governments, and interested Indian tribes prior to offering lands for lease for oil shale. The comment period would occur prior to the BLM's publication of a call for nominations.

Paperwork Reduction Act of 1995 (PRA)

This proposed rule would contain new information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the BLM has submitted a copy of the proposed regulations to the OMB for review. The BLM will not require collection of this information until OMB has given its approval.

As part of our continuing effort to reduce paperwork and respondent burden, we invite the public and other Federal agencies to comment on any aspect of the reporting burden through the information collection process. Submit written comments by either fax (202) 395–6566 or e-mail (*OIRA_Docket@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior [OMB Control Number ICR 1004–New, as it relates to the proposed Oil Shale Management rule].

The title of the new information collection request (ICR) is "Parts 3900–3930—Oil Shale Management—General." The intent of this proposed rulemaking is to establish regulations for a commercial leasing program. The BLM will collect information from

individuals, corporations, and associations in order to:

(1) Learn the extent and qualities of the public oil shale resource;

(2) Evaluate the environmental impacts of oil shale leasing and development;

(3) Determine the qualifications of prospective lessees to acquire and hold Federal oil shale leases;

(4) Administer statutes applicable to oil shale mining, production, resource recovery and protection, operations under oil shale leases, and exploration under leases and licenses;

(5) Ensure lessee compliance with applicable statutes, regulations, and lease terms and conditions; and

(6) Ensure that accurate records are kept of all Federal oil shale produced.

Prospectively estimating the annual burden hours for the commercial oil shale program is difficult because the oil shale industry is at the research and development stage where there is a lack of available information and the future technology to be used is uncertain. The burden hour estimates in the following charts were derived from a previous ICR completed for the Federal coal program, as the information collection associated with that program is somewhat similar to the proposed oil shale leasing program. The coal burden hour estimates were adjusted to reflect differences in the two processes. It is also difficult to make a prospective estimate of the number of annual responses; therefore, the BLM has used one response for each activity as a starting point, except for the number of applications received. We anticipate that we could receive several applications after these regulations are promulgated. The BLM estimates that this ICR for the oil shale management program will result in 22 responses totaling 1,784 burden hours at a total annual burden cost of $86,492 (Table 1). This estimate is based on the number of actions multiplied by the estimated burden hours per action multiplied by a $48.48 wage per hour (Table 2). Additionally, the BLM estimates that there will be processing/cost recovery fees in the amount of $526,592 (Table 3). See the following tables for burden hours and processing/cost recovery fees by CFR citation:

TABLE 1.—BURDEN BREAKDOWN

Parts 3900–3930 burden activity	Information collected	Hour burden	Average number of annual responses	Average annual burden hours	Total annual burden cost
Subpart 3904—Bonds and Trust Funds					
A lessee or licensee must furnish a bond before a lease or exploration license may be issued or transferred or a plan of development approved. The BLM will review the bond and, if adequate as to amount and execution, will accept it in order to indemnify the United States against default on payments due or other performance obligations. The BLM may also adjust the bond amount to reflect changed conditions. The BLM will cancel the bond when all requirements are satisfied	*Section 3904.12.*—File one copy of the bond form with original signatures in the proper BLM state office. Bonds must be filed on an approved BLM form. The obligor of a personal bond must sign the form. Surety bonds must have the lessee's end the acceptable surety's signature.	1	1	1	$48
	Section 3904.14(c)(1).—Prior to the approvel of a plan of development, in those instances where a state bond will be used to cover all of the BLM's reclamation requirements, evidence verifying that the existing state bond will satisfy all the BLM reclamation bonding requirements must be filed in the proper BLM office. The BLM will use no specific form to collect this information.	1	1	1	48
Part 3910—Oil Shale Exploration Licenses					
For those lands where no exploration data is available, the lease applicant may apply for an exploration license to conduct exploration on unleased public lands to determine the extent and specific characteristics of the Federal oil shale resource. The BLM will use the information in the application to: (1) Locate the proposed exploration site; (2) Determine if the lands are subject to entry for exploration; (3) Prepare a notice of invitation to other parties to participate in the exploration; and (4) Ensure the exploration plan is adequate to safeguard resource values, and public and worker heelth and safety	*Section 3910.31.*—The BLM will use no specific form to collect the information. The applicant will be required to submit the following information: (1) Name and address of applicant(s); (2) A nonrefundable filing fee of $295; (3) A general description of the area to be drilled described by legal land description; and (4) 3 copies of an exploration plan that includes the exact location of the affected lands, the name, address, and telephone number of the party conducting the exploration activities, a description of the proposed methods and extent of exploration, and reclamation.	24	1	24	1,164
The BLM will use this information from a licensee to determine if it will offer the land area for lease	*Section 3910.44.*—Upon the BLM's request, the licensee must provide copies of all data obtained under the exploration license in the format requested by the BLM. The BLM will consider the data confidential and proprietary until the BLM determines that public access to the data will not damage the competitive position of the licensee or the lands involved have been leased, whichever comes first. Submit all data obtained under the exploration license to the proper BLM office.	8	1	8	388
Subpart 3921—Pre-Sale Activities					
Corporations, associations, and individuals may submit expressions of leasing interest for specific areas to assist the applicable BLM State Director in determining whether or not to lease oil shale. The information provided will be used in the consultation with the governor of the affected state and in setting a geographic area for which a call for applications will be requested	*Section 3921.30.*—The BLM will request this information through the publication of a notice in the FEDERAL REGISTER and will use no specific form to collect the information. The expression of leasing interest will contain specific information consisting of name and address and area of interest described by legal land description.	4	1	4	194

TABLE 1.—BURDEN BREAKDOWN—Continued

Parts 3900–3930 burden activity	Information collected	Hour burden	Average number of annual responses	Average annual burden hours	Total annual burden cost
	Subpart 3922—Application Processing				
Entities interested in leasing the Federal oil shale resource must file an application in a geographic area for which the BLM has issued a "Call for Applications." The information provided by the applicant will be used to evaluate the impacts of issuing a proposed lease on the human environment. Failure to provide the requested additional information may result in suspension or termination of processing of the application or in a decision to deny the application	*Section 3922.20 and 3922.30.*—Lease applications must be filed in the proper BLM state office. No specific form of application is required, but the application must include information necessary to evaluate the impacts of issuing the proposed lease on the human environment, including, but not limited to, the following: (1) Name, address, telephone number of applicant, and a qualification statement, as required by subpart 3902; (2) A delineation of the proposed lease area or areas, the surface ownership (if other than the United States) of those areas, a description of the quality, thickness, and depth of the oil shale and of any other resources the applicant proposes to extract, and environmental data necessary to assess impacts from the proposed development; (3) A description of the proposed extraction method, including personnel requirements, production levels, and transportation methods including: (a) A description of the mining, retorting, or in situ mining or processing technology that the operator would use and whether the proposed development technology is substantially identical to a technology or method currently in use to produce marketable commodities from oil shale deposits; (b) An estimate of the maximum surface area of the lease area that will be disturbed or undergoing reclamation at any one time; (c) A description of the source and quantities of water to be used and of the water treatment and disposal methods necessary to meet applicable water quality standards; (d) A description of the air quality emissions; (e) A description of the anticipated noise levels from the proposed development; (f) A description of how the proposed lease development would comply with all applicable statutes and regulations governing management of chemicals and disposal of solid waste. If the proposed lease development would include disposal of wastes on the lease site, include a description of measures to be used to prevent the contamination of soil and of surface and ground water; (g) A description of how the proposed lease development would avoid, or, to the extent practicable, mitigate impacts to species or habitats protected by applicable state or Federal law or regulations, and impacts to wildlife habitat management; (h) A description of reasonably foreseeable social, economic, and infrastructure impacts to the surrounding communities, and to state and local governments from the proposed development; (i) A description of the known historical, cultural, or archeological resources within the lease area; (j) A description of infrastructure that would likely be required for the proposed development and alternative locations of those facilities, if applicable; (k) A discussion of proposed measures to mitigate any adverse impacts to the environment and to nearby communities; (l) A brief description of the reclamation methods that will be used; (m) Any other information that shows that the application meets the requirements of this subpart or that the applicant believes would assist the BLM in analyzing the impacts of the proposed development; and (n) A map, or maps, showing: (i) The topography, physical features, and natural drainage patterns; (ii) Existing roads, vehicular trails, and utility systems; (iii) The location of any proposed exploration operations, including seismic lines and drill holes; (iv) To the extent known, the location of any proposed mining operations and facilities, trenches, access roads, or trails, and supporting facilities including the approximate location and extent of the areas to be used for pits, overburden, and tailings; and (v) The location of water sources or other resources that may be used in the proposed operations and facilities. At any time during processing of the application, or the environmental or similar assessments of the application, the BLM may request additional information from the applicant.	308	3	924	44,796
	Subpart 3924—Lease Sale Procedures				
Prospective lessees will be required to submit a bid at a competitive sale in order to be issued a lease	*Section 3924.10.*—The BLM will request the following bid information via the notice of oil shale lease sale: (1) A certified check, cashier's check, bank draft, money order, personal check, or cash for one-fifth of the amount of the bonus; and (2) A qualifications statement signed by the bidder as described in subpart 3902.	8	1	8	388

TABLE 1.—BURDEN BREAKDOWN—Continued

Parts 3900–3930 burden activity	Information collected	Hour burden	Average number of annual responses	Average annual burden hours	Total annual burden cost
Subpart 3926—Conversion of Preference Right for Research, Demonstration, and Development (R, D and D) Leases					
The lessee of an R, D and D lease may apply for conversion of the R, D and D lease to a commercial lease	*Section 3926.10(c).*—A lessee of an R, D and D lease identified in subpart 3926 must apply for the conversion of the R, D and D lease to a commercial lease no later than 90 days after the commencement of production in commercial quantities. No specific form of application is required. The application for conversion must be filed in the BLM state office that issued the R, D and D lease. The conversion application must include: (1) Documentation that there has been commercial quantities of oil shale produced from the lease, including the narrative required by section 23 of R, D and D leases; and (2) Documentation that the lessee consulted with state and local officials to develop a plan for mitigating the socioeconomic impacts of commercial development on communities and infrastructure. (3) A bonus payment equal to the FMV of the lease; and (4) Bonding to cover all costs associated with reclamation.	308	1	308	14,932
Subpart 3930—Management of Oil Shale Exploration and Leases					
The records, logs, and samples provide information necessary to determine the nature and extent of oil shale resources on Federal lands and to monitor and adjust the extent of the oil shale reserve.	*Section 3930.11(b).*—The operator/lessee must retain for one year all drill and geophysical logs. The operator must also make such logs available for inspection or analysis by the BLM. The BLM may require the operator/lessee to retain representative samples of drill cores for 1 year. The BLM uses no specific form to collect the information.	19	1	19	921
	Section 3930.20(b).—The operator must record any new geologic information obtained during mining or in situ development operations regarding any mineral deposits on the lease. The operator must report this new information in a BLM-approved format to the proper BLM office within 90 days of obtaining the information.	19	1	19	921
Subpart 3931—Plans of Development and Exploration Plans					
The plan of development must provide for reasonable protection and reclamation of the environment and the protection and diligent development of the oil shale resources in the lease.	*Section 3931.11.*—The plan of development must contain, at a minimum, the following: (a) Names, addresses, and telephone numbers of those responsible for operations to be conducted under the approved plan and to whom notices and orders are to be delivered, names and addresses of Federal oil shale lessees and corresponding Federal lease serial numbers, and names and addresses of surface and mineral owners of record, if other than the United States; (b) A general description of geologic conditions and mineral resources within the area where mining is to be conducted, including appropriate maps; (c) A copy of a suitable map or aerial photograph showing the topography, the area covered by each lease, the name and location of major topographic and cultural features; (d) A statement of proposed methods of operation and development, including the following items as appropriate: (1) A description detailing the extraction technology to be used; (2) The equipment to be used in development and extraction; (3) The proposed access roads; (4) The size, location, and schematics of all structures, facilities, and lined or unlined pits to be built; (5) The stripping ratios, development sequence, and schedule; (6) The number of acres in the Federal lease(s) or license(s) to be affected; (7) Comprehensive well design and procedure for drilling, casing, cementing, testing, stimulation, clean-up, completion, and production, for all drilled well types, including those used for heating, freezing, and disposal; (8) A description of the methods and means of protecting and monitoring all aquifers; (9) Surveyed well location plats or project-wide well location plats; (10) A description of the measurement and handling of produced fluids, including the anticipated production rates and estimated recovery factors; and (11) A description/discussion of the controls that the operator will use to protect the public, including identification of: (i) Essential operations, personnel, and health and safety precautions; (ii) Programs and plans for noxious gas control (hydrogen sulfide, ammonia, etc.); (iii) Well control procedures; (iv) Temporary abandonment procedures; and (v) Plans to address spills, leaks, venting, and flaring; (e) An estimate of the quantity and quality of the oil shale resources; (f) An explanation of how MER of the resource will be achieved for each Federal lease; and (g) Appropriate maps and cross sections showing: (1) Federal lease boundaries and serial numbers; (2) Surface ownership and boundaries; (3) Locations of any existing and abandoned mines and existing oil and gas well (including well bore trajectories) and water well locations, including well bore trajectories; (4)				

TABLE 1.—BURDEN BREAKDOWN—Continued

Parts 3900–3930 burden activity	Information collected	Hour burden	Average number of annual responses	Average annual burden hours	Total annual burden cost
	Typical geological structure cross sections; (5) Location of shafts or mining entnes, strip pits, waste dumps, retort facilities, and surface facilites; (6) Typical mining or in situ development sequence, with appropriate time-frames; (h) A narrative addressing the environmental aspects of the proposed mine or in situ operation, including at a minimum, the following: (1) An estimate of the quantity of water to be used and pollutants that may enter any receiving waters; (2) A design for the necessary impoundment, treatment, control, or injection of all produced water, runoff water, and drainage from workings; and (3) A description of measures to be taken to prevent or control fire, soil erosion, subsidence, pollution of surface and ground water, pollution of air, damage to fish or wildlife or other natural resources, and hazards to public health and safety; (i) A reclamation plan and schedule for all Federal lease(s) or exploration license(s) that details all reclamation activities necessary to fulfill the requirements of § 3931.20; (j) The method of abandonment of operations on Federal lease(s) and exploration license(s) proposed to protect the unmined recoverable reserves and other resources, including: (1) The method proposed to fill in, fence, or close all surface openings that are hazardous to people or animals; and (2) For in situ operations, a description of the method and materials to be used to plug all abandoned development or production wells; and (k) Any additional information that the BLM determines is necessary for analysis or approval of the plan of development.	308	1	308	14,932
The BLM may, in the interest of conservation, order or agree to a suspension of operations and production.	*Section 3931.30.*—An application by a lessee for suspension of operations and production must be filed in duplicate in the proper BLM office and must set forth why it is in the interest of conservation to suspend operations and production. The BLM will use no specific form to collect this information.	24	1	24	1,164
Except for casual use, before conducting any exploration operations on federally-leased or federally-licensed lands, the lessee must submit an exploration plan to the BLM for approval.	*Section 3931.41.*—The BLM will use no specific form to collect this information. Exploration plans must contain the following information: (1) The name, address, and telephone number of the applicant, and, if applicable, that of the operator or lessee of record: (2) The name, address, and telephone number of the representative of the applicant who will be present during, and responsible for, conducting exploration; (3) A description of the proposed exploration area, cross-referenced to the map required under section 3931.41, including: (a) Applicable Federal lease and exploration license serial numbers; (b) Surface topography; (c) Geologic, surface water, and other physical features; (d) Vegetative cover; (e) Endangered or threatened species listed under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) that may be affected by exploration operations; (f) Districts, sites, buildings, structures, or objects listed on, or eligible for listing on, the National Register of Historic Places that may be present in the lease area; and (g) Known cultural or archaeological resources located within the proposed exploration area; (4) A description of the methods to be used to conduct oil shale exploration, reclamation, and abandonment of operations, including, but not limited to: (a) The types, sizes, numbers, capacity, and uses of equipment for drilling and blasting and road or other access route construction; (b) Excavated earth-disposal or debris-disposal activities; (c) The proposed method for plugging drill holes; and (d) The estimated size and depth of drill holes, trenches, and test pits; (5) An estimated timetable for conducting and completing each phase of the exploration, drilling, and reclamation; (6) The estimated amounts of oil shale or oil shale products to be removed during exploration, a description of the method to be used to determine those amounts, and the proposed use of the oil shale removed; (7) A description of the measures to be used during exploration for Federal oil shale to comply with the performance standards for exploration (43 CFR 3930.10) and applicable requirements of an approved state program; (8) A map at a scale of 1:24,000 or larger showing the areas of land to be affected by the proposed exploration and reclamation. The map must show: (a) Existing roads, occupied dwellings, and pipelines; (b) The proposed location of trenches, roads, and other access routes and structures to be constructed; (c) Applicable Federal lease and exploration license boundaries; (d) The location of land excavations to be conducted; (e) Oil shale exploratory holes to be drilled or altered; (f) Earth-disposal or debris-disposal areas; (g) Existing bodies of surface water; and (h) Topographic and drainage features; and (9) The name and address of the owner of record of the surface land, if other than the United States. If the surface is owned by a person other than the applicant or if the Federal oil shale is leased to a person other than the applicant, a description of the basis upon which the applicant claims the right to enter that land for the purpose of conducting exploration and reclamation.	24	1	24	1,164

TABLE 1.—BURDEN BREAKDOWN—Continued

Parts 3900–3930 burden activity	Information collected	Hour burden	Average number of annual responses	Average annual burden hours	Total annual burden cost
Approved exploration, mining and in situ development plans may be modified by the operator or lessee to adjust to changed conditions or to correct an oversight.	*Section 3931.50.*—The BLM will use no specific form to collect this information. The operator or lessee may apply in writing to the BLM for modification of the approved exploration plan or plan of development to adjust to changed conditions or to correct an oversight. To obtain approval of an exploration plan or plan of development modification, the operator or lessee must submit tc the proper BLM office a written statement of the proposed modification and the justification for such modification.	24	1	24	1,164
Production of all oil shale products or byproducts must be reported to the BLM on a monthly basis.	*Section 3931.70.*—(1) Report production of all oil shale products or by-products to the BLM on a monthly basis. (2) Report all production and royalty information to the MMS under 30 CFR parts 210 and 216. (3) Submit production maps to the proper BLM office at the end of each royalty reporting period or on a schedule determined by the BLM. Show all excavations in each separate bed or deposit on the maps so that the production of minerals for any period can be accurately ascertained. Production maps must also show surface boundaries, lease boundaries, topography, and subsidence resulting from mining activities. (4) For in situ development operations, the lessee or operator must submit a map showing all surface installations including pipelines, meter locations, or other points of measurement necessary for production verification as part of the plan of development. All maps must be modified as necessary to adequately represent existing operations. (5) Within 30 days after well completion, the lessee or operator must submit to the proper BLM office 2 copies of a completed Form 3160-4, Well Completion or Recompletion Report and Log, limited to information that is applicable to oil shale operations. Well logs may be submitted electronically using a BLM approved electronic format. Describe surface and bottom-hole locations in latitude and longitude.	16	1	16	776
Within 30 days after drilling completion the operator or lessee must submit to the BLM a signed copy of records of all core or test holes made on the lands covered by the lease or exploration license.	*Section 3931.80.*—Within 30 days after drilling completion, the operator or lessee must submit to the proper BLM office a signed copy of records of all core or test holes made on the lands covered by the lease or exploration license. The records must show the position and direction of the holes on a map. The records must include a log of all strata penetrated and conditions encountered, such as water, gas, or unusual conditions, and copies of analysis of all samples. Provide this information to the proper BLM office in either paper copy or in a BLM-approved electronic format. Within 30 days after creation, the operator or lessee must also submit to the proper BLM office a detailed lithologic log of each test hole and all other in-hole surveys or other logs produced. Upon the BLM's request, the operator or lessee must provide to the BLM splits of core samples and drill cuttings.	16	1	16	776
Subpart 3932—Lease Modifications and Readjustments					
A lessee may apply for a modification of a lease to include additional Federal lands adjoining those in the lease.	*Section 3932.10(b) and Section 3932.30(c).*—The BLM will use no specific form to collect this information. An application for modification of the lease size must: (1) Be filed with the proper BLM office; (2) Contain a legal description of the additional lands involved; (3) Contain a justification for the modification; (4) Explain why the modification would be in the best interest of the United States; (5) Include a nonrefundable processing fee that the BLM will determine under 43 CFR 3000.11; and (6) Include a signed qualifications statement consistent with subpart 3902. Before the BLM will aporove a lease modification, the lessee must file a written acceptance of the conditions in the modified lease and a written consent of the surety under the bond covering the original lease as modified. The lessee must also submit evidence that the bond has been amended to cover the modified lease.	12	1	12	582
Subpart 3933—Assignments and Subleases					
Any lease may be assigned or subleased in whole or in part to any person, association, or corporation that meets the qualification requirements at subpart 3902.	*Section 3933.31.*—(1) The BLM will use no specific form to collect this information. File in triplicate at the proper BLM office a separate instrument of assignment for each lease assignment. File the assignment application within 90 days of the date of final execution of the assignment instrument and with it include: (a) Name and current address of assignee; (b) Interest held by assignor and interest to be assigned; (c) The serial number of the affected lease and a description of the lands to be assigned as described in the lease; (d) Percentage of overriding royalties retained; and (e) Date and signature of assignor. (2) The assignee must provide a single copy of the request for approval of assignment which must contain a: (a) Statement of qualifications and holdings as required by subpart 3902; (b) Date and signature of assignee; and (c) Nonrefundable filing fee of $60.	10	1	10	485

TABLE 1.—BURDEN BREAKDOWN—Continued

Parts 3900–3930 burden activity	Information collected	Hour burden	Average number of annual responses	Average annual burden hours	Total annual burden cost
Subpart 3934—Relinquishments, Cancellations, and Terminations					
A lease or exploration license may be surrendered in whole or in part.	*Section 3934.10.*—The BLM will use no specific form to collect this information. The record title holder must file a written relinquishment, in triplicate, in the BLM state office having jurisdiction over the lands covered by the relinquishment.	18	1	18	873
Subpart 3935—Production and Sale Records					
Operators or lessees must maintain production and sale records which must be available for the BLM's examination during regular business hours.	*Section 3935.10.*—Operators or lessees must maintain accurate records: (1) Oil shale mined; (2) Oil shale put through the processing plant and retort; (3) Mineral products produced and sold; (4) Shale oil products, shale gas, and shale oil by-products sold; (5) Relevant quality analyses of oil shale mined or processed and of synthetic petroleum, shale oil or shale oil by-products sold; and (6) Shale oil products and by-products that are consumed on lease for the beneficial use of the lease.	16	1	16	776
Totals			22	1,784	86,492

TABLE 2

Job category	BLS occupational code	Mean hourly wage*	40% for benefits	Hourly rate	Weight (%)	Weighted value per hour
Attorney	23–1011	$56.29	$22.52	$78.81	10	$7.88
Managerial	11–0000	45.53	18.21	63.74	20	12.75
Technical/Professional	17–2151	38.44	15.38	53.82	40	21.53
Clerical	43–0000	15.04	6.02	21.06	30	6.32
Total Weighted Value per Hour					100	48.48

*Derived from Bureau of Labor Statistics: May 2006 National Occupational Employment and Wage Estimates, (*http://stats.bls.gov/oes/current/oes_nat.htm#b00-0000*); and revised to reflect a 3.0 percent increase from the 2nd quarter of 2006 to the 2nd quarter of 2007 as reported in the Bureau of Labor Statistics Civilian Employer Costs for Employee Compensation (*http://data.bls.gov/cgi-bin/surveymost?cm*).

Based on an average number of actions, we estimate the processing and cost recovery fees as follows:

TABLE 3

Estimated collections from processing and cost recovery case-by-case fees	Estimated number of actions	Processing fee per action	Estimated case-by-case cost recovery fee per action	Total estimated annual collection
Part 3910—Oil Shale Exploration Licenses	1	$295	(1)	$295
Subpart 3922—Application Processing	3	(1)	$172,323	516,969
The case-by-case processing fee does not include any required studies or analyses that are completed by third party contractors and funded by the applicant. The regulations at 43 CFR 3000.11 provide the regulatory framework for determining the cost recovery value.				
Subpart 3925—Award of Lease	1	60	(1)	60
The successful bidder must submit the necessary lease bond (see subpart 3904), the first year's rental, and the bidder's proportionate share of the cost of publication of the sale notice.				
Subpart 3932—Lease Size Modification	1	(1)	9,208	9,208
Subpart 3933—Assignments and Subleases	1	60	(1)	60
Totals	7			526,592

[1] Not applicable.

The BLM will consider comments by the public on this proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, usefulness, and clarity of the information to be collected; and

(4) Minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

The OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to BLM on the proposed regulations.

Authors

The principal authors of this proposed rule are Charlie Beecham, II, and Mary Linda Ponticelli, Division of Solid Minerals (Washington Office); assisted by Mavis Love, BLM Wyoming State Office; James Kohler, Sr., BLM Utah State Office; Hank Szymanski, BLM Colorado State Office; Paul McNutt, Division of Solid Minerals (Washington Office); Kelly Odom, Division of Regulatory Affairs (Washington Office); and Richard McNeer, Department of the Interior, Office of the Solicitor.

List of Subjects

43 CFR Part 3900

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Mineral royalties, Oil shale reserves, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds.

43 CFR Part 3910

Environmental protection, Exploration licenses, Intergovernmental relations, Oil shale reserves, Public lands-mineral resources, Reporting and recordkeeping requirements.

43 CFR Part 3920

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Oil shale reserves, public lands-mineral resources, Reporting and recordkeeping requirements.

43 CFR Part 3930

Administrative practice and procedure, Environmental protection, Mineral royalties, Oil shale reserves, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, for the reasons stated in the preamble and under the authorities stated below, the BLM proposes to amend 43 CFR subtitle B Chapter II as follows:

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

1. Add part 3900 to subchapter C to read as follows:

PART 3900—OIL SHALE MANAGEMENT—GENERAL

Subpart 3900—Oil Shale Management—Introduction

Subpart 3901—Land Descriptions and Acreage

Subpart 3902—Qualification Requirements

Subpart 3903—Fees, Rentals, and Royalties

Subpart 3904—Bonds and Trust Funds

Subpart 3905—Lease Exchanges

Authority: 30 U.S.C. 189, 359, and 241(a), 42 U.S.C. 15927, 43 U.S.C. 1732(b) and 1740.

Subpart 3900—Oil Shale Management—Introduction

§ 3900.2 Definitions.

As used in this part and parts 3910 through 3930 of this chapter, the term:

Acquired lands means lands which the United States obtained through purchase, gift, or condemnation, and mineral estates that are not public domain lands, including mineral estates associated with lands previously disposed of under the public land laws, including the mining laws.

Act means the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 *et seq.*).

BLM means the Bureau of Land Management and includes the individual employed by the Bureau of Land Management authorized to perform the duties set forth in this part and parts 3910 through 3930.

Commercial quantities means production of shale oil quantities in accordance with the approved Plan of Development for the proposed project through the research, development, and demonstration activities conducted on the lease, based on, and at the conclusion of which, there is a reasonable expectation that the expanded operation would provide a positive return after all costs of production have been met, including the amortized costs of the capital investment.

Department means the Department of the Interior.

Diligent development means achieving or completing the prescribed milestones listed in § 3930.30 of this chapter.

Director means the Director, Bureau of Land Management.

Entity means a person, association, or corporation, or any subsidiary, affiliate, corporation, or association controlled by or under common control with such person, association, or corporation.

Exploration means drilling, excavating, and geological, geophysical or geochemical surveying operations designed to obtain detailed data on the physical and chemical characteristics of Federal oil shale and its environment including:

(1) The strata below the Federal oil shale;
(2) The overburden;
(3) The strata immediately above the Federal oil shale; and
(4) The hydrologic conditions associated with the Federal oil shale.

Exploration license means a license issued by the BLM that allows the licensee to explore unleased oil shale deposits to obtain geologic, environmental, and other pertinent data concerning the deposits.

Exploration plan means a plan prepared in sufficient detail to show the:
(1) Location and type of exploration to be conducted;
(2) Environmental protection procedures to be taken;
(3) Present and proposed roads, if any; and
(4) Reclamation and abandonment procedures to be followed upon completion of operations.

Fair market value (FMV) means the monetary amount for which the oil shale deposit would be leased by a knowledgeable owner willing, but not obligated, to lease to a knowledgeable purchaser who desires, but is not obligated, to lease the oil shale deposit.

Federal lands means any lands or interests in lands, including oil shale interests underlying non-Federal surface, owned by the United States, without reference to how the lands were acquired or what Federal agency administers the lands.

Infrastructure means all support structures necessary for the production or development of shale oil, including, but not limited to:
(1) Offices;
(2) Shops;
(3) Maintenance facilities;
(4) Pipelines;
(5) Roads;
(6) Electrical transmission lines;
(7) Well bores;
(8) Storage tanks;
(9) Ponds;
(10) Monitoring stations;
(11) Processing facilities—retorts; and
(12) Production facilities.

In situ operation means the processing of oil shale in place.

Interest in a lease, application, or bid means any:
(1) Record title interest;
(2) Overriding royalty interest;
(3) Working interest;
(4) Operating rights or option or any agreement covering such an interest; or
(5) Participation or any defined or undefined share in any increments, issues, or profits that may be derived from or that may accrue in any manner from a lease based on or under any agreement or understanding existing when an application was filed or entered into while the lease application or bid is pending.

Kerogen means the solid, organic substance in sedimentary rock that yields oil when it undergoes destructive distillation.

Lease means a Federal lease issued under the mineral leasing laws, which grants the exclusive right to explore for and extract a designated mineral.

Lease bond means the bond or equivalent security given to the Department to assure performance of all obligations associated with all lease terms and conditions.

Maximum economic recovery means that, based on standard industry operating practices, all profitable portions of a leased Federal oil shale deposit must be mined. This requirement does not restrict the authority of the BLM to ensure the conservation of the oil shale reserves and other resources and to prevent the wasting of oil shale.

MMS means the Minerals Management Service.

Oil shale means a fine-grained sedimentary rock containing:
(1) Organic matter which was derived chiefly from aquatic organisms or waxy spores or pollen grains, which is only slightly soluble in ordinary petroleum solvents, and of which a large proportion is distillable into synthetic petroleum; and
(2) Inorganic matter, which may contain other minerals. This term is applicable to any argillaceous, carbonate, or siliceous sedimentary rock which, through destructive distillation, will yield synthetic petroleum.

Permit means any of the required approvals that are issued by Federal, state, or local agencies.

Plan of development means the plan created for oil shale operations that complies with the requirements of the Act and that details the plans, equipment, methods, and schedules to be used in oil shale development.

Production means:
(1) The extraction of shale oil, shale gas, or shale oil by-products through surface retorting or in situ recovery methods; or
(2) The severing of oil shale rock through surface or underground mining methods.

Proper BLM office means the Bureau of Land Management office having jurisdiction over the lands under application or covered by a lease or exploration license and subject to the regulations in this part and in parts 3910 through 3930 of this chapter (see subpart 1821 of part 1820 of this chapter for a list of BLM state offices).

Public domain lands means lands, including mineral estates, which:
(1) Never left the ownership of the United States;
(2) Were obtained by the United States in exchange for public domain lands;
(3) Have reverted to the ownership of the United States; or
(4) Were specifically identified by Congress as part of the public domain.

Reclamation means the measures undertaken to bring about the necessary reconditioning or restoration of lands or waters affected by exploration, mining, in situ operations, onsite processing operations or waste disposal in a manner which will meet the requirements imposed by the BLM under applicable law.

Reclamation bond means the bond or equivalent security given to the BLM to assure performance of all obligations relating to reclamation of disturbed areas under an exploration license or lease.

Secretary means the Secretary of the Interior.

Shale gas means the gaseous hydrocarbon-bearing products of surface retorting of oil shale or of in situ extraction that is not liquefied into shale oil. In addition to hydrocarbons, shale gas might include other gases such as carbon dioxide, nitrogen, helium, sulfur, other residual or specialty gases, and entrained hydrocarbon liquids.

Shale oil means synthetic petroleum derived from the destructive distillation of oil shale.

Sole party in interest means a party who alone is or will be vested with all legal and equitable rights and responsibilities under a lease, bid, or application for a lease.

Surface management agency means the Federal agency with jurisdiction over the surface of federally-owned lands containing oil shale deposits.

State Director means an employee of the Bureau of Land Management designated as the chief administrative officer of one of the BLM's 12 administrative areas designated as states.

Surface retort means the above-ground facility used for the extraction of kerogen by heating mined shale.

Surface retort operation means the extraction of kerogen by heating mined shale in an above-ground facility.

Synthetic petroleum means synthetic crude oil manufactured from shale oil and suitable for use as a refinery feedstock and for petrochemical production.

§ 3900.5 Information collection.

(a) OMB has approved the information collection requirements in parts 3900 through 3930 of this chapter under 44 U.S.C. 3501 *et seq.* The table in paragraph (d) of this section lists the subpart in the rule requiring the information and its title, provides the OMB control number, and summarizes the reasons for collecting the information and how the BLM uses the information.

(b) Respondents are oil shale lessees and operators. The requirement to respond to the information collections in these parts are mandated under the EP Act, (42 U.S.C. 15927), the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351–359), and the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1701 *et seq.*, including 43 U.S.C. 1732).

(c) The Paperwork Reduction Act of 1995 requires us to inform the public that an agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

(d) The BLM is collecting this information for the reasons given in the following table:

43 CFR parts 3900–3930, general (1004–XXXX)	Reasons for collecting information and how used
Sections 3904.12, 3904.14(c)(1)	A lessee or licensee must furnish a bond before a lease or exploration license may be issued or transferred or a plan of development approved. The BLM will review the bond and, if adequate as to amount and execution, will accept it in order to indemnify the United States against default on payments due or other performance obligations. The BLM may also adjust the bond amount to reflect changed conditions. The BLM will cancel the bond when all requirements are satisfied.
Sections 3910.31, 3910.44	For those lands where no exploration data is available, the lease applicant may apply for an exploration license to conduct exploration on unleased public lands to determine the extent and specific characteristics of the Federal oil shale resource. The BLM will use the information in the application to: (1) Locate the proposed exploration site; (2) Determine if the lands are subject to entry for exploration; (3) Prepare a notice of invitation to other parties to participate in the exploration; and (4) Ensure the exploration plan is adequate to safeguard resource values, and public and worker health and safety. The BLM will use this information from a licensee to determine if it will offer the land area for lease.
Section 3921.30	Corporations, associations, and individuals may submit expressions of leasing interest for specific areas to assist the applicable BLM State Director in determining whether or not to lease oil shale. The information provided will be used in the consultation with the governor of the affected state and in setting a geographic area for which a call for applications will be requested.
Sections 3922.20 and 3922.30	Entities interested in leasing the Federal oil shale resource must file an application in a geographic area for which the BLM has issued a "Call for Applications." The information provided by the applicant will be used to evaluate the impacts of issuing a proposed lease on the human environment. Failure to provide the requested additional information may result in suspension or termination of processing of the application or in a decision to deny the application.
Section 3924.10	Prospective lessees will be required to submit a bid at a competitive sale in order to be issued a lease.
Section 3926.10(c)	The lessee of an R, D and D lease may apply for conversion of the R, D and D lease to a commercial lease.
Section 3930.11(b), 3930.20(b)	The records, logs, and samples provide information necessary to determine the nature and extent of oil shale resources on Federal lands and to monitor and adjust the extent of the oil shale reserve.
Section 3931.11	The plan of development must provide for reasonable protection and reclamation of the environment and the protection and diligent development of the oil shale resources in the lease.
Section 3931.30	The BLM may, in the interest of conservation, order or agree to a suspension of operations and production.
Section 3931.41	Except for casual use, before conducting any exploration operations on federally-leased or federally-licensed lands, the lessee must submit an exploration plan to the BLM for approval.
Section 3931.50	Approved exploration, mining and in situ development plans may be modified by the operator or lessee to adjust to changed conditions or to correct an oversight.
Section 3931.70	Production of all oil shale products or byproducts must be reported to the BLM on a monthly basis.
Section 3931.80	Within 30 days after drilling completion the operator or lessee must submit to the BLM a signed copy of records of all core or test holes made on the lands covered by the lease or exploration license.
Sections 3932.10(b) and 3932.30(c)	A lessee may apply for a modification of a lease to include additional Federal lands adjoining those in the lease.
Section 3933.31	Any lease may be assigned or subleased in whole or in part to any person, association, or corporation that meets the qualification requirements at subpart 3902.
Section 3934.10	A lease or exploration license may be surrendered in whole or in part.
Section 3935.10	Operators or lessees must maintain production and sale records which must be available for the BLM's examination during regular business hours.

§ 3900.10 Lands subject to leasing.

The BLM may issue oil shale leases under this part on all Federal lands except:

(a) Those lands specifically excluded from leasing by the Act; and

(b) Any other lands withdrawn from leasing.

§ 3900.20 Appealing the BLM's decision.

Any party adversely affected by a BLM decision made under this part or parts 3910 through 3930 of this chapter may appeal the decision under part 4 of this title. All decisions and orders by the BLM under these parts remain effective pending appeal unless the BLM decides otherwise. A petition for the stay of a decision may be filed with the Interior Board of Land Appeals.

§ 3900.30 Filing documents.

(a) All necessary documents must be filed in the proper BLM office. A document is considered filed when the proper BLM office receives it with any required fee.

(b) All information submitted to the BLM under the regulations in this part or parts 3910 through 3930 will be available to the public unless exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552), under part 2 of this title, or unless otherwise provided for by law.

§ 3900.40 Multiple use development of leased or licensed lands.

(a) The granting of an exploration license or lease for the exploration, development, or production of deposits of oil shale does not preclude the BLM from issuing other exploration licenses or leases for the same lands for deposits of other minerals. Each exploration license or lease reserves the right to allow any other uses or to allow disposal of the leased lands if it does not unreasonably interfere with the exploration and mining operations of the lessee. The lessee or the licensee must make all reasonable efforts to avoid interference with other such authorized uses.

(b) Subsequent lessee or licensee will be required to conduct operations in a manner that will not interfere with the established rights of existing lessees or licensees.

(c) When the BLM issues an oil shale lease, it will cancel all oil shale exploration licenses for the leased lands.

§ 3900.50 Land use plans and environmental considerations.

(a) Any lease or exploration license issued under this part or parts 3910 through 3930 of this chapter will be issued in conformance with the decisions, terms, and conditions of a comprehensive land use plan developed under part 1600 of this chapter.

(b) Before a lease or exploration license is issued, the BLM, or the appropriate surface management agency, must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA).

(c) Before the BLM approves a plan of development, the BLM must comply with NEPA, in cooperation with the surface management agency when possible, if the surface is managed by another Federal agency.

§ 3900.61 Federal minerals where the surface is owned or administered by other Federal agencies, by state agencies or charitable organizations, or by private entities.

(a) *Public domain lands.* Unless consent is required by law, the BLM will issue a lease or exploration license only after the BLM has consulted with the surface management agency on public domain lands where the surface is administered by an agency outside of the Department. The BLM will not issue a lease or an exploration license on lands to which the surface managing agency withholds consent required by statute.

(b) *Acquired lands.* The BLM will issue a lease on acquired lands only after receiving written consent from an appropriate official of the surface management agency.

(c) *Lands covered by lease or license.* If a Federal surface management agency outside of the Department has required special stipulations in the lease or license or has refused consent to issue the lease or license, an applicant may pursue the administrative remedies to challenge that decision offered by that particular surface management agency, if any. If the applicant notifies the BLM within 30 calendar days after receiving the BLM's decision that the applicant has requested the surface management agency to review or reconsider its decision, the time for filing an appeal to the Interior Board of Land Appeals under part 4 of this title is suspended until a decision is reached by such agency.

(d) The BLM will not issue a lease or exploration license on National Forest System Lands without the consent of the Forest Service.

(e) State's, charitable organization's, or private entity's ownership of surface overlying Federal Minerals. Where the United States has conveyed title to, or otherwise transferred the control of the surface of lands to any state or political subdivision, agency, or instrumentality thereof, other than another Federal agency, but including a college or any other educational corporation or association, to a charitable or religious corporation or association, or to a private entity, the BLM will send such parties written notification by certified mail of the application for exploration license or lease. In the written notification, the BLM will give the parties a reasonable time, not to exceed 90 calendar days, within which to suggest any lease stipulations necessary for the protection of existing surface improvements or uses and to set forth the facts supporting the necessity of the stipulations or file any objections it may have to the issuance of the lease or license. The BLM makes the final decision as to whether to issue the lease or license and on what terms based on a determination as to whether the interests of the United States would best be served by issuing the lease or license with the particular stipulations. This is true even in cases where the party controlling the surface opposes the issuance of a lease or license or wishes to place restrictive stipulations on the lease.

§ 3900.62 Special requirements to protect the lands and resources.

The BLM will specify stipulations in a lease or exploration license to protect the lands and their resources. This may include stipulations required by the surface management agency or recommended by the surface management agency or non-Federal surface owner and accepted by the BLM.

Subpart 3901—Land Descriptions and Acreage

§ 3901.10 Land descriptions.

(a) All lands in an oil shale lease must be described by the legal subdivisions of the public land survey system or if the lands are unsurveyed, the legal description by metes and bounds.

(b) Unsurveyed lands will be surveyed, at the cost of the lease applicant, by a surveyor approved or employed by the BLM.

§ 3901.20 Acreage limitations.

No entity may hold more than 50,000 acres of Federal oil shale leases in any one state. Oil shale lease acreage does not count toward acreage limitations associated with leases for other minerals.

§ 3901.30 Computing acreage holdings.

The maximum acreage in any one state refers to the acres an entity may hold under a Federal lease on either public domain lands or acquired lands. Acquired lands and public domain lands are counted separately, so an entity may hold up to the maximum acreage of each at the same time.

Subpart 3902—Qualification Requirements

§ 3902.10 Who may hold leases.

(a) The following entities may hold leases or interests therein:

(1) Citizens of the United States;

(2) Associations (including partnerships and trusts) of such citizens; and

(3) Corporations organized under the laws of the United States or of any state or territory thereof.

(b) Citizens of a foreign country may only hold interest in leases through stock ownership, stock holding, or stock control in such domestic corporations. Foreign citizens may hold stock in United States corporations that hold leases if the Secretary has not determined that laws, customs, or regulations of their country deny similar privileges to citizens or corporations of the United States.

(c) A minor may not hold a lease. A legal guardian or trustee of a minor may hold a lease.

(d) An entity must be in compliance with Section 2(a)(2)(A) of the Act in order to hold a lease. If the BLM erroneously issues a lease to an entity that is in violation of Section 2(a)(2)(A) of the Act, the BLM will void the lease.

§ 3902.21 Filing of qualification evidence.

Applicants must file with the BLM a statement and evidence that the qualification requirements in this subpart are met. These may be filed separately from the lease application, but must be filed in the same office as the application. After the BLM accepts the applicant's qualifications, any additional information may be provided to the same BLM office by referring to the serial number of the record in which the evidence is filed. All changes to the qualifications statement must be in writing. The evidence provided must be current, accurate, and complete.

§ 3902.22 Where to file.

The lease application and qualification evidence must be filed in the proper BLM office (see subpart 1821 of part 1820 of this chapter).

§ 3902.23 Individuals.

Individuals who are applicants must provide to the BLM a signed statement showing:

(a) U.S. citizenship; and

(b) That acreage holdings do not exceed the limits in § 3901.20 of this chapter. This includes holdings through a corporation, association, or partnership in which the individual is the beneficial owner of more than 10 percent of the stock or other instruments of control.

§ 3902.24 Associations, including partnerships.

Associations that are applicants must provide to the BLM:

(a) A signed statement that:

(1) Lists the names, addresses, and citizenship of all members of the association who own or control 10 percent or more of the association or partnership, and certifies that the statement is true;

(2) Lists the names of the members authorized to act on behalf of the association; and

(3) Certifies that the association or partnership's acreage holdings and those of any member under paragraph (a)(1) of this section do not exceed the acreage limits in § 3901.20 of this chapter; and

(b) A copy of the articles of association or the partnership agreement.

§ 3902.25 Corporations.

Corporate officers or authorized attorneys-in-fact who represent applicants must provide to the BLM a signed statement that:

(a) Names the state or territory of incorporation;

(b) Lists the name and citizenship of, and percentage of stock owned, held, or controlled by, any stockholder owning, holding, or controlling more than 10 percent of the stock of the corporation, and certifies that the statement is true;

(c) Lists the names of the officers authorized to act on behalf of the corporation; and

(d) Certifies that the corporation's acreage holdings, and those of any stockholder identified under paragraph (b) of this section, do not exceed the acreage limits in § 3901.20 of this chapter.

§ 3902.26 Guardians or trustees.

Guardians or trustees for a trust, holding on behalf of a beneficiary, who are applicants must provide to the BLM:

(a) A signed statement that:

(1) Provides the beneficiary's citizenship;

(2) Provides the guardian's or trustee's citizenship;

(3) Provides the grantor's citizenship, if the trust is revocable; and

(4) Certifies the acreage holdings of the beneficiary, the guardian, trustee, or grantor, if the trust is revocable, do not exceed the aggregate acreage limitations in § 3901.20 of this chapter; and

(b) A copy of the court order or other document authorizing or creating the trust or guardianship.

§ 3902.27 Heirs and devisees.

If an applicant or successful bidder for a lease dies before the lease is issued:

(a) The BLM will issue the lease to the heirs or devisees, or their guardian, if probate of the estate has been completed or is not required. Before the BLM will recognize the heirs or devisees or their guardian as the record title holders of the lease, they must provide to the proper BLM office:

(1) A certified copy of the will or decree of distribution, or if no will or decree exists, a statement signed by the heirs that they are the only heirs and citing the provisions of the law of the deceased's last domicile showing that no probate is required; and

(2) A statement signed by each of the heirs or devisees with reference to citizenship and holdings as required by § 3902.23 of this chapter. If the heir or devisee is a minor, the guardian or trustee must sign the statement; and

(b) The BLM will issue the lease to the executor or administrator of the estate, if probate is required, but is not completed. In this case, the BLM considers the executor or administrator to be the record title holder of the lease. Before the BLM will issue the lease to the executor or administrator, the executor or administrator must provide to the proper BLM office:

(1) Evidence that the person who, as executor or administrator, submits lease and bond forms has authority to act in that capacity and to sign those forms;

(2) A certified list of the heirs or devisees of the deceased; and

(3) A statement signed by each heir or devisee concerning citizenship and holdings, as required by § 3902.23 of this chapter.

§ 3902.28 Attorneys-in-fact.

Attorneys-in-fact must provide to the proper BLM office evidence of the authority to act on behalf of the applicant and a statement of the applicant's qualifications and acreage holdings if it is also empowered to make this statement. Otherwise, the applicant must provide the BLM this information separately.

§ 3902.29 Other parties in interest.

If there is more than one party in interest in an application for a lease, include with the application the names of all other parties who hold or will hold any interest in the application or in the lease. All interested parties who wish to hold an interest in a lease must provide to the BLM the information required by this subpart to qualify to hold a lease interest.

Subpart 3903—Fees, Rentals, and Royalties

§ 3903.20 Forms of payment.

All payments must be by U.S. postal money order or negotiable instrument payable in U.S. currency. In the case of payments made to the MMS, such payments may also be made by electronic funds transfer (see 30 CFR part 218 for the MMS's payment procedures).

§ 3903.30 Where to submit payments.

(a) All filing and processing fees, all first-year rentals, and all bonuses for leases issued under this part or parts 3910 through 3930 of this chapter must be paid to the BLM state office that manages the lands covered by the application, lease, or exploration license, unless the BLM designates a different state office. The first one-fifth bonus installment is paid to the appropriate BLM state office. All remaining bonus installment payments are paid to the MMS.

(b) All second-year and subsequent rentals and all other payments for leases are paid to the MMS.

(c) All royalties on producing leases and all payments under leases in their minimum production period are paid to the MMS.

§ 3903.40 Rentals.

(a) The rental rate for oil shale leases is $2.00 per acre, or fraction thereof, payable in advance of the lease year. Rentals paid for any 1 year are credited against any production royalties accruing for that year.

(b) The BLM will send a notice demanding payment of late rentals within 30 calendar days after receipt of the notification. Failure to provide payment within 30 calendar days after notification will result in the BLM taking action to cancel the lease (see § 3934.30 of this chapter).

§ 3903.51 Minimum production and payments in lieu of production.

(a) Each lease must have a minimum annual production amount of shale oil or make a payment in lieu of production for any particular lease year, beginning with the 10th lease year.

(b) The payment in lieu of annual production is established in the lease and will not be less than $4 per acre or fraction thereof per year, payable in advance. Production royalty payments will be credited to payments in lieu of annual production for that year only.

Option 1

§ 3903.52 Production royalties.

(a) The lessee must pay royalties on all products of oil shale that are sold from or transported off of the lease.

(b) The royalty rate for the products of oil shale is 5 percent of the amount or value of production.

Option 2

§ 3903.52 Production royalties.

(a) The lessee must pay royalties on the amount or value of all products of oil shale that are sold from or transported off of the lease.

(b) The standard royalty rate for the products of oil shale is 12.5 percent of the amount or value of production.

(c) For any lease that begins production of oil shale within 12 years of issuance of the first commercial oil shale lease issued under subpart 3925 or subpart 3926, the royalty rate is 5 percent of the amount or value of production on the first 30 million barrels of oil equivalent produced from that oil shale lease.

§ 3903.53 Overriding royalties.

The lessee must file documentation of all overriding royalties associated with the lease in the proper BLM office within 90 calendar days after execution of the assignment of the overriding royalties.

§ 3903.54 Waiver, suspension, or reduction of rental or payments in lieu of production, or reduction of royalty, or waiver of royalty in the first 5 years of the lease.

(a) In order to encourage the maximum economic recovery (MER) of the leased mineral(s), and in the interest of conservation, whenever the BLM determines it is necessary to promote development or finds that leases cannot be successfully operated under the lease terms, the BLM may waive, suspend, or reduce the rental or payment in lieu of production, reduce the rate of royalty, or in the first 5 years of the lease, waive the royalty.

(b) Applications for waivers, suspension or reduction of rentals or payment in lieu of production, reduction in royalty, or waiver of royalty for the first 5 years of the lease must contain the serial number of the lease, the name of the record title holder, the operator or sub-lessee, a description of the lands by legal subdivision, and the following information:

(1) The location of each oil shale mine or operation, and include:

(i) A map showing the extent of the mining or development operations;

(ii) A tabulated statement of the minerals mined and subject to royalty for each month covering a period of not less than 12 months immediately preceding the date of filing of the application; and

(iii) The average production per day mined for each month, and complete information as to why the minimum production was not attained;

(2) Each application must contain:

(i) A detailed statement of expenses and costs of operating the entire lease;

(ii) The income from the sale of any leased products;

(iii) All facts showing whether the mines can be successfully operated under the royalty or rental fixed in the lease; and

(iv) Where the application is for a reduction in royalty, information as to whether royalties or payments out of production are paid to anyone other than the United States, the amounts so paid, and efforts made to reduce those payments;

(3) Any overriding royalties cannot be greater in aggregate than one-half the royalties paid to the United States.

(c) Contact the proper BLM office for detailed information on submitting copies of these applications electronically.

§ 3903.60 Late payment or underpayment charges.

Late payment or underpayment charges will be assessed under MMS regulations at 30 CFR 218.202.

Subpart 3904—Bonds and Trust Funds

§ 3904.10 Bonding requirements.

(a) Prior to issuing a lease or exploration license, the BLM requires exploration license or lease bonds for each lease or exploration license that covers all liabilities, other than reclamation, that may arise under the lease or license. The bond must cover all record title owners, operating rights owners, operators, and any person who conducts operations or is responsible for payments under a lease or license.

(b) Before the BLM will approve a plan of development, the lessee must provide to the proper BLM office a reclamation bond to cover all costs the BLM estimates will be necessary to cover reclamation.

§ 3904.11 When to file bonds.

File the lease bond prior to lease issuance, file the reclamation bond prior to the plan of development approval, and file the exploration bond prior to exploration license issuance.

§ 3904.12 Where to file bonds.

File one copy of the bond form with original signatures in the proper BLM state office. Bonds must be filed on an approved BLM form. The obligor of a personal bond must sign the form. Surety bonds must have the lessee's and the acceptable surety's signature.

§ 3904.13 Acceptable forms of bonds.

(a) The BLM will accept either a personal bond or a surety bond. Personal bonds are pledges of any of the following:

(1) Cash;

(2) Cashier's check;

(3) Certified check; or

(4) Negotiable U.S. Treasury bonds equal in value to the bond amount. Treasury bonds must give the Secretary authority to sell the securities in the case of failure to comply with the conditions and obligations of the exploration license or lease.

(b) Surety bonds must be issued by qualified surety companies approved by the Department of the Treasury. A list of qualified sureties is available at any BLM state office.

§ 3904.14 Individual lease, exploration license, and reclamation bonds.

(a) The BLM will determine individual lease bond amounts on a case-by-case basis. The minimum lease bond amount is $25,000.

(b) The BLM will determine reclamation bond and exploration license bond amounts on a case-by-case basis when it approves a plan of development or exploration plan. The reclamation or exploration license bond must be sufficient to cover the estimated cost of site reclamation.

(c) The BLM may enter into agreements with states to accept a state reclamation bond to cover the BLM's reclamation bonding requirements. The BLM may request additional information from the lessee or operator to determine whether the state bond will cover all of the BLM's reclamation requirements.

(1) If a state bond is to be used to satisfy the BLM bonding requirements, evidence verifying that the existing state bond will satisfy all the BLM reclamation bonding requirements must be filed in the proper BLM office.

(2) The BLM will require an additional bond if the BLM determines that the state bond does not cover all of the BLM bonding requirements.

§ 3904.15 Amount of bond.

(a) The BLM may increase or decrease the required bond amount if it determines that a change in amount is appropriate to cover the costs and obligations of complying with the requirements of the lease or license and these regulations. The BLM will not decrease the bond amount below the minimum (see § 3904.14(a) of this chapter).

(b) The lessee or operator must submit to the BLM every three years after reclamation bond approval a revised cost estimate of the reclamation costs. If the current bond does not cover the revised estimate of reclamation costs, the lessee or operator must increase the reclamation bond amount to meet or exceed the revised cost estimate.

§ 3904.20 Default.

(a) The BLM will demand payment from the lease bond to cover nonpayment of any rental or royalty owed or the reclamation or exploration license bond for any reclamation obligations that are not met. The BLM will reduce the bond amount by the amount of the payment made to cover the default.

(b) After any default, the BLM will provide notification of the amount required to restore the bond to the required level. A new bond or an increase in the existing bond to its pre-default level must be provided to the proper BLM office within 6 months of the BLM's written notification that the bond is below its required level. The BLM may accept separate or substitute bonds for each exploration license or lease. The BLM may take action to cancel the lease or exploration license covered by the bond if a replacement bond is not provided within the time period stated in the notification.

§ 3904.21 Termination of the period of liability.

(a) The BLM will not consent to termination of the period of liability under a bond unless an acceptable replacement bond has been filed or until all of the terms and conditions of the license or lease have been fulfilled.

(b) Terminating the period of liability of a bond ends the period during which obligations continue to accrue, but does not relieve the surety of the responsibility for obligations that accrued during the period of liability.

§ 3904.40 Long-term water treatment trust funds.

(a) The BLM may require the operator or lessee to establish a trust fund or other funding mechanism to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term, post-mining maintenance requirements. The funding must be adequate to provide for the construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. The BLM may identify the need for a trust fund or other funding mechanism during plan review or later.

(b) In determining whether a trust fund will be required, the BLM will consider the following factors:

(1) The anticipated post-mining obligations (PMO) that are identified in the environmental document or approved plan of development;

(2) Whether there is a reasonable degree of certainty that the treatment will be required based on accepted scientific evidence or models;

(3) The determination that the financial responsibility for those obligations rests with the operator; and

(4) Whether it is feasible, practical, or desirable to require separate or expanded reclamation bonds for those anticipated long-term PMOs.

Subpart 3905—Lease Exchanges

§ 3905.10 Oil shale lease exchanges.

To facilitate the recovery of oil shale, the BLM may consider land exchanges where appropriate and feasible to consolidate land ownership and mineral interest into manageable areas. Exchanges are covered under part 2200 of this chapter.

2. Add part 3910 to subchapter C to read as follows:

PART 3910—OIL SHALE EXPLORATION LICENSES

Subpart 3910—Exploration Licenses

Sec.

Authority: 25 U.S.C. 396(d) and 2107, 30 U.S.C. 241(a), 42 U.S.C. 15927, 43 U.S.C. 1732(b) and 1740.

Subpart 3910—Exploration Licenses

§ 3910.21 Lands subject to exploration.

The BLM may issue oil shale exploration licenses for all Federal lands subject to leasing under § 3900.10 of this chapter, except lands that are in an existing oil shale lease or in preference right leasing areas under the research, development, and demonstration (R, D and D) program. The BLM may issue exploration licenses for lands in preference right lease areas only to the R, D and D lessee.

§ 3910.22 Lands managed by agencies other than the BLM.

(a) The consent and consultation procedures required by § 3900.61 of this chapter also apply to exploration license applications.

(b) If exploration activities could affect the adjacent lands under the surface management of a Federal agency other than the BLM, the BLM will consult with that agency before issuing an exploration license.

§ 3910.23 Requirements for conducting exploration activities.

Exploration activities on Federal lands must be conducted under an exploration license or oil shale lease and an approved exploration plan under § 3904.41 of this chapter. The licensee may not remove any oil shale for sale, but may remove a reasonable amount of oil shale for analysis and study.

§ 3910.31 Filing of an application for an exploration license.

(a) Applications for exploration licenses must be submitted to the proper BLM office.

(b) No specific form is required. Applications must include:

(1) The name and address of the applicant(s);

(2) A nonrefundable filing fee of $295;

(3) A description of the lands covered by the application according to section, township and range in accordance with the public lands survey system or, if the lands are unsurveyed lands, the legal description by metes and bounds; and

(4) An acceptable electronic format or 3 paper copies of an exploration plan that complies with the requirements of § 3931.41 of this chapter. Contact the proper BLM office for detailed information on submitting copies electronically.

(c) An exploration license application may cover no more than 25,000 acres in a reasonably compact area and entirely within one state. An application for an exploration license covering more than 25,000 acres must include justification for an exception to the normal acreage limitation.

(d) Applicants for exploration licenses are required to invite other parties to participate in exploration under the license on a pro rata cost share basis.

(e) Using information supplied by the applicant, the BLM will prepare a notice of invitation and post the notice in the proper BLM office for 30 calendar days. The applicant will publish the BLM-approved notice once a week for 2 consecutive weeks in at least 1 newspaper of general circulation in the area where the lands covered by the exploration license application are situated. The notification must invite the public to participate in the exploration under the license and contain the name and location of the BLM office in which the application is available for inspection.

(f) If any person wants to participate in the exploration program, the applicant and the BLM must receive written notice from that person within 30 calendar days after the end of the 30-day posting period. A person who wants to participate in the exploration program must:

(1) State in their notification that they are willing to share in the cost of the exploration on a pro-rata share basis; and

(2) Describe any modifications to the exploration program that the BLM should consider.

(g) To avoid duplication of exploration activities in an area, the BLM may:

(1) Require modification of the original exploration plan to accommodate the exploration needs of those seeking to participate; or

(2) Notify those seeking to participate that they should file a separate application for an exploration license.

§ 3910.32 Environmental analysis.

(a) Before the BLM will issue an exploration license, the BLM, in consultation with any affected surface management agency, will perform the appropriate NEPA analysis of the application.

(b) For each exploration license, the BLM will include terms and conditions needed to protect the environment and resource values of the area and to ensure reclamation of the lands disturbed by the exploration activities.

§ 3910.40 Exploration license requirements.

The licensee must comply with all applicable Federal, state, and local laws and regulations, the terms and conditions of the license, and the approved exploration plan.

§ 3910.41 Issuance, modification, relinquishment, and cancellation.

(a) The BLM may:

(1) Issue an exploration license, or

(2) Reject an application for an exploration license based on, but not limited to:

(i) The need for resource information;

(ii) The environmental analysis;

(iii) The completeness of the application; or

(iv) Any combination of these factors.

(b) An exploration license is effective on the date the BLM specifies, which is also the date when exploration activities may begin. An exploration license is valid for a period of up to 2 years as specified in the lease after the effective date of the license.

(c) The BLM-approved exploration plan will be attached and made a part of each exploration license (see subpart 3931 of part 3930 of this chapter).

(d) After consultation with the surface management agency, the BLM may approve modification of the exploration license proposed by the licensee in writing if geologic or other conditions warrant. The BLM will not add lands to the license once it has been issued.

(e) Subject to the continued obligation of the licensee and the surety to comply with the terms and conditions of the exploration license, the exploration plan, and these regulations, a licensee may relinquish an exploration license for any or all of the lands covered by it. A relinquishment must be filed in the BLM state office in which the original application was filed.

(f) The BLM may cancel an exploration license for noncompliance with its terms and conditions and parts 3900 through 3930 of this chapter after the BLM provides the licensee with reasonable notice and an opportunity to correct the noncompliance.

§ 3910.42 Limitations on exploration licenses.

(a) The issuance of an exploration license for an area will not preclude the BLM's approval of an exploration license or issuance of a Federal oil shale lease for the same lands.

(b) If an oil shale lease is issued for an area covered by an exploration license, the BLM will cancel the exploration license effective the date of the lease for those lands that are common to both.

§ 3910.44 Collection and submission of data.

Upon the BLM's request, the licensee must provide copies of all data obtained under the exploration license in the format requested by the BLM. As authorized by the Freedom of Information Act, the BLM will consider the data confidential and proprietary until the BLM determines that public access to the data will not damage the competitive position of the licensee or the lands involved have been leased, whichever comes first. Submit all data obtained under the exploration license to the proper BLM office.

§ 3910.50 Surface use.

Operations conducted under an exploration license must:

(a) Not unreasonably interfere with or endanger any other lawful activity on the same lands;

(b) Not damage any improvements on the lands; and

(c) Comply with all applicable Federal, state, and local laws and regulations.

3. Add part 3920 to subchapter C to read as follows:

PART 3920—OIL SHALE LEASING

Subpart 3921—Pre-Sale Activities

Subpart 3922—Application Processing

Authority: 30 U.S.C. 241(a), 42 U.S.C. 15927, 43 U.S.C. 1732(b) and 1740.

Subpart 3921—Pre-Sale Activities

§ 3921.10 Special requirements related to land use planning.

The BLM State Director may announce a call for expressions of leasing interest as described in § 3921.30 of this chapter after areas available for leasing have been identified in a land use plan completed under part 1600 of this chapter.

§ 3921.20 Compliance with the National Environmental Policy Act.

Before the BLM will offer a tract for competitive lease sale under subpart 3924 of this chapter, the BLM must prepare a NEPA analysis of the proposed lease area under 40 CFR parts 1500 through 1508 either separately or in conjunction with a land use planning action.

§ 3921.30 Call for expression of leasing interest.

The BLM State Director may implement the provisions of §§ 3921.40 through 3921.60 of this subpart after review of any responses received as a result of a call for expression of leasing interest. The BLM notice announcing a call for expressions of leasing interest will:

(a) Be published in the **Federal Register** and in at least 1 newspaper of general circulation in each affected state for 2 consecutive weeks;

(b) Allow no less than 30 calendar days to submit expressions of interest;

(c) Request specific information including the name and address of the respondent and the legal land description of the area of interest;

(d) State that all information submitted under this subpart must be available for public inspection; and

(e) Include a statement indicating that data which is considered proprietary must not be submitted as part of an expression of leasing interest.

§ 3921.40 Comments from governors, local governments, and interested Indian tribes.

After the BLM receives responses to the call for expression of leasing interest, the BLM will notify the appropriate state governor's office, local governments, and interested Indian tribes and allow them an opportunity to provide comments regarding the responses and other issues related to oil shale leasing. The BLM will only consider those comments it receives within 60 calendar days after the notification requesting comments.

§ 3921.50 Determining the geographic area for receiving applications to lease.

After analyzing expressions of leasing interest received under § 3921.30 of this chapter and complying with the procedures at § 3921.40 of this chapter, the BLM State Director may determine a geographic area for receiving applications to lease. The BLM may also include additional geographic areas available for lease in addition to lands identified in expressions of interest to lease.

§ 3921.60 Call for applications.

If as a result of the analysis of the expression of leasing interest the BLM State Director determines that there is interest in having a competitive sale, the BLM State Director may publish a notice in the **Federal Register** announcing a call for applications to lease. The notice will:

(a) Describe the geographic area the BLM determined is available for application under § 3921.50 of this chapter;

(b) Allow no less than 90 calendar days for interested parties to submit applications to the proper BLM office; and

(c) Provide that applications submitted to the BLM must meet the requirements at subpart 3922 of this part.

Subpart 3922—Application Processing

§ 3922.10 Application processing fee.

(a) An applicant nominating or applying for a tract for competitive leasing must pay a cost recovery or processing fee that the BLM will determine on a case-by-case basis as described in § 3000.11 of this chapter and as modified by the following provisions.

(b) The cost recovery process for a competitive oil shale lease is as follows:

(1) The applicant nominating the tract for competitive leasing must pay the fee before the BLM will process the application and publish a notice of competitive lease sale;

(2) The BLM will publish a sale notice no later than 30 days before the proposed sale. The BLM will include in the sale notice a statement of the total cost recovery fee paid to the BLM by the applicant, up to 30 calendar days before the sale;

(3) Before the lease is issued:

(i) The successful bidder, if someone other than the applicant, must pay to the BLM the cost recovery amount specified in the sale notice, including the cost of the NEPA analysis; and

(ii) The successful bidder must pay all processing costs the BLM incurs after the date of the sale notice;

(4) If the successful bidder is someone other than the applicant, the BLM will refund to the applicant the amount paid under paragraph (b)(1) of this section;

(5) If there is no successful bidder, the applicant is responsible for all processing fees; and

(6) If the successful bidder is someone other than the applicant, within 30 calendar days after the lease sale, the successful bidder must file an application in accordance with § 3922.20 of this chapter.

§ 3922.20 Application contents.

A lease application must be filed by any party seeking to obtain a lease. Lease applications must be filed in the proper BLM state office. No specific form of application is required, but the application must include information necessary to evaluate the impacts of issuing the proposed lease or leases on the human environment. Except as otherwise requested by the BLM, the application must include, but is not limited to, the following:

(a) Name, address, and telephone number of applicant, and a qualification statement, as required by subpart 3902 of part 3900 of this chapter;

(b) A delineation of the proposed lease area or areas, the surface ownership (if other than the United States) of those areas, a description of the quality, thickness, and depth of the oil shale and of any other resources the applicant proposes to extract, and environmental data necessary to assess impacts from the proposed development; and

(c) A description of the proposed extraction method, including personnel requirements, production levels, and transportation methods, including:

(1) A description of the mining, retorting, or in situ mining or processing technology that the operator would use and whether the proposed development technology is substantially identical to a technology or method currently in use to produce marketable commodities from oil shale deposits;

(2) An estimate of the maximum surface area of the lease area that will be disturbed or be undergoing reclamation at any one time;

(3) A description of the source and quantities of water to be used and of the water treatment and disposal methods necessary to meet applicable water quality standards;

(4) A description of the regulated air emissions;

(5) A description of the anticipated noise levels from the proposed development;

(6) A description of how the proposed lease development would comply with all applicable statutes and regulations governing management of chemicals and disposal of solid waste. If the proposed lease development would include disposal of wastes on the lease site, include a description of measures to be used to prevent the contamination of soil and of surface and ground water;

(7) A description of how the proposed lease development would avoid, or, to the extent practicable, mitigate impacts on species or habitats protected by applicable state or Federal law or regulations, and impacts on wildlife habitat management;

(8) A description of reasonably foreseeable social, economic, and infrastructure impacts on the surrounding communities, and on state and local governments from the proposed development;

(9) A description of the known historical, cultural, or archaeological resources within the lease area;

(10) A description of infrastructure that would likely be required for the proposed development and alternative locations of those facilities, if applicable;

(11) A discussion of proposed measures to mitigate any adverse impacts to the environment and to nearby communities;

(12) A brief description of the reclamation methods that will be used;

(13) Any other information that shows that the application meets the requirements of this subpart or that the applicant believes would assist the BLM in analyzing the impacts of the proposed development; and

(14) A map, or maps, showing:

(i) The topography, physical features, and natural drainage patterns;

(ii) Existing roads, vehicular trails, and utility systems;

(iii) The location of any proposed exploration operations, including seismic lines and drill holes;

(iv) To the extent known, the location of any proposed mining operations and facilities, trenches, access roads, or trails, and supporting facilities including the approximate location and extent of the areas to be used for pits, overburden, and tailings; and

(v) The location of water sources or other resources that may be used in the proposed operations and facilities.

§ 3922.30 Application—Additional information.

At any time during processing of the application, or the environmental or similar assessments of the application, the BLM may request additional information from the applicant. Failure to provide the best available and most accurate information may result in suspension or termination of processing of the application, or in a decision to deny the application.

§ 3922.40 Tract delineation.

(a) The BLM will delineate tracts for competitive sale to provide for the orderly development of the oil shale resource.

(b) The BLM may delineate more or less lands than were covered by an application for any reason the BLM determines to be in the public interest.

(c) The BLM may delineate tracts in any area acceptable for further consideration for leasing, whether or not expression of leasing interest or applications have been received for those areas.

(d) Where the BLM receives more than 1 application covering the same lands, the BLM may delineate the lands that overlap as a separate tract.

Subpart 3923—Minimum Bid

§ 3923.10 Minimum bid.

The BLM will not accept any bid that is less than the FMV. In no case may the minimum bid be less than $1,000 per acre.

Subpart 3924—Lease Sale Procedures

§ 3924.5 Notice of sale.

(a) After the BLM complies with § 3921.20 of this chapter, the BLM may publish a notice of the lease sale in the **Federal Register** containing all information required by paragraph (b) of this section. The BLM will also publish a similar notice of lease sale that complies with this section once a week for 3 consecutive weeks, or such other time deemed appropriate by the BLM, in 1 or more newspapers of general circulation in the county or counties in which the oil shale lands are situated.

(b) The notice of the sale will:

(1) List the time and place of sale, the bidding method, and the legal land descriptions of the tracts being offered;

(2) Specify where a detailed statement of lease terms, conditions, and stipulations may be obtained;

(3) Specify the royalty rate and the amount of the annual rental;

(4) Specify that, prior to lease issuance, the successful bidder for a particular lease must pay the identified cost recovery amount, including the bidder's proportionate share of the total cost of the NEPA analysis and of publication of the notice; and

(5) Contain such other information as the BLM deems appropriate.

(c) The detailed statement of lease terms, conditions, and stipulations will, at a minimum, contain:

(1) A complete copy of each lease and all lease stipulations to the lease; and

(2) Resource information relevant to the tracts being offered for lease and the minimum production requirement.

§ 3924.10 Lease sale procedures and receipt of bids.

(a) The BLM will accept sealed bids only as specified in the notice of sale and will return to the bidder any sealed bid submitted after the time and date specified in the sale notice. Each sealed bid must include:

(1) A certified check, cashier's check, bank draft, money order, personal check, or cash for one-fifth of the amount of the bonus; and

(2) A qualifications statement signed by the bidder as described in subpart 3902 of part 3900 of this chapter.

(b) At the time specified in the sale notice, the BLM will open and read all bids and announce the highest bid. The BLM will make a record of all bids.

(c) No decision to accept or reject the high bid will be made at the time of sale.

(d) After the sale, the BLM will convene a sale panel to determine:

(1) If the high bid was submitted in compliance with the terms of the notice of sale and these regulations;

(2) If the high bid reflects the FMV of the tract; and

(3) Whether the high bidder is qualified to hold the lease.

(e) The BLM may reject any or all bids regardless of the amount offered, and will not accept any bid that is less than the FMV. The BLM will notify in writing the high bidder whose bid has been rejected and include a statement of reasons for the rejection.

(f) The BLM may offer the lease to the next highest qualified bidder if the

successful bidder fails to execute the lease or for any reason is disqualified from receiving the lease.

(g) The balance of the bonus bid is due and payable to the MMS in 4 equal annual installments on each of the first 4 anniversary dates of the lease, unless otherwise specified in the lease.

Subpart 3925—Award of Lease

§ 3925.10 Award of lease.

(a) The lease will be awarded to the highest qualified bidder whose bid exceeds the minimum bid, except as provided in § 3924.10 of this chapter. The BLM will provide the successful bidder 3 copies of the oil shale lease form for execution.

(b) Within 60 calendar days after receipt of the lease forms, the successful bidder must sign all copies and return them to the proper BLM office. The successful bidder must also submit the necessary lease bond (see subpart 3904 of this chapter), the first year's rental, any unpaid cost recovery fees, including costs associated with the NEPA analysis, and the bidder's proportionate share of the cost of publication of the sale notice. The BLM may, upon written request, grant an extension of time to submit the items under this paragraph.

(c) If the successful bidder does not comply with this section, the BLM will not issue the lease and the bidder forfeits the one-fifth bonus payment submitted with the bid.

(d) If the lease cannot be awarded for reasons determined by the BLM to be beyond the control of the successful bidder, the BLM will refund the deposit submitted with the bid.

(e) If the successful bidder was not an applicant under § 3922.20 of this chapter, the successful bidder must submit an application and the BLM may require additional NEPA analysis of the successful bidder's proposed operations.

Subpart 3926—Conversion of Preference Right for Research, Demonstration, and Development (R, D and D) Leases

§ 3926.10 Conversion of an R, D and D lease to a commercial lease.

(a) Applications to convert R, D and D leases, including preference right areas, into commercial leases, are subject to the regulations at parts 3900 and 3910, this part, and part 3930, except for lease sale procedures at subparts 3921 and 3924 and § 3922.40.

(b) A lessee of an R, D and D lease must apply for the conversion of the R, D and D lease to a commercial lease no later than 90 calendar days after the commencement of production in commercial quantities. No specific form of application is required. The application for conversion must be filed in the BLM state office that issued the R, D and D lease. The conversion application must include:

(1) Documentation that there has been commercial quantities of oil shale produced from the lease, including the narrative required by the R, D and D leases;

(2) Documentation that the lessee consulted with state and local officials to develop a plan for mitigating the socioeconomic impacts of commercial development on communities and infrastructure;

(3) A bid payment no less than specified in § 3923.10 of this chapter and equal to the FMV of the lease; and

(4) Bonding as required by § 3904.14 of this chapter.

(c) The lessee of an R, D and D lease has the exclusive right to acquire any and all portions of the preference right area designated in the R, D and D lease up to a total of 5,120 acres in the lease. The BLM will approve the conversion application, in whole or in part, if it determines that:

(1) There have been commercial quantities of shale oil produced from the lease;

(2) The bid payment for the lease met or exceeded FMV;

(3) The lessee consulted with state and local officials to develop a plan for mitigating the socioeconomic impacts of commercial development on communities and infrastructure;

(4) The bond is consistent with § 3904.14 of this chapter; and

(5) Commercial scale operations can be conducted, subject to mitigation measures to be specified in stipulations or regulations, without unacceptable environmental consequences.

(d) The commercial lease must contain terms consistent with the regulations in parts 3900 and 3910, this part, and part 3930 and stipulations developed through appropriate NEPA analysis.

Subpart 3927—Lease Terms

§ 3927.10 Lease form.

Leases are issued on a BLM approved standard form. The BLM may modify those provisions of the standard form that are not required by statute or regulations and may add such additional stipulations and conditions, as appropriate, with notice to bidders in the notice of sale.

§ 3927.20 Lease size.

The maximum size of an oil shale lease is 5,760 acres and the minimum size of an oil shale lease is 160 acres.

§ 3927.30 Lease duration.

Leases issue for a period of 20 years and continue as long as there is annual minimum production or as long as there are payments in lieu of production (see § 3903.51 of this chapter). The BLM may initiate procedures to cancel a lease under subpart 3934 of part 3930 of this chapter for not maintaining annual minimum production, for not making the payment in lieu of production, or for not complying with the lease terms, including the diligent development milestones (see § 3930.30 of this chapter).

§ 3927.40 Effective date of leases.

Leases are dated and effective the first day of the month following the date the BLM signs it. However, upon receiving a prior written request, the BLM may make the effective date of the lease the first day of the month in which the BLM signs it.

§ 3927.50 Diligent development.

Oil shale lessees must meet:

(a) Diligent development milestones;

(b) Annual minimum production requirements or payments in lieu of production starting the 10th lease year, except when the BLM determines that operations under the lease are interrupted by strikes, the elements, or causes not attributable to the lessee. Market conditions are not considered a valid reason to waive or suspend the requirements for annual minimum production. The BLM will determine the annual production requirements based on the extraction technology to be used and on the BLM's estimate of the recoverable resources on the lease, expected life of the operation, and other factors.

4. Add part 3930 to subchapter C to read as follows:

PART 3930—MANAGEMENT OF OIL SHALE EXPLORATION AND LEASES

Subpart 3930—Management of Oil Shale Exploration Licenses and Leases

Sec.

Subpart 3931—Plans of Development and Exploration Plans

Authority: 25 U.S.C. 396d and 2107, 30 U.S.C. 241(a), 42 U.S.C. 15927, 43 U.S.C. 1732(b), 1733, and 1740.

Subpart 3930—Management of Oil Shale Exploration Licenses and Leases

§ 3930.10 General performance standards.

The operator/lessee must comply with the following performance standards concerning exploration, development, and production:

(a) All operations must be conducted to achieve Maximum Economic Recovery;

(b) Operations must be conducted under an approved plan of development or exploration plan;

(c) The operator/lessee must diligently develop the lease and must comply with the diligence development milestones and production requirements at § 3930.30 of this chapter;

(d) The operator/lessee must notify the BLM promptly if operations encounter unexpected wells or drill holes that could adversely affect the recovery of shale oil or other minerals producible under an oil shale lease during mining operations, and must not take any action that would disturb such wells or drill holes without the BLM's prior approval;

(e) The operator/lessee must conduct operations to:

(1) Prevent waste and conserve the recoverable oil shale reserves and other resources;

(2) Prevent damage to or degradation of oil shale formations;

(3) Ensure that other resources are protected upon abandonment of operations; and

(f) The operator must save topsoil for use in final reclamation after the reshaping of disturbed areas has been completed.

§ 3930.11 Performance standards for exploration and in situ operations.

The operator/lessee must adhere to the following standards for all exploration and in situ drilling operations:

(a) At the end of exploration operations, all drill holes must be capped with at least 5 feet of cement and plugged with a permanent plugging material that is unaffected by water and hydrocarbon gases and will prevent the migration of gases and water in the drill hole under normal hole pressures. For holes drilled deeper than stripping limits, the operator/lessee, using cement or other suitable plugging material the BLM approves in advance, must plug the hole through the thickness of the oil shale bed(s) or mineral deposit(s) and through aquifers for a distance of at least 50 feet above and below the oil shale bed(s) or mineral deposit(s) and aquifers, or to the bottom of the drill hole. The BLM may approve a lesser cap or plug. Capping and plugging must be managed to prevent water pollution and the mixing of ground and surface waters and to ensure the safety of people, livestock, and wildlife;

(b) The operator/lessee must retain for 1 year all drill and geophysical logs. The operator must also make such logs available for inspection or analysis by the BLM. The BLM may require the operator/lessee to retain representative samples of drill cores for 1 year;

(c) The operator/lessee may, after the BLM's written approval, use drill holes as surveillance wells for the purpose of monitoring the effects of subsequent operations on the quantity, quality, or pressure of ground water or mine gases; and

(d) The operator/lessee may, after written approval from the BLM and the surface owner, convert drill holes to water wells. When granting such approvals, the BLM will include a transfer to the surface owner of responsibility for any liability, including eventual plugging, reclamation, and abandonment.

§ 3930.12 Performance standards for underground mining.

(a) Underground mining operations must be conducted in a manner to prevent the waste of oil shale, to conserve recoverable oil shale reserves, and to protect other resources. The BLM must approve in writing permanent abandonment and operations that render oil shale inaccessible.

(b) The operator/lessee must adopt mining methods that ensure the proper recovery of recoverable oil shale reserves.

(c) Operators/lessees must adopt measures consistent with known technology to prevent or, where the mining method used requires subsidence, control subsidence, maximize mine stability, and maintain the value and use of surface lands. If the plan of development indicates that pillars will not be removed and controlled subsidence is not part of the plan of development, the POD must show that pillars of adequate dimensions will be left for surface stability, considering the thickness and strength of the oil shale beds and the strata above and immediately below the mined interval.

(d) The lessee/operator must have the BLM's approval to temporarily abandon a mine or portions thereof.

(e) The operator/lessee must have the BLM's prior approval to mine any recoverable oil shale reserves or drive any underground workings within 50 feet of any of the outer boundary lines of the federally-leased or federally-licensed land. The BLM may approve operations closer to the boundary after taking into consideration state and Federal environmental laws and regulations.

(f) The lessee/operator must have the BLM's prior approval before drilling any

lateral holes within 50 feet of any outside boundary.

(g) Either the operator/lessee or the BLM may initiate the proposal to mine oil shale in a barrier pillar if the oil shale in adjoining lands has been mined out. The lessee/operator of the Federal oil shale must enter into an agreement with the owner of the oil shale in those adjacent lands prior to mining the oil shale remaining in the Federal barrier pillars (which otherwise may be lost).

(h) The BLM must approve final abandonment of a mining area.

§ 3930.13 Performance standards for surface mines.

(a) Pit widths for each oil shale seam must be engineered and designed to eliminate or minimize the amount of oil shale fender to be left as a permanent pillar on the spoil side of the pit.

(b) Considering mine economics and oil shale quality, the amount of oil shale wasted in each pit must be minimal.

(c) The BLM must approve the final abandonment of a mining area.

(d) The BLM must approve the conditions under which surface mines, or portions thereof, will be temporarily abandoned, under the regulations in this part.

(e) The operator/lessee may, in the interest of conservation, mine oil shale up to the Federal lease or license boundary line, provided that the mining:

(1) Complies with existing state and Federal mining, environmental, reclamation, and safety laws and rules; and

(2) Does not conflict with the rights of adjacent surface owners.

(f) The operator must save topsoil for final application after the reshaping of disturbed areas has been completed.

§ 3930.20 Operations.

(a) *Maximum Economic Recovery (MER).* All mining and in situ development and production operations must be conducted in a manner to yield the MER of the oil shale deposits, consistent with the protection and use of other natural resources, the protection and preservation of the environment, including, land, water, and air, and with due regard for the safety of miners and the public. All shafts, main exits, and passageways, and overlying beds or mineral deposits that at a future date may be of economic importance must be protected by adequate pillars in the deposit being worked or by such other means as the BLM approves.

(b) *New geologic information.* The operator must record any new geologic information obtained during mining or in situ development operations regarding any mineral deposits on the lease. The operator must report this new information in a BLM-approved format to the proper BLM office within 90 calendar days after obtaining the information.

(c) *Statutory compliance.* Operators must comply with applicable Federal and state law, including, but not limited to the following:

(1) Clean Air Act (42 U.S.C. 1857 *et seq.*);

(2) Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 *et seq.*);

(3) Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*);

(4) National Historic Preservation Act, as amended (16 U.S.C. 470 *et seq.*);

(5) Archaeological and Historical Preservation Act, as amended (16 U.S.C. 469 *et seq.*);

(6) Archaeological Resources Protection Act, as amended (16 U.S.C. 470aa *et seq.*); and

(7) Native American Graves Protection and Repatriation Act, as amended (25 U.S.C. 3001 *et seq.*).

(d) Resource protection. The following additional resource protection provisions apply to oil shale operations:

(1) Operators must comply with applicable Federal and state standards for the disposal and treatment of solid wastes. All garbage, refuse, or waste must either be removed from the affected lands or disposed of or treated to minimize, so far as is practicable, their impact on the lands water, air, and biological resources;

(2) Operators must conduct operations in a manner to prevent adverse impacts to threatened or endangered species and any of their habitat that may be affected by operations.

(3) If the operator encounters any scientifically important paleontological remains or any historical or archaeological site, structure, building, or object on Federal lands, it must immediately notify the BLM. Operators must not, without prior BLM approval, knowingly disturb, alter, damage, or destroy any scientifically important paleontological remains or any historical or archaeological site, structure, building, or object on Federal lands.

§ 3930.30 Diligent development milestones.

(a) Operators must diligently develop the oil shale resources consistent with the terms and conditions of the lease, plan of development, and these regulations. If the operator does not maintain or comply with diligent development milestones, the BLM may initiate lease cancellation. In order to be considered diligently developing the lease, the lessee/operator must comply with the following diligence milestones:

(1) Milestone 1. Within 2 years of the lease issuance date, submit to the proper BLM office an initial plan of development that meets the requirements of subpart 3931. The operator must revise the plan of development following subpart 3931 of this part, if the BLM determines that the initial plan of development is unacceptable;

(2) Milestone 2. Within 3 years of the lease issuance date, submit a final plan of development. The BLM may, based on circumstances beyond the control of the lessee or operator, or on the complexity of the plan of development, grant a 1 year extension to the lessee or operator to submit a complete plan of development;

(3) Milestone 3. Within 2 years after the BLM approves the final plan of development, apply for all required Federal and state permits and licenses;

(4) Milestone 4. Before the end of the 7th year after lease issuance, begin infrastructure installation, as required by the BLM approved plan of development; and

(5) Milestone 5. Before the end of the 10th year after lease issuance, begin oil shale production.

(b) Operators may apply for additional time to complete a milestone. The BLM may grant additional time for completing a milestone if the operator provides documentation that shows to the BLM's satisfaction that achieving the milestone by the deadline is not possible for reasons that are beyond the control of the operator.

(c) Operators must maintain minimum annual production every year after the 10th lease year or pay in lieu of production according to the lease terms.

(d) Each lease will provide for minimum production. The minimum production requirement stated in the lease must be met by the end of the 10th lease year and will be based on the BLM's estimate of the extraction technology to be used, the recoverable resources on the lease, expected life of the operation, and other factors the BLM considers.

(e) Each lease will provide for payment in lieu of the minimum production for any particular year starting the 10th lease year. Payments in lieu of production in year 10 of the lease satisfies Milestone 5 in paragraph (a)(5) of this section.

§ 3930.40 Penalties for missing diligence milestones.

The BLM will assess a penalty of $50 for each acre in the lease for each missed diligence milestone each year until the operator or lessee complies with § 3930.30(a) of this chapter. For example: If the operator does not submit the required plan of development within 2 years of lease issuance (the first milestone), the BLM will assess the operator an additional $50 per acre penalty each year until the milestone is met. If the operator does not meet the second milestone (apply for all required permits and licenses by 2 years after the BLM approves the plan of development), the BLM will assess the operator $50 per acre penalty per year resulting in a total penalty of $100 per acre, per year. If the operator does not begin production by the end of the initial lease term, or make payments in lieu thereof, the BLM may initiate lease cancellation procedures (see §§ 3934.21 and 3934.22 of this part).

Subpart 3931—Plans of Development and Exploration Plans

§ 3931.10 Exploration plans and plans of development for mining and in situ operations.

(a) The plan of development must provide for reasonable protection and reclamation of the environment and the protection and diligent development of the oil shale resources in the lease.

(b) The operator must submit to the proper BLM office an exploration plan or plan of development describing in detail the proposed exploration, testing, development, or mining operations to be conducted. Exploration plans or plans of development must be consistent with the requirements of the lease or exploration license and protect nonmineral resources and provide for the reclamation of the lands affected by the operations on Federal lease(s) or exploration license(s). All plans of development and exploration plans must be submitted to the proper BLM office.

(c) The lessee or operator must submit 3 copies of the plan of development to the proper BLM office or submit it in an acceptable electronic format. Contact the proper BLM office for detailed information on submitting copies electronically (see § 3931.40 for submission of exploration plans).

(d) The BLM will consult with any other Federal, state, or local agencies involved and review the plan. If the BLM denies the plan, it will indicate what additional information is necessary to complete the application.

(e) All development and exploration activities must comply with the BLM-approved plan of development or exploration plan.

(f) Activities under § 3931.40 of this subpart, other than casual use, may not begin until the BLM approves an exploration plan or plan of development.

§ 3931.11 Content of plan of development.

The plan of development must contain, at a minimum, the following:

(a) Names, addresses, and telephone numbers of those responsible for operations to be conducted under the approved plan and to whom notices and orders are to be delivered, names and addresses of Federal oil shale lessees and corresponding Federal lease serial numbers, and names and addresses of surface and mineral owners of record, if other than the United States;

(b) A general description of geologic conditions and mineral resources within the area where mining is to be conducted, including appropriate maps;

(c) A copy of a suitable map or aerial photograph showing the topography, the area covered by each lease, the name and location of major topographic and cultural features;

(d) A statement of proposed methods of operation and development, including the following items as appropriate:

(1) A description detailing the extraction technology to be used;

(2) The equipment to be used in development and extraction;

(3) The proposed access roads;

(4) The size, location, and schematics of all structures, facilities, and lined or unlined pits to be built;

(5) The stripping ratios, development sequence, and schedule;

(6) The number of acres in the Federal lease(s) or license(s) to be affected;

(7) Comprehensive well design and procedure for drilling, casing, cementing, testing, stimulation, clean-up, completion, and production, for all drilled well types, including those used for heating, freezing, and disposal;

(8) A description of the methods and means to protect and monitor all aquifers;

(9) Surveyed well location plats or project-wide well location plats;

(10) A description of the measurement and handling of produced fluids, including the anticipated production rates and estimated recovery factors; and

(11) A description/discussion of the controls that the operator will use to protect the public, including identification of:

(i) Essential operations, personnel, and health and safety precautions;

(ii) Programs and plans for noxious gas control (hydrogen sulfide, ammonia, etc.);

(iii) Well control procedures;

(iv) Temporary abandonment procedures; and

(v) Plans to address spills, leaks, venting, and flaring;

(e) An estimate of the quantity and quality of the oil shale resources;

(f) An explanation of how MER of the resource will be achieved for each Federal lease;

(g) Appropriate maps and cross sections showing:

(1) Federal lease boundaries and serial numbers;

(2) Surface ownership and boundaries;

(3) Locations of any existing and abandoned mines and existing oil and gas well (including well bore trajectories) and water well locations, including well bore trajectories;

(4) Typical geological structure cross sections;

(5) Location of shafts or mining entries, strip pits, waste dumps, retort facilities, and surface facilities;

(6) Typical mining or in situ development sequence, with appropriate time-frames;

(h) A narrative addressing the environmental aspects of the proposed mine or in situ operation, including at a minimum, the following:

(1) An estimate of the quantity of water to be used and pollutants that may enter any receiving waters;

(2) A design for the necessary impoundment, treatment, control, or injection of all produced water, runoff water, and drainage from workings; and

(3) A description of measures to be taken to prevent or control fire, soil erosion, subsidence, pollution of surface and ground water, pollution of air, damage to fish or wildlife or other natural resources, and hazards to public health and safety;

(i) A reclamation plan and schedule for all Federal lease(s) or exploration license(s) that details all reclamation activities necessary to fulfill the requirements of § 3931.20;

(j) The method of abandonment of operations on Federal lease(s) and exploration license(s) proposed to protect the unmined recoverable reserves and other resources, including:

(1) The method proposed to fill in, fence, or close all surface openings that are hazardous to people or animals; and

(2) For in situ operations, a description of the method and materials to be used to plug all abandoned development or production wells; and

(k) Any additional information that the BLM determines is necessary for

analysis or approval of the plan of development.

§ 3931.20 Reclamation.

(a) The operator or lessee must restore the disturbed lands to their pre-mining or pre-exploration use or to a BLM-determined higher use.

(b) The operator must reclaim the area disturbed by taking reasonable measures to prevent or control onsite and offsite damage to lands and resources.

(c) Reclamation includes, but is not limited to:

(1) Measures to control erosion, landslides, and water runoff;

(2) Measures to isolate, remove, or control toxic materials;

(3) Reshaping the area disturbed, application of the topsoil, and re-vegetation of disturbed areas, where reasonably practicable; and

(4) Rehabilitation of fisheries and wildlife habitat.

(d) The operator or lessee must substantially fill in, fence, protect, or close all surface openings, subsidence holes, surface excavations, or workings which are a hazard to people or animals. These protected areas must be maintained in a secure condition during the term of the lease or exploration license. During reclamation, but before abandonment of operations, all openings, including water discharge points, must be closed to the BLM's satisfaction. For in situ operations, all drilled holes must be plugged and abandoned, as required by the approved plan.

(e) The operator or lessee must reclaim or protect surface areas no longer needed for operations as contemporaneously as possible as required by the approved plan.

§ 3931.30 Suspension of operations and production.

(a) The BLM may, in the interest of conservation, agree to a suspension of lease operations and production. Applications by lessees for suspensions of operations and production must be filed in duplicate in the proper BLM office and must explain why it is in the interest of conservation to suspend operations and production.

(b) The BLM may order a suspension of operations and production if the suspension is necessary to protect the resource or the environment:

(1) While the BLM performs necessary environmental studies or analysis;

(2) To ensure that necessary environmental remediation or cleanup is being performed as a result of activity or inactivity on the part of the operator; or

(3) While necessary environmental remediation or cleanup is being performed as a result of unwarranted or unexpected actions.

(c) The term of any lease will be extended by adding thereto any period of suspension of operations and production during such term.

(d) A suspension will take effect on the date the BLM specifies. Rental, upcoming diligent development milestones, and minimum annual production will be suspended:

(1) During any period of suspension of operations and production beginning with the first day of the lease month on which the suspension of operations and production is effective; or

(2) If the suspension of operations and production is effective on any date other than the first day of a lease month, beginning with the first day of the lease month following such effective date.

(e) The suspension of rental and minimum annual production will end on the first day of the lease month in which the suspension ends.

(f) The minimum annual production requirements of a lease will be proportionately reduced for that portion of a lease year for which a suspension of operations and production is directed or granted by the BLM, as would any payments in lieu of production.

§ 3931.40 Exploration.

To conduct exploration operations under an exploration license or on a lease after lease issuance, but prior to approval of the plan of development, the following rules apply:

(a) Except for casual use, before conducting any exploration operations on federally-leased or federally-licensed lands, the operator or lessee must submit to the proper BLM office for approval 5 copies of the exploration plan or a copy of the plan in an acceptable electronic format. Contact the proper BLM office for detailed information on submitting copies electronically. As used in this paragraph, casual use means activities that do not cause appreciable surface disturbance or damage to lands or other resources and improvements. Casual use does not include use of heavy equipment, explosives, or vehicular movement off established roads and trails.

(b) The exploration activities must be consistent with the requirements of the underlying Federal lease or exploration license, and address protection of recoverable oil shale reserves and other resources and reclamation of the surface of the lands affected by the exploration operations. The exploration plan must meet the requirements of § 3931.20 and must show how reclamation will be an integral part of the proposed operations and that reclamation will progress as contemporaneously as practicable with operations.

§ 3931.41 Content of exploration plan.

Exploration plans must contain the following:

(a) The name, address, and telephone number of the applicant, and, if applicable, that of the operator or lessee of record;

(b) The name, address, and telephone number of the representative of the applicant who will be present during, and responsible for, conducting exploration;

(c) A description of the proposed exploration area, cross-referenced to the map required under paragraph (h) of this section, including:

(1) Applicable Federal lease and exploration license serial numbers;

(2) Surface topography;

(3) Geologic, surface water, and other physical features;

(4) Vegetative cover;

(5) Endangered or threatened species listed under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) that may be affected by exploration operations;

(6) Districts, sites, buildings, structures, or objects listed on, or eligible for listing on, the National Register of Historic Places that may be present in the lease area; and

(7) Known cultural or archaeological resources located within the proposed exploration area;

(d) A description of the methods to be used to conduct oil shale exploration, reclamation, and abandonment of operations including, but not limited to:

(1) The types, sizes, numbers, capacity, and uses of equipment for drilling and blasting, and road or other access route construction;

(2) Excavated earth-disposal or debris-disposal activities;

(3) The proposed method for plugging drill holes; and

(4) The estimated size and depth of drill holes, trenches, and test pits;

(e) An estimated timetable for conducting and completing each phase of the exploration, drilling, and reclamation;

(f) The estimated amounts of oil shale or oil shale products to be removed during exploration, a description of the method to be used to determine those amounts, and the proposed use of the oil shale or oil shale products removed;

(g) A description of the measures to be used during exploration for Federal oil shale to comply with the performance standards for exploration (§ 3930.10);

(h) A map at a scale of 1:24,000 or larger showing the areas of land to be affected by the proposed exploration and reclamation. The map must show:

(1) Existing roads, occupied dwellings, and pipelines;

(2) The proposed location of trenches, roads, and other access routes and structures to be constructed;

(3) Applicable Federal lease and exploration license boundaries;

(4) The location of land excavations to be conducted;

(5) Oil shale exploratory holes to be drilled or altered;

(6) Earth-disposal or debris-disposal areas;

(7) Existing bodies of surface water; and

(8) Topographic and drainage features; and

(i) The name and address of the owner of record of the surface land, if other than the United States. If the surface is owned by a person other than the applicant or if the Federal oil shale is leased to a person other than the applicant, include evidence of authority to enter that land for the purpose of conducting exploration and reclamation.

§ 3931.50 Exploration plan and plan of development modifications.

(a) The operator or lessee may apply in writing to the BLM for modification of the approved exploration plan or plan of development to adjust to changed conditions or to correct an oversight. To obtain approval of an exploration plan or plan of development modification, the operator or lessee must submit to the proper BLM office a written statement of the proposed modification and the justification for such modification.

(b) The BLM may require a modification of the approved exploration plan or plan of development.

(c) The BLM may approve a partial exploration plan or plan of development, if circumstances warrant, or if development of an exploration or plan of development for the entire operation is dependent upon unknown factors that cannot or will not be determined until operations progress. The operator or lessee must not, however, perform any operation not covered in a BLM-approved plan.

§ 3931.60 Maps of underground and surface mine workings and in situ surface operations.

Maps of underground workings and surface operations must be to a scale of 1:24,000 or larger if the BLM requests it. All maps must be appropriately marked with reference to government land marks or lines and elevations with reference to sea level. When required by the BLM, include vertical projections and cross sections in plan views. Maps must be based on accurate surveys and certified by a professional engineer, professional land surveyor, or other professionally qualified person. Accurate copies of such maps must be furnished by the operator to the BLM when and as required. All maps submitted must be in a format acceptable to the BLM. Contact the proper BLM office for information on what is the acceptable format to submit maps.

§ 3931.70 Production maps and production reports.

(a) Report production of all oil shale products or by-products to the BLM on a monthly basis.

(b) Report all production and royalty information to the MMS under 30 CFR parts 210 and 216.

(c) Submit production maps to the proper BLM office at the end of each royalty reporting period or on a schedule determined by the BLM. Show all excavations in each separate bed or deposit on the maps so that the production of minerals for any period can be accurately ascertained. Production maps must also show surface boundaries, lease boundaries, topography, and subsidence resulting from mining activities.

(d) If the lessee or operator does not provide the BLM the maps required by this section, the BLM will employ a licensed mine surveyor to make a survey and maps of the mine, and the cost will be charged to the operator or lessee.

(e) If the BLM believes any map submitted by an operator or lessee is incorrect, the BLM may have a survey performed, and if the survey shows the map submitted by the operator or lessee to be substantially incorrect in whole or in part, the cost of performing the survey and preparing the map will be charged to the operator or lessee.

(f) For in situ development operations, the lessee or operator must submit a map showing all surface installations, including pipelines, meter locations, or other points of measurement necessary for production verification as part of your plan of development. All maps must be modified as necessary for adequate representation of existing operations.

(g) Within 30 calendar days after well completion, the lessee or operator must submit to the proper BLM office 2 copies of a completed Form 3160–4, Well Completion or Recompletion Report and Log, limited to information that is applicable to oil shale operations. Well logs may be submitted electronically using a BLM-approved electronic format. Describe surface and bottom-hole locations in latitude and longitude.

§ 3931.80 Core or test hole samples and cuttings.

(a) Within 30 calendar days after drilling completion, the operator or lessee must submit to the proper BLM office a signed copy of records of all core or test holes made on the lands covered by the lease or exploration license. The records must show the position and direction of the holes on a map. The records must include a log of all strata penetrated and conditions encountered, such as water, gas, or unusual conditions, and copies of analysis of all samples. Provide this information to the proper BLM office in either paper copy or in a BLM-approved electronic format. Contact the proper BLM office for information on submitting copies electronically. Within 30 calendar days after creation, the operator or lessee must also submit to the proper BLM office a detailed lithologic log of each test hole and all other in-hole surveys or other logs produced. Upon the BLM's request, the operator or lessee must provide to the BLM splits of core samples and drill cuttings.

(b) The lessee or operator must abandon surface exploration drill holes for development or holes for exploration to the BLM's satisfaction by cementing or casing or by other methods approved in advance by the BLM. Abandonment must be conducted in a manner to protect the surface and not endanger any present or future underground or surface operation or any deposit of oil, gas, other mineral substances, or ground water.

(c) Operators may convert drill holes to surveillance wells for the purpose of determining the effect of subsequent operations upon the quantity, quality, or pressure of ground water or mine gases. The BLM may require such conversion or the operator may request that the BLM approve such conversion. Prior to lease or exploration license termination, all surveillance wells must be plugged and abandoned and reclaimed, unless the surface owner assumes responsibility for reclamation of such surveillance wells. The transfer of liability for reclamation will not be considered complete until the BLM approves it in writing.

(d) Drilling equipment must be equipped with blowout control devices suitable for the pressures encountered and acceptable to the BLM.

§ 3931.100 Boundary pillars.

(a) All boundary pillars must be at least 50 feet thick, unless otherwise

specified in writing by the BLM. Boundary and other main pillars may be mined only with the BLM's prior written consent or on the BLM's order.

(b) If the oil shale on adjacent Federal lands has been worked out beyond any boundary pillar and no hazards exist, the operator or lessee must, on the BLM's written order, mine out and remove all available oil shale in such boundary pillar, both in the lands covered by the lease and in the adjacent Federal lands, when the BLM determines that such oil shale can be mined safely without undue hardship to the operator or lessee.

(c) If the mining rights in adjacent lands are privately owned or controlled, the lessee must have an agreement with the owners of such interests for the extraction of the oil shale in the boundary pillars.

Subpart 3932—Lease Modifications and Readjustments

§ 3932.10 Lease size modification.

(a) A lessee may apply for a modification of a lease to include Federal lands adjacent to those in the lease. The total area of the lease, including the acreage in the modification application and any previously authorized modification, must not exceed the maximum lease size (see § 3927.20 of this chapter).

(b) An application for modification of the lease size must:

(1) Be filed with the proper BLM office;

(2) Contain a legal land description of the additional lands involved;

(3) Contain an explanation of how the modification would meet the criteria in § 3932.20(a) which qualifies the lease for modification;

(4) Explain why the modification would be in the best interest of the United States;

(5) Include a nonrefundable processing fee that the BLM will determine under § 3000.11 of this chapter; and

(6) Include a signed qualifications statement consistent with subpart 3902 of part 3900 of this chapter.

§ 3932.20 Lease modification land availability criteria.

(a) The BLM may grant a lease modification if:

(1) There is no competitive interest in the lands covered by the modification application;

(2) The lands covered by the modification application cannot be reasonably developed as part of another independent federally-approved operation;

(3) The modification would be in the public interest; and

(4) The modification does not cause a violation of lease size limitations under § 3927.20 of this chapter or acreage limitations under § 3901.20 of this chapter.

(b) The BLM may approve adding lands covered by the modification application to the existing lease without competitive bidding, but before the BLM will approve adding lands to the lease, the applicant must pay in advance the FMV for the interests to be conveyed.

(c) Before modifying a lease, the BLM will prepare any necessary NEPA analysis covering the proposed lease area under 40 CFR parts 1500 through 1508 and recover the cost of such analysis from the applicant.

§ 3932.30 Terms and conditions of a modified lease.

(a) The terms and conditions of a lease modified under this subpart will be made consistent with the laws, regulations, and land use plans applicable at the time the lands are added by the modification.

(b) The royalty rate for the lands in the modification is the same as for the original lease.

(c) Before the BLM will approve a lease modification, the lessee must file a written acceptance of the conditions in the modified lease and a written consent of the surety under the bond covering the original lease as modified. The lessee must also submit evidence that the bond has been amended to cover the modified lease and pay BLM processing costs.

§ 3932.40 Readjustment of lease terms.

(a) All leases are subject to readjustment of lease terms, conditions, and stipulations at the end of the first 20-year period (the primary term of the lease) and at the end of each 10-year period thereafter.

(b) Royalty rates will be subject to readjustment at the end of the primary term and every 20 years thereafter.

(c) At least 30 days prior to the expiration of the readjustment period, the BLM will notify the lessee by written decision if any readjustment is to be made and of the proposed readjusted lease terms, including any revised royalty rate.

(d) Readjustments may be appealed. In the case of an appeal, unless the readjustment is stayed by the Interior Board of Land Appeals or the courts, the lessee must comply with the revised lease terms, including any revised royalty rate, pending the outcome of the appeal.

Subpart 3933—Assignments and Subleases

§ 3933.10 Leases subject to assignment or sublease.

Any lease may be assigned or subleased in whole or in part to any person, association, or corporation that meets the qualification requirements in subpart 3902 of part 3900 of this chapter to hold such lease. The BLM may approve or disapprove assignments and subleases.

§ 3933.20 Filing fees.

Each application for assignment or sublease of record title or overriding royalty must include a nonrefundable filing fee of $60. The BLM will not accept any assignment that does not include the filing fee.

§ 3933.31 Record title assignments.

(a) File in triplicate at the proper BLM office a separate instrument of assignment for each lease assignment. File the assignment application within 90 calendar days after the date of final execution of the assignment instrument and with it include the:

(1) Name and current address of assignee;

(2) Interest held by assignor and interest to be assigned;

(3) Serial number of the affected lease and a description of the lands to be assigned as described in the lease;

(4) Percentage of overriding royalties retained; and

(5) Dated signature of assignor.

(b) The assignee must provide a single copy of the request for approval of assignment which must contain a:

(1) Statement of qualifications and holdings as required by subpart 3902 of part 3900 of this chapter;

(2) Date and the signature of the assignee; and

(3) Nonrefundable filing fee of $60.

(c) The approval of an assignment of all interests in a specific portion of the lands in a lease will create a separate lease, which will be given a new serial number.

§ 3933.32 Overriding royalty interests.

File at the proper BLM office, for record purposes only, all overriding royalty interest assignments within 90 calendar days after the date of execution of the assignment.

§ 3933.40 Lease account status.

The BLM will not approve an assignment of a lease unless the lease account is in good standing.

§ 3933.51 Bond coverage.

Before the BLM will approve an assignment, the assignee must submit to

the proper BLM office a new bond in an amount to be determined by the BLM, or, in lieu thereof, documentation of consent of the surety on the present bond to the substitution of the assignee as principal (see subpart 3904 of part 3900 of this chapter).

§ 3933.52 Continuing responsibility under assignment and sublease.

(a) The assignor and its surety are responsible for the performance of any obligation under the lease that accrues prior to the effective date of the BLM's approval of the assignment. After the effective date of the BLM's approval of the assignment, the assignee and its surety are responsible for the performance of all lease obligations that accrue after the effective date of the BLM's approval of the assignment of the lease, notwithstanding any terms in the assignment to the contrary. If the BLM does not approve the assignment, the assignor's obligation to the United States continues as though no assignment had been filed.

(b) After the effective date of approval of a sublease, the sublessor and sublessee are jointly and severally liable for the performance of all lease obligations, notwithstanding any terms in the sublease to the contrary.

§ 3933.60 Effective date.

An assignment or sublease takes effect, so far as the United States as lessor is concerned, on the first day of the month following the BLM's final approval, or if the assignee requests it in advance, the first day of the month of the approval.

§ 3933.70 Extensions.

The BLM's approval of an assignment or sublease does not extend the readjustment period of the lease.

Subpart 3934—Relinquishments, Cancellations, and Terminations

§ 3934.10 Relinquishments.

(a) A lease or exploration license or any legal subdivision thereof may be surrendered by the record title holder by filing a written relinquishment, in triplicate, in the BLM state office having jurisdiction of the lands covered by the relinquishment.

(b) To be relinquished, the lease account must be in good standing and the relinquishment must be considered to be in the public interest.

(c) A relinquishment will take effect on the date the BLM approves it, subject to the:

(1) Continued obligation of the lessee or licensee and surety to make payments of all accrued rentals and royalties;

(2) The proper rehabilitation of the lands to be relinquished to a condition acceptable to the BLM under these regulations;

(3) Terms of the lease or license; and

(4) Approved exploration plan or development plan.

(d) Prior to relinquishment of an exploration license, the licensee must give any other parties participating in activities under the exploration license the opportunity to take over operations under the exploration license. The licensee must provide to the BLM written evidence that the offer was made to all other parties participating in the exploration license.

§ 3934.21 Written notice of cancellation.

The BLM will provide the lessee or licensee written notice of any default, breach, or cause of forfeiture, and provide a time period of 30 calendar days to correct the default, to request an extension of time in which to correct the default, or to submit evidence showing why the BLM is in error and why the lease or exploration license should not be canceled.

§ 3934.22 Causes and procedures for lease cancellation.

(a) The BLM will take appropriate steps in a United States District Court of competent jurisdiction to institute proceedings for the cancellation of the lease if the lessee:

(1) Does not comply with the provisions of the Act as amended and other relevant statutes;

(2) Does not comply with any applicable regulations; or

(3) Defaults in the performance of any of the terms, covenants, and stipulations of the lease, and the BLM does not formally waive the default, breach, or cause of forfeiture.

(b) A waiver of any particular default, breach, or cause of forfeiture will not prevent the cancellation and forfeiture of the lease for any other default, breach, or cause of forfeiture, or for the same cause occurring at any other time.

§ 3934.30 License terminations.

The BLM may terminate an exploration license if:

(a) The BLM issued it in violation of any law or regulation, or if there are substantive factual errors, such as a lack of title;

(b) The licensee does not comply with the terms and conditions of the exploration license; or

(c) The licensee does not comply with the approved exploration plan.

§ 3934.40 Payments due.

If a lease is canceled or relinquished for any reason, all bonus, rentals, royalties, and minimum royalties paid will be forfeited, and any amounts not paid will be immediately payable to the United States.

§ 3934.50 Bona fide purchasers.

The BLM will not cancel a lease or an interest in a lease of a purchaser if at the time of purchase the purchaser was not aware and could not have reasonably determined from the BLM records the existence of a violation of any of the following:

(a) Federal regulatory requirements;

(b) The Act, as amended; or

(c) Lease terms and conditions.

Subpart 3935—Production and Sale Records

§ 3935.10 Accounting records.

(a) Operators or lessees must maintain records that provide an accurate account of, or include all:

(1) Oil shale mined;

(2) Oil shale put through the processing plant and retort;

(3) Mineral products produced and sold;

(4) Shale oil products, shale gas, and shale oil by-products sold; and

(5) Shale oil products and by-products that are consumed on-lease for the beneficial use of the lease.

(b) The records must include relevant quality analyses of oil shale mined or processed and of all products including synthetic petroleum, shale oil, shale gas, and shale oil by-products sold.

(c) Production and sale records must be made available for the BLM's examination during regular business hours.

Subpart 3936—Inspection and Enforcement

§ 3936.10 Inspection of underground and surface operations and facilities.

Operators, licensees, or lessees must allow the BLM, at any time, either day or night, to inspect or investigate underground and surface mining or exploration operations to determine compliance with lease or license terms and conditions, compliance with the approved exploration or development plan, and to verify production.

§ 3936.20 Issuance of notices of noncompliance and orders.

(a) If the BLM determines that an operator, licensee, or lessee has not complied with established requirements, the BLM will issue to the operator, licensee, or lessee a notice of noncompliance.

(b) If operations threaten immediate, serious, or irreparable damage to the environment, the mine or deposit being

mined, or other valuable mineral deposits or other resources, the BLM will order the cessation of operations and will require the operator, licensee, or lessee to revise the plan of development or exploration plan.

(c) The operator, licensee, or lessee will be considered to have received all orders or notices of noncompliance and orders that the operator, licensee, or lessee receives by personal delivery or certified mail. The BLM will consider service of any notice of noncompliance or order to have occurred 7 business days after the date the notice or order is mailed. Verbal orders and notices may be given to officials at the mine or exploration site, but the BLM will confirm them in writing within 10 business days. The operator or lessee must notify the BLM of any change of address or operator or lessee name.

§ 3936.30 Enforcement of notices of noncompliance and orders.

(a) If the operator, licensee, or lessee does not take action in accordance with the notice of noncompliance, the BLM may issue an order to cease operations or initiate legal proceedings to cancel or terminate the lease or license under subpart 3934 of this chapter.

(1) A notice of noncompliance will state how the operator, licensee, or lessee has not complied with established requirements, and will specify the action which must be taken to correct the noncompliance and the time limits within which such action must be taken. The operator, licensee, or lessee must notify the BLM when noncompliance items have been corrected.

(2) If the operator, licensee, or lessee does not comply with the notice of noncompliance or order within the specified time frame, the operator, licensee, or lessee must pay a fine of $500 per day until the noncompliance is corrected to the BLM's satisfaction.

(3) Noncompliance with the approved exploration or development plan that results in wasted resource may result in the lessee or licensee being assessed royalty at the market value, in addition to the noncompliance fine.

(b) If the BLM determines that the failure to comply with the exploration or development plan threatens health or human safety or immediate, serious, or irreparable damage to the environment, the mine or the deposit being mined or explored, or other valuable mineral deposits or other resources, the BLM may, either in writing or verbally followed with written confirmation within 5 business days, order the cessation of operations or exploration without prior notice.

§ 3936.40 Appeals.

Notices of noncompliance and orders or decisions issued under the regulations in this part may be appealed as provided in part 4 of this title. All decisions and orders by the BLM under this part remain effective pending appeal unless the BLM decides otherwise. A petition for the stay of a decision may be filed with the Interior Board of Land Appeals.

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Part III

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Nine Metal Fabrication and Finishing Source Categories; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2006–0306; FRL–8683–3]

RIN 2060–AO27

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Nine Metal Fabrication and Finishing Source Categories

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing national emission standards for control of hazardous air pollutants for nine metal fabrication and finishing area source categories (identified in section I.A. below). This final rule establishes emission standards in the form of management practices and equipment standards for new and existing operations of dry abrasive blasting, machining, dry grinding and dry polishing with machines, spray painting and other spray coating, and welding operations. These standards reflect EPA's determination regarding the generally achievable control technology and/or management practices for the nine area source categories.

DATES: This final rule is effective on July 23, 2008. The incorporation by reference of certain publications listed in this final rule is approved by the Director of the **Federal Register** as of July 23, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2006–0306. All documents in the docket are listed in the Federal Docket Management System index at *http://www.regulations.gov index*. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the National Emission Standards for Hazardous Air Pollutants for Nine Metal Fabrication and Finishing Area Source Categories Docket, at the EPA Docket and Information Center, EPA West, Room 3334, 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: Dr. Donna Lee Jones, Sector Policies and Programs Division, Office of Air Quality Planning and Standards (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5251; fax number: (919) 541–3207; e-mail address: *jones.donnalee@epa.gov*.

SUPPLEMENTARY INFORMATION:

Outline. The information in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

The regulated categories and entities potentially affected by this final action are shown in Table 1 below. This final rule applies to area sources [a] where the primary activity of their facilities is in one of the following nine source categories: (1) Electrical and Electronic Equipment Finishing Operations; (2) Fabricated Metal Products; (3) Fabricated Plate Work (Boiler Shops); (4) Fabricated Structural Metal Manufacturing; (5) Heating Equipment, except Electric; (6) Industrial Machinery and Equipment Finishing Operations; (7) Iron and Steel Forging; (8) Primary Metal Products Manufacturing; and (9) Valves and Pipe Fittings. More specifically, this rule applies to area sources in these nine source categories that use or have the potential to emit compounds of cadmium, chromium, lead, manganese, or nickel from metal fabrication or finishing operations. Facilities affected by this final rule are not subject to the miscellaneous coating requirements in 40 CFR part 63, subpart HHHHHH, "National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources," for their affected source(s) that are subject to the requirements of this final rule. There potentially may be other operations at the area sources that are not subject to the requirements of this final rule, but are instead subject to subpart HHHHHH of this part.

[a] Section 112(a) of the Clean Air Act defines an area source as any stationary source of HAP that is not a major source. A major source is defined as any stationary source or group of stationary sources located within a contiguous area and under common control that emits, or has the potential to emit, considering controls, in the aggregate, 10 tons per year (tpy) or more of any single HAP or 25 tpy or more of any combination of HAP.

TABLE 1.—REGULATED CATEGORIES AND ENTITIES POTENTIALLY AFFECTED

Metal fabrication and finishing category	NAICS codes [1]	Examples of regulated entities
Electrical and Electronics Equipment Finishing Operations.	335999, 335312	Establishments primarily engaged in manufacturing motors and generators; and electrical machinery, equipment, and supplies, not elsewhere classified. The electrical machinery equipment and supplies industry sector of this source category includes facilities primarily engaged in high energy particle acceleration systems and equipment, electronic simulators, appliance and extension cords, bells and chimes, insect traps, and other electrical equipment and supplies, not elsewhere classified. The Motors and Generators Manufacturing industry sector of this source category includes those establishments primarily engaged in manufacturing electric motors (except engine starting motors) and power generators; motor generator sets; railway motors and control equipment; and motors, generators and control equipment for gasoline, electric, and oil-electric buses and trucks.
Fabricated Metal Products.	332117, 332999	Establishments primarily engaged in manufacturing fabricated metal products, such as fire or burglary resistive steel safes and vaults and similar fire or burglary resistive products; and collapsible tubes of thin flexible metal. Also included are establishments primarily engaged in manufacturing powder metallurgy products, metal boxes; metal ladders; metal household articles, such as ice cream freezers and ironing boards; and other fabricated metal products not elsewhere classified.
Fabricated Plate Work (Boiler Shops).	332313, 332410, 332420	Establishments primarily engaged in manufacturing power and marine boilers, pressure and nonpressure tanks, processing and storage vessels, heat exchangers, weldments and similar products.
Fabricated Structural Metal Manufacturing.	332312	Establishments primarily engaged in fabricating iron and steel or other metal for structural purposes, such as bridges, buildings, and sections for ships, boats, and barges.
Heating Equipments, except Electric.	333414	Establishments primarily engaged in manufacturing heating equipment, except electric and warm air furnaces, including gas, oil, and stoker coal fired equipment for the automatic utilization of gaseous, liquid, and solid fuels. Typical products produced in this source category include low-pressure heating (steam or hot water) boilers, fireplace inserts, domestic (steam or hot water) furnaces, domestic gas burners, gas room heaters, gas infrared heating units, combination gas-oil burners, oil or gas swimming pool heaters, heating apparatus (except electric or warm air), kerosene space heaters, gas fireplace logs, domestic and industrial oil burners, radiators (except electric), galvanized iron nonferrous metal range boilers, room heaters (except electric), coke and gas burning salamanders, liquid or gas solar energy collectors, solar heaters, space heaters (except electric), mechanical (domestic and industrial) stokers, wood and coal-burning stoves, domestic unit heaters (except electric), and wall heaters (except electric).
Industrial Machinery and Equipment Finishing Operations.	333120, 333132, 333911	Establishments primarily engaged in construction machinery manufacturing; oil and gas field machinery manufacturing; and pumps and pumping equipment manufacturing. The construction machinery manufacturing industry sector of this source category includes establishments primarily engaged in manufacturing heavy machinery and equipment of types used primarily by the construction industries, such as bulldozers; concrete mixers; cranes, except industrial plan overhead and truck-type cranes; dredging machinery; pavers; and power shovels. Also included in this industry are establishments primarily engaged in manufacturing forestry equipment and certain specialized equipment, not elsewhere classified, similar to that used by the construction industries, such as elevating platforms, ship cranes and capstans, aerial work platforms, and automobile wrecker hoists. The oil and gas filed machinery manufacturing industry sector of this source category includes establishments primarily engaged in manufacturing machinery and equipment for use in oil and gas fields or for drilling water wells, including portable drilling rigs. The pumps and pumping equipment industry sector of this source category includes establishments primarily engaged in manufacturing pumps and pumping equipment for general industrial, commercial, or household use, except fluid power pumps and motors. This category includes establishments primarily engaged in manufacturing domestic water and sump pumps.
Iron and Steel Forging ...	33211	Establishments primarily engaged in the forging manufacturing process, where purchased iron and steel metal is pressed, pounded or squeezed under great pressure into high strength parts known as forgings. The process is usually performed hot by preheating the metal to a desired temperature before it is worked. The forging process is different from the casting and foundry processes, as metal used to make forged parts is never melted and poured.
Primary Metals Products Manufacturing.	332618	Establishments primarily engaged in manufacturing products such as fabricated wire products (except springs) made from purchased wire. These facilities also manufacture steel balls; nonferrous metal brads and nails; nonferrous metal spikes, staples, and tacks; and other primary metals products not elsewhere classified.
Valves and Pipe Fittings	332919	Establishments primarily engaged in manufacturing metal valves and pipe fittings; flanges; unions, with the exception of purchased pipes; and other valves and pipe fittings not elsewhere classified.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be effected by this action. For descriptions of the North American Industry Classification System (NAICS) codes, you can view information on the U.S. Census site at *http://www.census.gov/epcd/ec97brdg*. To determine whether your facility would be regulated by this action you should examine the applicability criteria in the final rule (40 CFR 63.11514, "Am I subject to this subpart?"). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as

listed in 40 CFR 63.13 of subpart A (General Provisions).

B. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through EPA's Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by September 22, 2008. Under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Section 307(d)(7)(B) of the CAA further provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

II. Background Information for This Final Rule

Section 112(d) of the CAA requires us to establish national emission standards for hazardous air pollutants (NESHAP) for both major and area sources of hazardous air pollutants (HAP) that are listed for regulation under CAA section 112(c). A major source emits or has the potential to emit 10 tons per year (tpy) or more of any single HAP or 25 tpy or more of any combination of HAP. An area source is a stationary source that is not a major source.

Section 112(k)(3)(B) of the CAA calls for EPA to identify at least 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. EPA implemented this provision in 1999 in the Integrated Urban Air Toxics Strategy, (64 FR 38715, July 19, 1999). Specifically, in the Strategy, EPA identified 30 HAP that pose the greatest potential health threat in urban areas, and these HAP are referred to as the "30 urban HAP." Section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. We selected these nine source categories for regulation based on these required analyses. We then implemented these requirements through the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999) and subsequent updates to the source category list.

Under CAA section 112(d)(5), we may elect to promulgate standards or requirements for area sources "which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants." As explained in the preamble to the proposed NESHAP, we are issuing standards based on generally available control technology (GACT).

We are issuing these final national emission standards in response to a court-ordered deadline that requires EPA to issue standards for 11 source categories listed pursuant to section 112(c)(3) and (k) by June 15, 2008 (Sierra Club v. Johnson, no. 01–1537, D.D.C., March 2006). We have already issued regulations addressing one of the 11 area source categories. See regulations for Wood Preserving (72 FR 38864, July 16, 2007.) Other rulemakings will include standards for the remaining source categories that are due in June 2008.

III. Summary of Major Changes Since Proposal

A. Applicability

In response to comments, we made several changes to clarify the applicability of this final rule. Specifically, we have revised the definition of metal fabrication and finishing HAP (MFHAP) to mean any compound of cadmium, chromium, lead, manganese, and nickel. We also clarified throughout this final rule that this final rule applies only to area sources in the nine source categories that use or have the potential to emit MFHAP.[b] In addition, we have revised the definition of MFHAP to clarify that material that "contains" MFHAP means a material containing one or more MFHAP as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material. Any material that does not contain cadmium, chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), and does not contain manganese in amounts greater than or equal to 1.0 percent by weight (as the metal), is not considered to be a material containing MFHAP. We have also added language clarifying that the rule does not apply to military installations, NASA and National Nuclear Security facilities, and aerospace facilities.

B. Compliance Dates

We made changes to the compliance dates of this final rule. Specifically, we have extended the two-year compliance period to three years for existing affected sources. We have also corrected errors in the compliance dates for new sources.

C. Standards and Compliance Requirements

In response to comments, we have made several changes to the standards for operations at the nine metal fabrication and finishing source categories, and more specific changes to the standards for abrasive blasting, painting, and welding.

[b] Note that the control devices and management practices that control and/or reduce emissions of MFHAP in this rule also control and/or reduce emissions of all HAP (including the additional metal HAP of arsenic, cobalt, and selenium, for example) that have the potential to be emitted, as those HAP are included in, or adsorbed or condensed onto, the PM. All potential metal HAP emissions are thereby controlled because the equipment standards and management practices in this rule control particulate matter (PM) as a surrogate for MFHAP and any other metal HAP (as listed above), that have the potential to be emitted, via these PM controls.

For all operations where the proposed rule required regularly scheduled sweeping, we have changed the requirement to take measures necessary to minimize excess dust.

For abrasive blasting, we have revised the rule text to clarify the requirements for objects greater than 8 feet in any dimension. These objects are allowed to be abrasive blasted without control devices, but sources must still comply with all applicable management practices for such operations and conduct visible emissions monitoring. We have also changed the requirements for outdoor abrasive blasting to remove the prohibition on blasting during wind events and on substrates with coatings containing lead.

For painting operations, in response to comments we have removed the VOHAP coating limit requirements. Also, we have revised the provisions regulating MFHAP emissions from painting so that sources in the Fabricated Structural Metal Manufacturing source category (Standard Industrial Classification (SIC) 3441, NAICS 332312) are only subject to the spray painting management practices (i.e., use of HVLP paint guns, painter training and certification, and spray gun cleaning requirements).

For welding, we have revised the rule to clarify that the management practices are to be implemented "as practicable," and in accordance with sound welding engineering principles, while maintaining required weld quality. We have also removed the requirement for specific control efficiency for welding fume control systems.

We have also changed the process by which facilities seek approval to use an alternative equipment standard other than those specifically listed in this final rule. In the proposal we indicated that facilities that would like to use equipment other than those listed must seek approval to do so pursuant to the procedures in § 63.6(g) of the General Provisions to part 63. We did not receive any comments on this part of the proposal, nor did any commenters identify any alternative equipment standards that are equivalent to those specified in this final rule. We believe that facilities should be able to request approval to use an alternative equipment standard, and therefore, we have identified two different options available to facilities that would like to use alternative equipment that achieves at least equivalent MFHAP emission reductions as the controls specified in this final rule: (1) Facilities may petition the Agency to amend this final rule pursuant to section 553(e) of the Administrative Procedure Act, or (2) facilities may work with state permitting authorities pursuant to EPA's regulations at 40 CFR subpart E ("Approval of State Programs and Delegation of Federal Authorities"). Subpart E implements section 112(l) of the CAA, which authorizes EPA to approve alternative state/local/tribal HAP standards or programs when such requirements are demonstrated to be no less stringent than EPA promulgated standards. We believe that these options are more appropriate mechanisms for area sources subject to section 112(d)(5) rules to obtain approval of alternative equipment standards.

In response to comments, we have also made several changes to the compliance requirements. We eliminated the visual determination of fugitive emissions requirements for dry abrasive blasting performed in vented chambers, dry grinding and dry polishing with machines, and machining. We have maintained the visual determination of fugitive emissions requirement for abrasive blasting of objects greater than 8 feet in any dimension performed without the use of a control device. We have changed the graduated schedule for visible emissions testing to allow for quarterly testing after three months of successful monthly tests (i.e., tests where no visible emissions are detected). We have also removed the visual emissions determination requirements for smaller welding operations that annually use less than 2,000 pounds of welding rod containing one or more MFHAP.

D. Reporting and Recordkeeping Requirements

We have revised § 63.11519, "What are my notification, reporting, and recordkeeping requirements?" of this final rule to add a requirement for submittal of annual certification and compliance reports (which were already required to be prepared and maintained on-site.) We have also corrected the submittal dates for the Initial Notification and Compliance of Notification Status reports.

E. Definitions

We have made several changes to the definitions in § 63.11522, "What definitions apply to this subpart?", of this final rule and have added definitions for other terms used in this final rule. We added definitions for control device, filtration control device, material containing MFHAP, military munitions, and quality control activities. We have revised the definitions of dry grinding and polishing with machines, facility maintenance, and MFHAP.

F. Other

We also corrected some typographical errors that appeared in various sections of the proposed rule.

IV. Summary of Final Standards

A. Do the final standards apply to my source?

This final rule (subpart XXXXXX) applies to new or existing affected metal fabrication and finishing area sources in one of the following nine source categories (listed alphabetically) that use or emit MFHAP: (1) Electrical and Electronic Equipment Finishing Operations; (2) Fabricated Metal Products; (3) Fabricated Plate Work (Boiler Shops); (4) Fabricated Structural Metal Manufacturing; (5) Heating Equipment, Except Electric; (6) Industrial Machinery and Equipment Finishing Operations; (7) Iron and Steel Forging; (8) Primary Metal Products Manufacturing; and (9) Valves and Pipe Fittings. A more detailed description of these source categories can be found in section II.B, above. If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions). Source categories affected by this final rule are not subject to the miscellaneous coating requirements in 40 CFR part 63, subpart HHHHHH, "National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources," for their operations subject to the requirements of this final rule. There potentially may be other operations at the facility not subject to the requirements of this final rule that are instead subject to subpart HHHHHH of this part.

B. When must I comply with these standards?

All existing area source facilities subject to this final rule will be required to comply with the rule requirements no later than July 25, 2011. New sources must comply with the requirements of this final rule by July 23, 2008 or start-up; whichever is later.

C. What processes does this final rule address?

There are five general production operations common to the nine metal fabrication and finishing source categories that can emit MFHAP. These five production operations are: (1) Dry abrasive blasting; (2) dry grinding and

dry polishing with machines; (3) machining; (4) spray painting; and (5) welding, which we have further differentiated into nine distinct metal fabrication and finishing processes.

For dry abrasive blasting operations, this final rule addresses three distinct types of blasting operations: (1) Those performed in completely enclosed chambers that do not allow any air or emissions to escape, (2) those performed in vented enclosures, and (3) those performed on objects greater than 8 feet in any dimension that are not performed in vented enclosures.

We identified three distinct types of spray painting operations that emit MFHAP: (1) Operations that spray paint objects less than or equal to 15 feet in any dimension where paint spray booths or spray rooms are commonly used; (2) operations that spray paint objects greater than 15 feet in any dimension for which paint spray booths or spray rooms are not used; and (3) spray painting operations in the Fabricated Structural Metal Manufacturing source category, which also do not use paint spray booths or spray rooms. The latter two types of processes that do not use spray booths or spray rooms were combined for applicability of this final rule. Therefore this final rule addresses: (1) Spray painting of objects, in general, and (2) spray painting of objects greater than 15 feet in any dimension or spray painting operations in the Fabricated Structural Metal Manufacturing source category.

For dry grinding and dry polishing with machines, machining, and welding, we did not observe any distinct differences that would warrant further distinguishing the operations into separate processes. Therefore, these three processes, combined with the three for dry abrasive blasting and the two for painting described above, results in eight total processes addressed by this final rule, as follows: (1) Dry abrasive blasting performed in completely enclosed and unvented blast chambers; (2) dry abrasive blasting performed in vented enclosures; (3) dry abrasive blasting of objects greater than 8 feet in any dimension that are not performed in vented enclosures; (4) dry grinding and dry polishing with machines; (5) machining; (6) control of MFHAP in the spray painting of objects in paint spray booths or spray rooms; (7) control of MFHAP in the spray painting of objects greater than 15 feet in any dimension, or spray painting operations in the Fabricated Structural Metal Manufacturing source category; and (8) welding.

D. What are the emissions control requirements?

The following is a description of the control requirements for the eight metal fabrication and finishing processes described above in section III.C of this preamble. The control requirements only apply when an operation is being performed that uses materials that contain or have the potential to emit MFHAP.[c] The definition of "containing" MFHAP is identical to the Occupational Safety and Health Administration (OSHA) definitions specified in 29 CFR 1910.1200(d)(4), where carcinogens are contained in quantities of 0.1 percent by mass or more, and 1.0 percent by mass or more for noncarcinogens, as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material. For MFHAP, this corresponds to materials that contain cadmium, chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), and manganese in amounts greater than or equal to 1.0 percent by weight (as the metal).

1. Standards for Dry Abrasive Blasting Performed in Completely Enclosed and Unvented Blast Chambers

Completely enclosed and unvented blast chambers are generally small "glove box" type dry abrasive blasting operations. Because there are no vents or openings in the enclosures, there are no emissions directly from the operation itself.

This final rule requires owners or operators of completely enclosed and unvented blast chambers to comply with the following two management and pollution prevention practices: (1) Minimize dust generation during emptying of the enclosure; and (2) operate all equipment used in the blasting operation according to manufacturer's instructions.

2. Standards for Dry Abrasive Blasting Performed in Vented Enclosures

This final rule requires owners or operators of affected new and existing dry abrasive blasting operations performed in vented enclosures to perform blasting with a control system that includes an enclosure as a capture device, and a cartridge, fabric, or HEPA filter as a control device to control particulate matter (PM) emissions, as a surrogate for MFHAP, from the process.

An enclosure is defined to be any structure that includes a roof and at least two complete walls, with side curtains and ventilation as needed to ensure that no air or PM exits the chamber while blasting is performed. Apertures or slots may be present in the roof or walls to allow for transport of the blasted objects using overhead cranes, or cable and cord entry into the blasting chamber.

This final rule also requires owners or operators of all affected new and existing dry abrasive blasting operations performed in vented enclosures to comply with the following three management and pollution prevention practices: (1) As practicable, take measures necessary to minimize excess dust in the surrounding area to reduce MFHAP emissions; (2) enclose abrasive material storage areas and holding bins, seal chutes and conveyors transporting abrasive materials; and (3) operate all equipment according to manufacturer's instructions.

3. Standards for Dry Abrasive Blasting of Objects Greater Than 8 Feet in Any Dimension

This final rule requires owners or operators of affected new and existing dry abrasive blasting operations that perform abrasive blasting on substrates greater than 8 feet in any dimension without control systems to comply with the following four management and pollution prevention practices to minimize MFHAP emissions from the processes: (1) Switch from high PM-emitting blast media (e.g., sand) to low PM-emitting blast media (e.g., crushed glass, specular hematite, steel shot, aluminum oxide), whenever practicable; (2) do not re-use the blast media unless contaminants (i.e., any material other than the base metal, such as paint residue) have been removed by filtration or screening so that the abrasive material conforms to its original size and makeup; (3) enclose abrasive material storage areas and holding bins, seal chutes and conveyors transporting abrasive materials; and (4) operate all equipment according to manufacturer's instructions. This final rule also requires that visible emissions monitoring be performed.

4. Standards for Dry Grinding and Dry Polishing With Machines

Dry grinding and dry polishing with machines operations often emit significant PM, which is a surrogate for MFHAP. Dry grinding and dry polishing with machines operations do not include dry grinding and dry polishing operations performed with hand-held or bench-scale devices.

This final rule requires owners or operators of affected new and existing

[c] See footnote (b) above that discusses the co-control of all HAP via control of MFHAP with the PM controls of this rule.

dry grinding and dry polishing with machines operations to capture PM emissions, as a surrogate for MFHAP, and vent the exhaust to a cartridge, fabric, or HEPA filter.

This final rule also requires owners or operators of affected new and existing dry grinding and dry polishing with machines operations to comply with the following two management and pollution prevention practices: (1) As practicable, take measures necessary to minimize excess dust in the surrounding area to reduce PM emissions; and (2) operate all equipment used in dry grinding and dry polishing with machines according to manufacturer's instructions.

5. Standards for Machining

The majority of the PM released by machining operations consists of large particles or metal shavings that fall immediately to the floor. Any MFHAP that is released would originate from the part or product being machined. Machining is totally enclosed and/or uses lubricants or liquid coolants that do not allow small particles to escape. This final rule requires owners or operators of affected new and existing machining operations to comply with the following two management and pollution prevention practices to minimize dust generation in the workplace: (1) As practicable, take measures necessary to minimize excess dust in the surrounding area to reduce PM emissions; and (2) operate equipment used in machining operations according to manufacturer's instructions.

6. Standards for Control of MFHAP From Spray Painting

This final rule requires new and existing spray painting affected sources to comply with two equipment standards: (1) Use of spray booths or spray rooms equipped with PM filters and (2) the use of low-emitting and pollution preventing spray gun technology. This final rule also requires two management practices associated with the spray gun technology: (1) Spray painter training; and (2) spray gun cleaning. The requirement for PM filters does not apply to spray painting of objects greater than 15 feet in any dimension and spray painting at Fabricated Structural Metal Manufacturing facilities not performed in spray booths, which are discussed separately in IV.D.7, below.

The following painting activities are not covered in this final rule:

(1) Paints applied from a hand-held device with a paint cup capacity that is less than 3.0 fluid ounces (89 cubic centimeters);

(2) Surface coating application using powder coating, hand-held, non-refillable aerosol containers, or non-atomizing application technology, including, but not limited to, paint brushes, rollers, hand wiping, flow coating, dip coating, electrodeposition coating, web coating, coil coating, touch-up markers, or marking pens;

(3) Any painting or coating that normally requires the use of an airbrush or an extension on the spray gun to properly reach limited access spaces; or the application of paints or coatings that contain fillers that adversely affect atomization with HVLP or equivalent spray guns, and the application of coatings that normally have a dried film thickness of less than 0.0013 centimeter (0.0005 in.).

Spray painting also does not include thermal spray operations, also known as metallizing, flame spray, plasma arc spray, and electric arc spray, among other names, in which solid metallic or non-metallic material is heated to a molten or semi-molten state and propelled to the work piece or substrate by compressed air or other gas, where a bond is produced upon impact. Thermal spraying operations at area sources are subject to the Plating and Polishing Area Source NESHAP, subpart WWWWWW of this part.

Spray Booth PM Control Requirement. This final rule requires the spray booths or spray rooms[d] of affected new and existing facilities to be fitted with fiberglass or polyester fiber filters or other comparable filter technology that has been demonstrated to achieve at least 98 percent control efficiency of paint overspray (also referred to as "arrestance"). As an alternate compliance option, spray booths or spray rooms can be equipped with a water curtain, called a "waterwash" or "waterspray" booth.

98 Percent PM Control Filter—For spray booths or spray rooms equipped with a PM filter, the procedure used to demonstrate filter efficiency must be consistent with the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Method 52.1, "Gravimetric and Dust-Spot Procedures for Testing Air-Cleaning Devices Used in General Ventilation for Removing Particulate Matter, June 4, 1992" (incorporated by reference, see § 63.14). The Director of the **Federal Register** approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the ASHRAE at 1791 Tullie Circle, NE. Atlanta, GA 30329 or by electronic mail at orders@ashrae.org. You may inspect a copy at the NARA. For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Compliance with the filter efficiency standard also can be demonstrated through data provided by the filter manufacturer. The test paint for measuring filter efficiency must be a high-solids bake enamel delivered at a rate of at least 135 grams per minute from a conventional (non-HVLP) air-atomized spray gun operating at 40 pounds per square inch air pressure (psi); the air flow rate across the filter shall be 150 feet per minute. Affected facilities may use published filter efficiency data provided by filter vendors to demonstrate compliance with the 98 percent efficiency requirement and would not be required to perform this measurement.

Waterwash spray booths or spray rooms—As an alternative compliance option, spray booths or spray rooms may be equipped with a water curtain that achieves at least 98 percent control of MFHAP. The waterwash or "waterspray" spray booths or spray rooms must be required to operated and maintained according to the manufacturer's specifications.

Spray Gun Technology Requirements. This final rule requires all affected new and existing facilities using spray-applied paints to use HVLP spray guns, electrostatic application, or airless spray techniques.

If you would like to use paint spray equipment that you believe is equivalent to HVLP spray guns, you must seek the appropriate approval, as explained above in section III.C. The method that you use to show the equivalency of the alternate spray equipment must conform with the California South Coast Air Quality Management District's "Spray Equipment Transfer Efficiency Test Procedure for Equipment User, May 24, 1989" and "Guidelines for Demonstrating Equivalency with District Approved Transfer Efficient Spray Guns, September 26, 2002" (incorporated by reference, see § 63.14).

The Director of the **Federal Register** approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the California South Coast Air Quality Management District Web site at

[d] The spray booth roof may contain narrow slots for connecting the parts and products to overhead cranes, or for cord or cable entry into the spray booth.

http://www.aqmd.gov/permit/docspdf/TransferEfficiencyTestingGuidelinesforHVLPEquivalency.pdf and *http://www.aqmd.gov/permit/docspdf/Spray-Eqpt-Trfr-Efficiency.pdf*. You may inspect a copy at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. The requirements of this paragraph do not apply to painting performed by students and instructors at paint training centers.

Spray Painting Training Requirements. This final rule requires all workers that perform spray painting at affected new and existing facilities to be trained, with certification made available that this training has occurred. The painters must be certified as having completed classroom or hands-on training in the proper selection, mixing, and application of paints. Refresher training must be repeated at least once every 5 years. These requirements do not apply to operators of robotic or automated surface painting operations. The initial and refresher training must address the following topics to reduce paint overspray, which has a direct effect on emissions reductions, as follows:

- Spray gun equipment selection, set up, and operation, including measuring paint viscosity, selecting the proper fluid tip or nozzle, and achieving the proper spray pattern, air pressure and volume, and fluid delivery rate.
- Spray technique for different types of paints to improve transfer efficiency and minimize paint usage and overspray, including maintaining the correct spray gun distance and angle to the part, using proper banding and overlap, and reducing lead and lag spraying at the beginning and end of each stroke.
- Routine spray booth and filter maintenance, including filter selection and installation.

For the purposes of the training requirements, the facility owner or operator may certify that their employees have completed training during "in-house" training programs. Also, facilities that can show by documentation or certification that a painter's work experience and/or training has resulted in training equivalent to the training described above are not required to provide the initial training required for these painters.

Spray painters at existing sources must be trained by the compliance date, or 180 days after hiring, whichever is later. Spray painters at new sources must be trained and certified no later than January 20, 2009, 180 days after startup, or 180 days after hiring, whichever is later. These training requirements do not apply to the students of an accredited surface painting training program who are under the direct supervision of an instructor who meets the requirements of this paragraph. The training and certification for this rule is valid for a period not to exceed 5 years after the date the training is completed.

Spray Gun Cleaning Requirements. This final rule requires all paint spray gun cleaning operations at affected new and existing facilities to be done with either non-HAP gun cleaning solvents, or in such a manner that an atomized mist or spray of spray gun cleaning solvent and paint residue is not created outside of a container that collects used gun cleaning solvent. Spray gun cleaning may be done, for example, by hand cleaning of parts of the disassembled gun in a container of solvent, by flushing solvent through the gun without atomizing the solvent and paint residue, or by using a fully enclosed spray gun washer. A combination of these non-atomizing methods above may also be used.

7. Standards for Control of MFHAP From Spray Painting of Objects Greater Than 15 Feet in Any Dimension and Spray Painting at Fabricated Structural Metal Manufacturing Facilities Not Performed in Spray Booths

This final rule requires owners or operators of new and existing spray painting affected sources which paint objects greater than 15 feet in any dimension and owners or operators of new and existing spray painting affected sources in the Fabricated Structural Metal Manufacturing source category, that are not performed in spray booths, to comply with an equipment standard, the use of low-emitting and pollution preventing spray gun technology. This final rule also requires two management practices: (1) Spray painter training and (2) spray gun cleaning. Paint operations that comply with these requirements do not need to comply with the PM filter requirements listed above for spray painting of objects in spray booths.

Sources subject to the MFHAP requirements from spray painting objects greater than 15 feet in any dimension must also meet the same requirements for spray gun technology standards, spray painting training requirements, and spray gun cleaning requirements as those specified above in IV.D.6 for the spray painting of objects in paint spray booths or rooms.

8. Standards for Welding

This final rule requires owners or operators of affected new and existing welding operations to minimize emissions of MFHAP by implementing one or more of the following management practices to be used as practicable, while concurrently maintaining the required welding quality through the application of sound welding engineering judgment:

(A) Use of welding processes with reduced fume generation capabilities (e.g., gas metal arc welding (GMAW)—also called metal inert gas welding (MIG));

(B) Use of welding process variations (e.g., pulsed GMAW), which can reduce fume generation rates;

(C) Use of welding filler metals, shielding gases, carrier gases, or other process materials which are capable of reduced welding fume generation;

(D) Optimize welding process variables (e.g., electrode diameter, voltage, amperage, welding angle, shield gas flow rate, travel speed) to reduce the amount of welding fume generated; and

(E) Use of a welding fume capture and control system, operated according to the manufacturer's specifications.

E. What are the initial compliance requirements?

To demonstrate initial compliance with this final rule, owners or operators of affected new and existing sources with dry abrasive blasting, machining, dry grinding and dry polishing with machines, spray painting, and welding operations must certify that they have implemented all required management and pollution prevention practices.

In addition, owners or operators of new and existing affected sources with spray painting operations that use or have the potential to emit MFHAP must also certify that they are in compliance with the following requirements: use of PM filters in spray booths or spray rooms; use of approved spray delivery and cleaning systems; and proper training of workers in spray painting application techniques.

F. What are the continuous compliance requirements?

There are continuous requirements for all affected processes in metal fabrication and finishing sources. There are also additional continuous compliance requirements for specific processes or groups of processes, as follows: visual emissions testing for dry abrasive blasting of objects greater than 8 feet in any dimension; PM control efficiency rating of filters used in spray painting objects in spray booths or spray

rooms for MFHAP control; and visual emissions testing for welding at facilities that use 2,000 pounds or more per year of MFHAP-containing welding rod (on a rolling 12-month average basis). These requirements are discussed in more detail below.

1. Continuous Compliance Requirements for All Sources

This final rule requires owners or operators of all affected new and existing sources to demonstrate continuous compliance by adhering to the management practices specified in this final rule and maintaining the appropriate records to document this compliance.

Owners or operators that comply with this final rule by operating capture and control systems must operate and maintain each capture system and control device according to the manufacturer's specifications. They also must maintain records to document conformance with this requirement and keep the manufacturer's instruction manual available at the facility at all times.

2. Visual Emissions Testing for Dry Abrasive Blasting of Objects Greater Than 8 Feet in Any Dimension To Determine Continuous Compliance

Visible Emissions Testing. For new and existing affected sources of dry abrasive blasting operations of objects greater than 8 feet in any dimension who comply with the provisions of § 63.11516(a)(3), "What are my standards and management practices?", this final rule requires visible emissions testing to demonstrate continuous compliance with management and pollution prevention practices intended to reduce emissions of PM, as a surrogate for MFHAP.

The affected sources of dry abrasive blasting of objects greater than 8 feet in any dimension must perform visual determinations of fugitive emissions, according to the graduated schedule described below, using EPA Method 22 (40 CFR part 60, appendix A–7) for a period of 15 continuous minutes at the fence line or property border nearest to the outdoor abrasive blasting operation, or at the primary vent, stack, exit, or opening from the building for indoor blasting operations. The presence of visible emissions must be noted if any emissions are observed for more than a total of 6 minutes during the 15-minute period. In case of failure in any Method 22 test, immediate corrective action is required to reduce or eliminate the visible emissions. The affected source is then required to perform more frequent visible emissions testing, as described in the graduated schedule below.

Graduated Testing Schedule. The graduated schedule for continuous compliance with visible emissions testing for this rule, which progresses from daily to weekly to monthly to quarterly testing, is as follows.

Affected sources of dry abrasive blasting of objects greater than 8 feet in any dimension are required to be tested daily for visible emissions with Method 22 for 10 consecutive days that the source is in operation. If visible emissions are not observed during these 10 days, the affected source can be tested once every 5 consecutive days (weekly) that the source is in operation. If no visible emissions are observed during these four consecutive weekly Method 22 tests, the affected source can be tested once per consecutive 21 days (month) of operation. If no visible emissions are observed during three consecutive monthly Method 22 tests, the affected source can be tested once per consecutive three months of operation (quarterly). If any visible emissions are observed during the weekly, monthly, or quarterly testing, the affected source must resume visible emissions testing on the more frequent schedule, *i.e.* , weekly visible emissions testing is increased to daily, monthly testing is increased to weekly, and quarterly testing is increased to monthly.

3. Tests for Spray Painting for MFHAP Control To Determine Continuous Compliance

Affected new and existing facilities that perform spray painting must ensure and certify that: (1) All new and existing personnel, including contract personnel, who spray-apply surface paints with MFHAP are trained in the proper application of surface paints; (2) all spray-applied paints with MFHAP are applied with a HVLP spray gun, electrostatic application, airless spray gun, or equivalent; (3) emissions of MFHAP are minimized during mixing, storage, and transfer of paints; and (4) paint and solvent lids are kept closed when not in use.

In addition, for spray painting objects less than or equal to 15 feet in any dimension (except for spray painting affected sources in the Fabricated Structural Metal Manufacturing source category), owners or operators of affected processes must ensure and certify that paint spray booths or spray rooms are fitted with fiberglass or polyester fiber filters or other comparable filter or waterspray technology that can be demonstrated to achieve at least 98 percent control efficiency of the MFHAP in the paint.

4. Visual Emissions Testing for Welding To Determine Continuous Compliance

For new and existing affected sources with welding operations that use 2,000 pounds or more per year of MFHAP-containing welding rod (on a rolling 12-month average basis), this final rule requires visible emissions testing from a vent, stack, exit, or opening from the building containing the welding metal fabrication and finishing operations to demonstrate continuous compliance with the emissions standards in this rule, which are expressed as management practices and equipment standards. This testing has a three-tier compliance structure.

Tier 1. The first tier for welding compliance requires visual determinations of fugitive emissions using EPA Method 22 and allows the same graduated testing schedule described above in section III.F.2 for dry abrasive blasting of objects 8 feet or more in any dimension, which includes provisions for reducing the frequency of the Method 22 tests when no visible emissions are observed in consecutive time periods of operation. If no visible emissions are found, no corrective action is required.

If visible emissions are present during any Method 22 test, immediate corrective action will be required that includes inspection of all fume sources and control methods in operation, and documentation of the visual emissions test results. In this instance, the graduated schedule requires the affected source to resume visible emissions testing in the previous, more frequent schedule, i.e., weekly visible emissions testing is increased to daily, monthly testing is increased to weekly, and quarterly testing is increased to monthly.

Tier 2. The second tier for welding compliance must be implemented if visible emissions are detected for the second time in any consecutive 12-month period. The second tier requires corrective action and documentation of the detection of visible emissions and the corrective action taken. Corrective action must take place immediately after the failed Method 22 test. In addition, the second tier for welding compliance requires a facility to perform a visual determination of emissions opacity using EPA Method 9 (40 CFR part 60, appendix A–4) within 24 hours of the failed Method 22 test. In EPA Method 9, the average of 24 15-second intervals of opacity observation is determined, producing a total of 360 seconds or 6

minutes of opacity observation or 6-minute average opacity.

If in the second tier tests using Method 9 the average of the 6-minute opacities is determined to be 20 percent or less, implementation of Method 9 testing is required with a graduated schedule of reduced frequency like that used for the Method 22 tests, described above in section III.F.2, from daily to weekly to monthly to quarterly for consecutive successful tests. If opacity continues to be less than or equal to 20 percent and, pursuant to the graduated schedule the Method 9 testing for the welding processes is able to be reduced to once a month, the facility would have the choice of switching back to performing Method 22 tests on a monthly basis. Alternatively, the facility could choose to continue performing monthly Method 9 tests. With either test method, the facility can reduce to quarterly testing if there are no exceedences in three consecutive monthly tests.

If the average of the 6-minute opacities is determined to be greater than 20 percent in the Method 9 tests in the second tier, the third tier of welding compliance requirements is required, as described below.

Tier 3. The third tier for welding compliance includes the development and implementation of a Site-specific Welding Emissions Management Plan (SWMP) within 30 days and submittal of the SWMP to the delegated authority. The SWMP must be kept at the facility in a readily accessible location for inspector review. Also, the facility must report any exceedence of the 20 percent opacity limit on an annual basis along with their annual certification and compliance report.

The purpose of the SWMP is to ensure that no visible emissions occur in the future from this process, as determined by EPA Method 22 tests or 20 percent opacity or less by EPA Method 9. Application of the SWMP may involve more effective implementation of the management and pollution prevention practices, beyond the levels already in place at the facility, or, as a final option, the use of capture equipment and control devices. During the development of the SWMP, daily Method 9 tests are required to continue to be performed, according to the graduated schedule. The SWMP must be updated after any failures to meet 20 percent or less opacity as determined by Method 9. If opacity continues to be 20 percent or less and Method 9 testing of the welding processes at the facility falls to once a month, according to the graduated testing schedule, the facility will have a choice of changing to monthly Method 22 tests or remaining with monthly Method 9, as above. The SWMP must be updated annually and include revisions to reflect any changes in welding operations or controls at the facility.

The SWMP must address the following: the type(s) of welding operation(s) currently used at the facility; the measures used to minimize welding fume at each of type of welding operation or each welding station; and procedures used by the facility to ensure that these measures are being implemented. No outside consultants or professional engineer certification is required or necessary to prepare the SWMP.

G. What are the notification, recordkeeping, and reporting requirements?

The affected new and existing sources are required to comply with certain requirements of the General Provisions (40 CFR part 63, subpart A), which are identified in Table 2 of this final rule. Each new source is required to submit an Initial Notification no later than 120 days after initial startup or November 20, 2008, whichever is later. Existing affected sources must submit the Initial Notification no later than July 25, 2011. Notification of Compliance Status reports are required to be submitted according to the requirements in 40 CFR 63.9 in the General Provisions no later than 120 days after the applicable compliance date. The affected source is required to prepare and submit an annual certification and compliance status report. If there are any exceedences during the year, the facility must submit this annual certification and compliance report with any exceedence reports prepared during the year. The exceedence reports must describe the circumstance of the exceedence and the corrective action taken.

Facilities also are required to maintain all records that demonstrate initial and continuous compliance with this final rule, including records of all required notifications and reports, with supporting documentation; and records showing compliance with management and pollution prevention practices. Owners and operators must also maintain records of the following, if applicable: date and results of all visual determinations of fugitive emissions, including any follow-up tests and corrective actions taken; date and results of all visual determinations of emissions opacity, and corrective actions taken; and a copy of the SWMP, if it is required.

V. Summary of Comments and Responses

We received a total of 24 comments on the proposed NESHAP from industry representatives, trade associations, federal and state agencies, and the general public during the public comment period. Sections V.A through V.F of this preamble provide responses to the significant public comments received on the proposed NESHAP.

A. Applicability

Comment: Several commenters expressed concern regarding potential overlap between the applicability of this subpart (XXXXXX) and other part 63 NESHAP. One commenter said that EPA should clarify that the proposed rule does not apply to "dry grinding and dry polishing with machines" affected sources that are also subject to the proposed area source standards for plating and polishing operations, subpart WWWWWW. Commenters also indicated that there appeared to be overlap with Paint Stripping and Miscellaneous Surface Coating NESHAP, subpart HHHHHH, as there was overlap in the potentially applicable NAICS codes provided in the preambles. The commenter said that EPA should clarify that the rule does not apply to metal fabrication and finishing operations that are subject to a major source NESHAP, in particular the Aerospace Manufacturing NESHAP (subpart GG).

Response: Operations at a facility in one of the nine area source categories specifically listed in § 63.11514, "Am I subject to this subpart?", specifically paragraphs (a)(1) through (9), are subject to this final rule. Each of these area source categories is characterized by the descriptions provided in Table 1 in section I.A of this preamble. The miscellaneous surface coating requirements in subpart HHHHHH are more generic regulations that apply to processes at many different types of facilities. The specificity regarding the applicability of this final rule overrides the more generic miscellaneous coating regulation in subpart HHHHHH, mainly because it is specified as such in subpart HHHHHH. In other words, if a facility is in one of the nine area source categories included under this final rule, it is not subject to any other area source regulation for the operations regulated by this final rule: abrasive blasting, dry grinding and dry polishing with machines, machining, spray painting, and welding.

On the other hand, operations addressed by the Plating and Polishing NESHAP (subpart WWWWWW), such

as dry mechanical polishing operations performed after plating to complete the plating processes, and thermal spraying are subject to subpart WWWWWW. Therefore, any area source facilities that conduct polishing after plating or thermal spraying would be subject to subpart WWWWWW for their plating and polishing operations. However, the MFHAP control requirements for dry polishing with machines are identical between subpart WWWWWW for "dry mechanical polishing," and this final rule for "dry polishing with machines." The recordkeeping and reporting requirements are also the same between the two rules for polishing operations. At the time of this final rule, we were not aware of any overlap of facilities between these two area source rules, but since there may be sources in the future where there is an overlap, we leave open the possibility of the applicability of both rules.

With regard to the comment related to the major sources subject to the Aerospace NESHAP, we would point out that (1) Aerospace facilities would not be included under any of the nine source categories subject to this final rule, and (2) major sources are not subject to this final rule, as this final rule applies only to area sources.

Comment: Other commenters more specifically addressed the potential overlap between the Nine Metal Fabrication and Finishing Area Source Category rule and subpart HHHHHH, Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources NESHAP. The commenters noted that the proposed rule indicated that facilities covered by the proposed rule would be exempt from subpart HHHHHH. However, they said since subpart HHHHHH is already final, permitting authorities cannot exempt facilities from it merely on the basis of a subsequent proposed regulation, such as the metal fabrication NESHAP. One commenter recommended that EPA reverse the applicability and state that facilities subject to and complying with the requirements of subpart HHHHHH would be considered in compliance with the MFHAP provisions for painting operations under this metal fabrication NESHAP. The commenter said that facilities would still be required to comply with other provisions that are not covered under subpart HHHHHH.

Response: While we understand the potential confusion between the applicability of these two area source regulations, coating operations at a facility in one of the nine source categories specifically listed in § 63.11514, "Am I subject to this subpart?", specifically paragraphs (a)(1) through (9), are subject to this final rule and not subpart HHHHHH (the Paint Stripping and Miscellaneous Surface Coating Operations Sources NESHAP). We believe that the simplicity of having all affected sources at a single facility in one of these nine metal fabrication and finishing area source categories subject to a single subpart is better in the long term. Further, subpart HHHHHH was promulgated on January 9, 2008, and its compliance date for existing sources is not until January 10, 2011. We believe that any short term permitting complexities that have arisen in the five or six months between promulgation of the final Paint Stripping and Miscellaneous Surface Coating NESHAP and the Nine Metal Fabrication and Finishing Area Source Category NESHAP can be addressed in the two and one-half years before their compliances dates. Therefore, we did not make changes in accordance with the commenter's recommendation.

Comment: One commenter requested clarification of potential overlap of the metal fabrication rule and subpart HHHHHH. They note that the applicability section of the proposed rule states that if a facility is "subject to" the provisions of this final rule, it is not subject to subpart HHHHHH, the Miscellaneous Surface Coating Operations Rule. The commenter interprets this to mean that if a facility is in one of the nine source categories covered by this final rule, it is "subject to" this final rule, even though an exception in the rule may exempt it from one or more of the rule's requirements. Thus, according to the commenter, if the facility is not required to comply with the standards for spray painting under this final rule, it is also not subject to subpart HHHHHH.

Response: We agree with the commenter's analysis. As noted above, facilities in one of the nine area source categories subject to this final rule are not subject to the miscellaneous coating requirements of the Paint Stripping and Miscellaneous Surface Coating Operations Sources NESHAP (subpart HHHHHH) because it is stated as such in the subpart HHHHHH rule. In addition, if facilities in one of the nine area source categories subject to this final rule use paints that do not contain MFHAP, they are not subject to the painting requirements in this final rule. The fact that subpart HHHHHH also has the same MFHAP criteria for determining applicability of that rule's painting requirements is not relevant to the applicability question.

Comment: One commenter stated that the mass balance necessary to determine the amount of PM emissions from forging operations which escape the building is not feasible. They suggested that the forging industry should not be included in the standard as a result.

Response: For forging operations, the only emissions measurement necessary is for determination of area source status for the facility as a whole, which is in terms of HAP emissions and not PM. Further, no mass balances are required for PM or MFHAP emissions from any affected sources covered by the rule, including forging facilities.

Comment: Several commenters requested that maintenance activities, and research and development operations be excluded from the rule. Specifically, two commenters recommended welding and machining/grinding performed for maintenance should be excluded, and stick welding performed for maintenance was specifically mentioned in another instance. Another commenter requested that the fabrication of unique pieces of process equipment or materials handling equipment be excluded. One of the commenters also requested an exemption for research and development operations. Another requested an exemption for quality assurance/quality control operations and training centers. Alternatively, they requested that training centers be added to the definition of research and laboratory activities. They claimed that this exemption is necessary to cover trade schools and other academic centers of learning, as well as industrial training facilities, many of which will have to intensify their operations solely as a result of this rule's training requirements.

Related to these comments, two commenters requested changes to the definition of "facility maintenance". One commenter requested that the definition from the Paint Stripping and Miscellaneous Surface Coating Operations NESHAP be used, specifically that the following phrase: "Facility maintenance includes the application of coatings to stationary structures or their appurtenances at the site of installation, to portable buildings at the site of installation, to pavements, or to curbs." Another commenter proposed that EPA revise the definition of "facility maintenance" to clarify that infrastructure includes process and control equipment.

Response: Research and laboratory facilities, equipment repair operations, and facility maintenance were excluded from the proposed rule because emissions from these activities were not part of the 1990 inventory. Specifically, § 63.11514(e) of § 63.11514, "Am I subject to this subpart?", states: "This

subpart does not apply to research or laboratory facilities, as defined in section 112(c)(7) of the CAA." Additionally, § 63.11514(f) states: "This subpart does not apply to tool or equipment repair operations, or facility maintenance as defined in § 63.11522, "What definitions apply to this subpart?". We received no adverse comment regarding whether the nine listed area source categories included these activities, and we therefore did not make changes to this final rule.

We agree with the commenter that it is appropriate to also exclude quality control activities since, based on reasonable assumptions, we believe that emissions from these activities were not part of the 1990 inventory. Therefore this final rule clarifies that the emission control requirements do not apply to these activities. We have also added a definition of quality control activities that is based on the definition in the Paint Stripping and Miscellaneous Surface Coating Operations Sources NESHAP (subpart HHHHHH).

With regard to the definition of facility maintenance, the language regarding stationary structures or appurtenances was already in the proposed rule. We did clarify that facility maintenance includes work on process and control equipment.

Finally, we did not add an exclusion for training centers as the commenter suggested, nor did we add "training center" into the definition of research and development activities. While the commenter is correct that the requirements of this rule will result in increased training needs, the examples that they provided (trade schools, academic centers of learning, industrial training facilities) would not be subject to this rule as they are not in one of the nine area source categories covered, since their primary business is not in the fabrication or finishing of metal products.

Comment: Two commenters recommended the addition of language that EPA has included in several other rules to prevent surface coating operations on military installations from being subject to multiple rules.

Response: While the operations covered by the rule may be performed at military installations, the applicability of the rule is specific to the nine metal fabrication area source categories, as specified in § 63.11514, "Am I subject to this subpart?". In order to make this clear with regard to military operations, paragraphs have been added to § 63.11514 that specify that this subpart does not apply to military operations or the production of military munitions. In addition, consistent with subpart HHHHHH, we have also clarified that these provisions do not apply to NASA and National Nuclear Security facilities.

Comment: Two commenters requested clarification that although their facilities may perform some metal fabrication and finishing operations, since their facilities are not primarily engaged in any of the nine source categories identified in the rule, they are not subject to the provisions of the rule.

Response: The commenter is correct. If the primary activities of their facilities do not place them in one of the identified source categories, they are not subject to the rule. To clarify this issue, we have added a definition to the rule for "primarily engaged", as follows: "Primarily engaged means the manufacturing, fabricating, or forging of one or more products listed in one of the nine metal fabrication and finishing source categories described in Table 1, "Description of Source Categories Affected by this Subpart," represents at least 50 percent of the production at a facility, where production quantities are established by the volume, linear foot, square foot, or other value suited to the specific industry." This definition is consistent with the descriptions provided above in section I.A, "Does this action apply to me?". It is also consistent with the basis of the listing of the source categories in the 1990 air toxics inventory.

Comment: Several commenters opposed the requirements in the proposed rule because they felt these requirements were not justified by the environmental benefits. One commenter questioned the justification for the rule, stating that the imposition of significant costs for additional control, monitoring, recordkeeping and reporting obligations, with no corresponding environmental benefit is unwarranted and unduly burdensome. Similarly, another commenter stated that the proposed NESHAP creates an unjustifiable administrative burden for many manufacturers, disproportionately burdening smaller operations that would have *de minimis* emissions. According to the commenters, small businesses which have never before been subject to a NESHAP would be required to submit notifications, reports, and keep records needed to demonstrate compliance with the rule. These commenters believe that EPA should not require small businesses to comply with such administrative requirements because of the negligible risk they believe are posed by these small businesses with marginal emissions. Still another commenter opposed the proposed rule because they believed it would further undermine the climate of business certainty necessary for manufacturers to comply with rational federal regulations that balance economic growth and environmental protection. The commenter said that EPA seeks to impose a real compliance burden that will achieve no clear environmental objective.

Several commenters recommended that EPA consider *de minimis* exemptions or thresholds for small operations or operations emitting very small amounts of MFHAP which would be heavily impacted by the rule, but result in only small emissions reductions. Two commenters specifically requested exclusions of machining and grinding operations, and operations which are already controlled.

Response: These nine metal fabrication and finishing area source categories are area source categories that are needed to meet the CAA section 112(c)(3) requirement that we subject to regulation the area source categories representing 90 percent of the emissions of cadmium, chromium, lead, manganese and nickel. See section 112(c)(3). We recognize that these nine metal fabrication and finishing area source categories are comprised of a large number of relatively small facilities. Although area sources individually may be considered low-emitting sources, collectively, they are not. The commenters' suggestions do not take into account our requirement under section 112(c)(3). As discussed above, we previously determined that we need these nine area source categories to fulfill EPA's obligation under this requirement, which provides that EPA regulate area sources accounting for 90 percent of the emissions of the 30 urban HAP.

However, in developing this final rule, we attempted to further reduce the burden, especially on small facilities, while ensuring that this final rule includes sufficient requirements for ensuring compliance. We have incorporated the following changes in this final rule to reduce the burden: Reducing the number of operations that are required to do monitoring from five to two operations (if present); further reducing the requirement for monitoring by excluding from the monitoring requirement any facility with welding operations that use less than 2,000 pounds per year of welding rod containing MFHAP; reducing the frequency of monitoring to quarterly for affected operations that do not have visible emissions or opacity exceedences; specifying that this final rule does not apply to material that contains MFHAP in quantities less than

0.1 percent for carcinogens (which includes cadmium, chromium, nickel, and lead), or less than 1.0 percent for carcinogens (which includes manganese). In addition, we are planning various outreach activities specifically for this industry to help affected facilities comply with this final rule to further reduce the overall burden.

Comment: The criteria in § 63.11514, "Am I subject to this subpart?", specifically paragraph § 63.11514(a), states that you are subject to this subpart "if you own or operate an area source of MFHAP." The commenter indicated that this implies that facilities within the scope of the proposed rule could have emissions other than MFHAP. Since there is no limitation on the size of sources subject to the proposed rule, the proposed language leaves open the possibility that a major source of HAP, but not of MFHAP, could be subject to the rule if the MFHAP emissions do not exceed the major source threshold.

Response: We acknowledge the awkward wording referred to by the commenter and have made changes to make it clear that the regulation applies to sources that are area sources for HAP.

Comment: One commenter suggested that in determining the applicability of the proposed rule, a source should only be considered to be engaged in metal fabrication or finishing operations if it manufactures a finished and assembled product. They suggested that rather than simply referencing applicable source categories and included NAICS codes, "metal fabrication or finishing source categories" should be unambiguously defined as "operations described in Table 1 to this subpart that are assembly operations that purchase cast metal parts (no casting on site), perform various finishing operations, and then assemble their products, with the exception of iron and steel forging."

Response: While we appreciate the commenter's attempt to further clarify the applicability provisions of the rule, we do not believe that this language captures the basis of the listing of the source categories in the 1990 inventory as do the descriptions in Table 1 of the proposed and final rules. Therefore, we have declined to incorporate the commenter's suggested language in our definitions. While some of the activities described in Table 1 do produce a finished and assembled product, some of them do not. However, as a result of other comments, we have revised the description of affected sources to only include facilities that are "primarily engaged" in the indicated activities, as discussed above. We believe that this change should sufficiently clarify the applicability of this final rule.

Comment: One commenter stated that his organization, which represents a subset of the Fabricated Structural Metal Manufacturing source category, namely, "Structural Steel Fabricators in Non-urban, Non-stainless, Non-galvanizing Fully-enclosed Shop (NAICS 332312)," should be excluded from this rule because their products are covered by permit under the Architectural Surface Coating rule under the CAA. Also, the spray paint booths or spray rooms required by this final rule are infeasible and cost-prohibitive, and the VOHAP calculations are inapplicable and unmanageable compared to previous EPA approaches to calculating VOHAP content of paints. In addition, the commenter stated that this subset of the source category is not like the other categories, because facilities in NAICS 332312 only do some of the operations regulated in the proposed rule and some operations do not use or emit the MFHAP. Therefore, this source category should be separately regulated and not included with the other eight source categories in this rule.

Response: In regard to the conflict of this rule alleged by the commenter with EPA's National VOC Emission Standards for Architectural Coatings (40 CFR part 59, subpart D), we clarify for the commenter that subpart D controls VOC emissions, as per CAA section 183(e), and only affects manufacturers, distributors, and importers of architectural coatings; users of the architectural coating products, therefore, are not regulated entities under CAA section 183(e). Subpart D also covers coatings intended for field application rather than coatings intended for shop or factory application. Therefore, the commenter is incorrect that this rule is in conflict with subpart D. Since this final rule removes the standards for VOHAP from spray painting operations, the issues raised with regard to VOHAP calculations are no longer relevant.

To address this and other commenters' concerns regarding the burden of compliance, we have revised this final rule so that if facilities do not emit or use materials containing MFHAP above specified levels, i.e., greater than or equal to 0.1 percent cadmium, chromium, lead, or nickel by weight (of the metal), or 1 percent manganese by weight (of the metal), then the requirements of this final rule do not apply. We have also reduced the monitoring requirement in this final rule so that only two types of operations will need to do monitoring, as compared to the previous five operations in the proposed rule: (1) Abrasive blasting with MFHAP performed on objects greater than 8 feet, and (2) welding operations performed with annual use of welding rod with MFHAP greater than or equal to 2,000 pounds. Under this final rule, affected facilities with annual use of welding rod with MFHAP less than 2,000 pounds are not subject to the visible emissions monitoring requirements.

In addition, we found through other comments we received that there is a unique feature of the facilities in the Fabricated Structural Metal Manufacturing source category (NAICS 332312), as the commenter has also noted, in regard to spray painting small objects less than or equal to 15 feet along with large objects greater than 15 feet in open areas and not enclosed in spray booths or spray rooms, as discussed below (under section V.E.4, Management Practices for MFHAP Control for Painting). Therefore, we have revised this rule to accommodate this process difference and removed the spray booth requirement.

Finally, based on our research for this rule that included site visits, surveys, and contacts with industry representatives, we believe that the operations in all the nine metal fabrication and finishing source categories are sufficiently similar to justify including all nine source categories in one rule, if the above-cited exception that accommodates the one significant difference is included.

B. Compliance Dates

Comment: Four commenters disagreed with the two-year compliance timeframe. They suggested that because of the large number of sources that state or local permitting agencies will need to identify and contact (many of whom are small businesses), and the potential need for sources to train painters and install necessary equipment, that three years is more typical and more appropriate.

Response: We agree with the commenters' reasoning, and have adjusted the compliance date accordingly.

Comment: One commenter from a regulatory assistance organization noted that the scheduling of the promulgation and compliance dates of this rule will make it difficult for them to provide outreach while commenting on the other EPA area source rules proposed or in development. They recommended adjusting the notification dates and other dates in this rule to avoid this conflict.

Response: While we appreciate the difficulty the commenter has in

managing these various activities, we have little latitude in shifting the promulgation date of this final rule since it is mandated by a court order. The notification and other dates in this rule are guided by the part 63 General Provisions. We have extended the compliance period to three years in this final rule to provide sufficient opportunity for facilities and organizations to prepare for compliance. We expect that this additional time will provide some relief to the commenter in their needs as well.

Comment: One commenter suggested that because of the necessity of arranging training, it will be very difficult for small facilities with painting operations to meet the compliance deadlines.

Response: The proposed rule would have required that, for existing sources, training would be completed by September 3, 2008. Upon reconsideration, we believe that having this training completed in advance of the compliance date is not necessary. Therefore, this final rule requires that training be complete by the compliance date. This will give facilities three full years to schedule and complete the training.

Comment: One commenter stated that new affected sources should be allowed 180 days after startup to demonstrate compliance, rather than 120 days, as proposed, to be consistent with other major and area source rules.

Response: The commenter is correct in that the notification of compliance status report is sometimes required by some 40 CFR part 63 major and area source rules to be submitted 180 days after the startup of new affected sources. However, there are also examples where these rules require this compliance notification 120 days after startup. Since there are no source tests that are required for this rule, we do not feel that an additional 60 days is necessary.

Comment: One commenter stated that there was no compliance deadline included in the proposed rule for a new affected source that starts up prior to the publication of this final rule.

Response: The commenter is incorrect. The proposed compliance dates at § 63.11515 "What are my compliance dates?", states: "[i]f you start up a new affected source after the date of publication of this final rule in the **Federal Register**, you must achieve compliance with the provisions in this subpart upon startup of your affected source." However, this text was incomplete and should have required new sources to comply with the requirements of this final rule by the date of publication of this final rule in the **Federal Register**, or upon start-up, whichever is later. This language has been corrected in this final rule.

C. Scope of Rule

Comment: Several comments were received expressing concern about how the proposed rule applied to the use of MFHAP. First, one commenter pointed out that the definition of MFHAP in the proposed rule is not consistent with definition in the proposal preamble. The preamble referred to MFHAP compounds, while the definition of MFHAP in the rule only lists the elements. The comments suggested adding "compounds of" to the definition.

Two commenters requested clarification that, for spray painting affected sources, EPA only intended to require the use of a spray booth and other work practices when the paint being sprayed contains MFHAP. If a fabricator uses paints containing MFHAP even once, the language of the regulation might require it to apply the management practices even when spraying non-MFHAP paints.

Two commenters recommended establishing threshold amounts for MFHAP in the same manner that the proposed rule did for VOHAP in paints. Specifically, they stated, for paints, the proposed rule required that you count each VOHAP that is measured to be present at 0.1 percent by mass or more for OSHA-defined carcinogens, as specified in 29 CFR 1910.1200(d)(4), and 1.0 percent by mass or more for other compounds.

Response: With regard to the definition of MFHAP, it was our intent that the rule apply to compounds containing these five metals, as noted by the commenter. Therefore, we have revised the definition of MFHAP in this final rule to include "any compound of the following metals: cadmium, chromium, lead, manganese, or nickel, or any of these metals in the elemental form, with the exception of lead," consistent with the HAP definitions in the CAA (section 112 (b)).

The proposed rule, in § 63.11514(a), "Am I subject to this subpart?", states that "(y)ou are subject to this subpart if you own or operate an area source that emits metal fabrication or finishing metal HAP (MFHAP), defined to be the compounds of cadmium, chromium, lead, manganese, and nickel, or an area source that emits VOHAP from spray painting operations, which performs metal fabrication or finishing operations in one of the nine source categories listed in paragraphs (a)(1) through (9) of this section." As discussed above, we have removed the requirements related to VOHAP. Therefore, the affected sources are equipment and activities necessary to perform the designated operations (abrasive blasting, machining, dry grinding and polishing, spray painting, and welding) which use or have the potential to emit MFHAP. It is our intent that any of these operations that ever use materials containing MFHAP, or that have the potential to ever emit MFHAP, are affected sources.

However, we have made a modification to the affected source definition in § 63.11514(b), "Am I subject to this subpart?", to add the concept of the use of "materials containing MFHAP", as opposed to just "MFHAP." We agree with the recommendation that OSHA-based thresholds are appropriate for defining whether a material "contains" MFHAP, since we believe that materials that contain MFHAP below these thresholds contain such very small amounts of HAP that they were not included in the 1990 inventory. For example, § 63.11514(b)(2) of this final rule states: "A machining affected source is the collection of all equipment and activities necessary to perform machining operations that uses materials containing MFHAP* * *," where "material containing MFHAP" is defined in § 63.11522, "What definitions apply to this subpart?", to be: "material that contains cadmium, chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), or contains manganese in amounts greater than or equal to 1.0 percent by weight (as the metal), as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material."

In addition, when operations are occurring at an affected source that does not use any materials containing MFHAP, we do not believe that the management practices to minimize MFHAP emissions need to be followed. While the commenter only raised this issue with respect to painting, we believe that it should be universally applicable to all types of affected sources. Therefore, we have made changes in § 63.11516, "What are my standards and management practices," of this final rule to make it clear that these requirements apply only when materials containing MFHAP are being used. For example, § 63.11516(a) of this final rule states the following: "Dry abrasive blasting standards. If you own or operate a new or existing dry abrasive blasting affected source you must comply with the requirements in paragraphs (a)(1) through (3) of this section, as applicable, for each dry

abrasive blasting operation that uses materials that *contain MFHAP* or have the potential to emit MFHAP. These requirements do not apply when abrasive blasting operations are being performed that do not use any materials containing MFHAP and do not have the potential to emit MFHAP."

Comment: One commenter recommended that EPA specify hexavalent chromium instead of using the general term "chromium." The general term "chromium" includes trivalent chromium, which is an important material used in small quantities for achieving certain metallic and pearlescent finishes; it has a relatively benign nature as compared to hexavalent chromium. Also, EPA used hexavalent chromium in their Urban HAP analysis in the Integrated Urban Air Toxics Strategy instead of total chromium.

Response: The CAA specifically lists "chromium compounds" as a hazardous air pollutant. In our original listing for the Urban Air Toxics Strategy (64 FR 38706, July 19, 1999), we listed "chromium compounds" as one of the Urban HAP targeted for the Integrated Urban Air Toxics Strategy. CAA section 112(c)(3) requires us to list source categories accounting for 90 percent of the emissions of each of the listed urban HAP, including chromium compounds. As explained above, we need the nine source categories at issue here to reach the 90 percent requirement in CAA section 112(c)(3) for chromium compounds.

The commenter is correct that trivalent chromium is relatively benign as compared to hexavalent chromium. The reason why we used hexavalent chromium in the Urban HAP analysis in the Integrated Urban Air Toxics Strategy was to prioritize and rank the sources of Urban HAP area source categories for regulation, for the exact reason that the commenter states. However, we always intended to use chromium compounds as the regulated pollutant since the listing of the categories was based on emissions of chromium compounds, not hexavalent chromium. Many of our control strategies for chromium and other metal HAP involve the use of PM as a surrogate for chromium and other metal HAP. These PM control strategies control all chromium compounds along with PM and other metal HAP, therefore the form of chromium would not change the type of PM control strategy we choose. The coating control strategies in this rule either control PM and other metal HAP along with chromium (for the case of PM paint booth filters required for spray painting) or reduce the total amount of coating used (and therefore the amount of PM and other metal HAP), through the use of HVLP spray technology, training, and management practices.

In summary, although we recognize the differences in the health effects of hexavalent and trivalent chromium, we are required to regulate chromium compounds from the nine source categories at issue in this rule.

Comment: Two commenters questioned whether the HAP reduction warrants the regulation. One commenter stated that MFHAP are present only in small amounts at the facilities it represents. Little PM leaves the building perimeters, and an even smaller percentage is MFHAP.

Response: As noted in the preamble to the proposed rule and reiterated above, section 112(k)(3)(B) of the CAA requires EPA to identify at least 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in urban areas. Section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. We determined that these nine metal fabrication and finishing area source categories are among the area source categories that we need to meet the section 112(c)(3) requirement to regulate area source categories representing 90 percent of the emissions of cadmium, chromium, lead, manganese and nickel. See section 112(c)(3).

We recognize that these metal fabrication area source categories are comprised of a large number of relatively small facilities. Although area sources individually may be considered low-emitting sources, collectively, they are not; therefore, we are issuing regulations for these source categories. However, as discussed above, we have attempted to minimize the burden on the affected facilities, especially small businesses, and have revised the requirements further in this final rule to further reduce the burden to small facilities.

We disagree with the commenter's statement that this rule will result in no environmental benefit. This final rule will help to ensure that future emissions will be limited to the same levels currently achieved. If the source categories were not regulated, as suggested by the commenter, there would be no such limit of future emissions from new facilities in the nine metal fabrication and finishing area source categories.

Comment: One commenter noted that in § 63.11514(b)(4), "Am I subject to this subpart?", the paragraph defining a spray painting operation includes those using paints containing VOHAP or MFHAP. The commenter stated that the standards outlined in § 63.11516(d) and (e), "What are my standards and management practices?", apply to all spray painting affected sources and thus do not specifically apply to sources that only emit MFHAP or VOHAP. The commenter recommended that the standards be rephrased so that paragraph (d) specifically states that it applies to sources of MFHAP and paragraph (e) to sources of VOHAP. Another commenter noted an error wherein § 63.11516(d) states: "If you own or operate a new or existing spray painting affected source as defined in § 63.11522, "What definitions apply to this subpart?". However, the definition of "spray painting affected source" is in § 63.11514(b)(4), "Am I subject to this subpart?", not in the "Definitions" section (§ 63.11522).

Response: The commenters are correct, in that the provisions in § 63.11516(d) and (e), "What are my standards and management practices?", are intended to apply only to operations using paints containing MFHAP. The rule text has been revised to reflect this. The standards for VOHAP from spray painting operations have been removed from this final rule.

D. Impacts of Rule

Comment: Two commenters suggested that the proposed rule will potentially affect many more small facilities than estimated by EPA. One commenter noted that "InfoUSA" (*http://www.infousa.com*) reports over 37,000 facilities with fewer than 100 employees and over 17,000 with fewer than 10 employees in the SIC codes corresponding to the Nine Metal Fabrication and Finishing Area Source Categories, versus the 5,800 facilities estimated in the proposal preamble. Another commenter stated that there are over 4,000 metal fabrication sources in Texas alone.

Response: Our estimate of the total number of affected facilities, and the number of small businesses, was based on the most recently available U.S. Economic Census (2002). We were able to obtain similar facility numbers using the cited web site, but have no explanation for the discrepancy between these two respected sources of information. However, we stand by the Census, which has the sole purpose of providing U.S. economic information, to obtain an estimate of the number of facilities in these source categories.

Comment: One commenter notes that the preamble states that 5,800 sources

will be regulated by this rule, of which 90 percent are small businesses. They say this is inequitable and places a considerable burden on small businesses.

Response: As explained above, we need to regulate these nine metal fabrication and finishing area source categories to meet the 90 percent requirement in section 112(c)(3) for emissions of cadmium, chromium, lead, manganese, and nickel. In developing the proposed rule, we attempted to minimize the burden on small businesses, while ensuring that the rule includes sufficient requirements for ensuring compliance. This final rule imposes no testing requirements, and we have eliminated the requirement to conduct visual emissions monitoring for some types of sources from that which was required in the proposed rule. With respect to recordkeeping, our understanding is that the required records are already maintained at most facilities as part of routine procedures. Therefore, the recordkeeping requirements do not represent any significant burden on these facilities.

Comment: Seven commenters stated that the estimated costs of the proposed rule are underestimated, and that $1,120 initially and $735 annually is not reflective of the actual cost to small businesses. They argue that the total number of labor hours is also not reflective of the time needed by small businesses to comply. According to the commenters, the number of hours needed to comply with the paperwork, training, monitoring and installation of upgraded equipment will exceed 80 hours the first year. They stated their belief that cost estimates using EPA's initial cost and hours pro-rated, will be over $3,700 per facility. According to the commenters, this does not include any capital costs needed to comply with the NESHAP and no consideration has been given to non-fiscal resources. The commenters argued that most companies will require outside consulting assistance to meet compliance, training, and record-keeping requirements. One commenter specifically mentioned the costs of obtaining Method 9 certification (and annual re-certification) for employees.

Response: We based those reporting and recordkeeping estimates of the burden on past experience with similar rules, and believe that they are reasonable. As noted in response to other comments, we have made several changes to this final rule to decrease the burden on all affected facilities. For example, we have eliminated the requirement to conduct visual emission observations from all sources except large welding operations and uncontrolled blasting operations on objects greater than 8 feet in any dimension. No capital costs are incurred as a result of this rule since all facilities are currently using the MFHAP control methods that the rule requires. Also, Method 9 is only required if an exceedence of Method 22 occurs twice and we do not expect this to occur for most facilities.

E. Management Practices

1. General

Comment: The management practices in the proposed rule for abrasive blasting, machining, and dry grinding and polishing included the requirement that affected sources "must keep work areas free of excess MFHAP material by sweeping or vacuuming dust once per day, once per shift, or once per operation, as needed depending on the severity of dust generation." Several commenters disagreed with these requirements. One commenter suggested that leaving dust on the floor may produce less airborne dust than frequent sweeping, which renders the dust airborne again. They also suggested that there may be worker safety issues related to sweeping in unsafe areas. Another commenter stated that the proposed rule would overlap with existing Federal and state programs and with jurisdiction of OSHA. They stated that by proposing to mandate that manufacturers "keep work areas free of excess dust by regular sweeping or vacuuming to control the accumulation of dust and other particles," and further giving a regulatory definition for what constitutes "regular vacuuming," EPA complicates manufacturers' efforts to comply with various federal and state worker safety regulations, but also mandates practices that most business owners either already undertake pursuant to existing law, and/or to maximize the health of their works. They stated their belief that this increases or duplicates regulatory burdens and best practices and hampers operational efficiency within manufacturing facilities. Further, this commenter said that mandating the frequency with which metal operations must sweep the floor of their factories will not help EPA fulfill its mandate to protect environmental and public health, since manufacturers already comply with these practices.

While these comments are related to the sweeping requirements for all sources, other commenters had more specific criticisms of these requirements as applied to outdoor blasting. These commenters noted that the requirements for sweeping and enclosure of storage areas and conveyors for outdoor abrasive blasting seem inappropriate for outdoor operations which are not themselves enclosed, and where the abrasive falls to the ground under the work pieces. They stated that making outdoor blasting operations "clear and enclose as you go" would be cost prohibitive.

These commenters provided a variety of suggestions. Some commenters requested removal of these requirements. Another commenter suggested that the term "if possible" be added to the management practice of sweeping outdoor areas, as they pointed out that an affected source may not be able to sweep or vacuum over unpaved surfaces or rock. One commenter said that EPA should reexamine the proposal and attempt to pinpoint real, potential gaps that may exist under existing regulatory programs rather than issue regulations that will cause overlaps and potential confusion, thereby undermining environmental compliance and industrial productivity. Finally, a commenter suggested a requirement for sweeping on a frequency determined by facility managers considering safety and emissions.

Response: The primary purpose of the management practices described by the commenters is to minimize the potential for fugitive emissions that occur due to the "stirring up" of MFHAP dust in the work area. We recognize that these practices would likely have a larger beneficial effect on the ambient air inside the facility than for outside the plant boundaries. We also recognize that these practices are commonly employed at these facilities to reduce worker exposure to these dusts, hence the inclusion of these practices as "generally available control technology." Our intention was to have these requirements work in concert with established plant practices and OSHA requirements. However, we understand how conflicts could result from the very prescriptive proposed requirements. We also recognize there could be situations where a requirement to sweep at least once per day could be more detrimental than beneficial. We do, however, continue to believe that it is important that owners and operators of these operations perform routine practices to reduce the possibility of fugitive MFHAP emissions due to accumulated dust in these work areas. Therefore, we did not take the one commenter's suggestion to completely eliminate these requirements. Rather, we have incorporated the recommendation of another commenter to make these sweeping/vacuuming requirements at

the discretion of the owner or operator of the affected source. Specifically, this final rule requires that affected sources "must take measures necessary to minimize excess dust to reduce emissions." This general requirement also applies to blasting that is conducted outdoors or indoors.

2. Abrasive Blasting

Comment: One commenter suggested that EPA revise § 63.11516(a), "What are my standards and management practices?", to take into account all possible abrasive blasting activities. They indicated that the proposed paragraph § 63.11516(a)(1) applied to dry blasting objects less than or equal to 8 feet in totally enclosed and unvented blast chambers, paragraph § 63.11516(a)(2) applied to dry blasting objects less than or equal to 8 feet in vented enclosures, and paragraph § 63.11516(a)(3) applied to dry blasting objects greater than 8 feet. They concluded that it appeared that EPA meant to draft this section so that paragraph (a)(3) applied to any size objects dry blasted outdoors. Also, they pointed out that there were no regulations that applied to dry blasting objects greater than 8 feet indoors. In this regard, the commenter stated that there appeared to be a typographical error in the second sentence of paragraph (a)(2). They indicated that it should be re-written to the following: "As an alternative, dry abrasive blasting operations for which the items to be blasted are equal to or less than 8 feet (2.4 meters) in any dimension, may be performed outdoors, subject to the requirements in paragraph (a)(3) of this section."

Response: Paragraph § 63.11516(a)(1), "What are my standards and management practices?", is specific to dry blasting of objects in totally enclosed and unvented blast chambers. While we would not expect that large objects would ever be blasted in a totally enclosed and unvented blast chamber, these provisions are applicable to any situation where an object is blasted in such a blast chamber. Therefore, we have corrected the title of the section in this final rule to state: "Standards for dry abrasive blasting performed in enclosed and unvented blast chambers."

The proposed standard in § 63.11516(a)(2), "What are my standards and management practices?", applied to blasting operations which have vents allowing any air or blast material to escape. This provision of the proposed rule was intended to encompass all blasting performed in vented blasting chambers, regardless of the size of the object being blasted. Therefore, the size of the material blasted has been removed from the title of the provision in this final rule so that the rule applies to objects of any size, as long as the objects are blasted in chambers vented to a filtration control device.

The only blasting operations (excluding those in enclosed *unvented* chambers) that may not be subject to the revised provisions of § 63.11516(a)(2), "What are my standards and management practices?" in this final rule, are operations where objects greater than 8 feet are being blasted. These operations may be performed indoors or outdoors, without a filtration control device. These operations are subject to the management practices in paragraph § 63.11516(a)(3). They are also subject to visual emissions testing requirements. In other words, we consider that the differences in the type of the process where large (*i.e.*, greater than 8 feet) objects are being blasted to warrant separate requirements for situations where blast chambers, vented or unvented, cannot be used.

Therefore, in this final rule, the title of paragraph § 63.11516(a)(1), "What are my standards and management practices?", has been changed to "Standards for dry abrasive blasting performed in totally enclosed and unvented blast chambers." Also, the title of paragraph § 63.11516(a)(2) has been changed to "Standards for dry abrasive blasting performed in vented enclosures". Paragraph § 63.11516(a)(3), "Standards for dry abrasive blasting of objects greater than 8 feet in any one dimension" has been amended to address blasting of objects greater than 8 feet in any one dimension, either indoors or outdoors, with operations performed in both blasting locations required to perform management practices and visible emissions monitoring.

Comment: One commenter questioned the mention of silica sand in the rule as an acceptable abrasive, noting OSHA regulations related to worker exposure to silicon dioxide (SiO_2) and dangers of silicosis.

Response: The commenter is mistaken that we recommend the use of sand or silica. The intent of this portion of the proposed rule was explicitly to limit emission of MFHAP by minimizing the use of high-PM generating blast media, such as sand. In this final rule, in § 63.11516 (a)(3)(i)(E), "What are my standards and management practices?", we say in this regard: "Whenever practicable, you must switch from high PM-emitting blast media (*e.g.*, sand) to low PM-emitting blast media (*e.g.*, crushed glass, specular hematite, steel shot, aluminum oxide), where PM is a surrogate for MFHAP."

Comment: One commenter asked that the proposed rule text be clarified to specify that the requirement in § 63.11516(a)(2)(ii)(B), "What are my standards and management practices?", for enclosure of conveyors only applies to conveyors used to transport blast media and debris, not those carrying the material to be blasted. Other commenters noted that the requirements for enclosure of storage areas and conveyors for outdoor abrasive blasting seemed inappropriate for outdoor operations which are not themselves enclosed, and they requested removal of these requirements.

Response: We agree with these comments and have revised the requirements in this final rule accordingly.

Comment: One commenter noted that § 63.11516(a)(3)(i)(E), "What are my standards and management practices?", states that no dry abrasive blasting shall be performed on substrates having paints containing greater than 0.1 percent lead. However, no test method is specified in the rule. Another commenter asked whether the prohibition of blasting of lead bearing paints only applies to outdoor activities or if it applies to indoor blasting as well.

Response: We have removed this requirement. We agree with the commenter that testing for lead in all painted substrates would impose an impractical burden. We believe that the required work practices will address emissions of lead and other MFHAP through reduction of PM emissions.

Comment: One commenter objected to the absolute prohibition of outdoor dry blasting during a wind event. They have several facilities in locations where these wind events are very common. If no visible emissions are detected at the facility fence line or property border or border, there should be no absolute prohibition of blasting during a wind event.

Response: We agree with the commenter. This final rule retains the provisions that require the determination of visible emissions at the fence line or property border. Therefore, we believe that the owner or operator of an abrasive blasting affected source can use their judgment whether a windy event would impact the visible emissions at the fence line or property border. Therefore, this prohibition of outdoor blasting during a wind event has been removed.

3. Dry Grinding and Polishing With Machines

Comment: Two commenters requested clarification that the grinding requirements do not apply to hand-held grinding equipment; one commenter requested that bench-scale equipment also not be included in the requirement since capture and control devices are not used in this situation.

Response: As evidenced by the name of the affected source (*i.e.*, dry grinding and dry polishing with machines), our intention was not to cover hand-held grinding or polishing, or bench-scale equipment. To make this clear, we have revised the definition of dry grinding and dry polishing with machines as follows: "Dry grinding and dry polishing with machine means grinding or polishing without the use of lubricating oils or fluids in fixed or stationary machines. Hand grinding and hand polishing, and bench-scale grinding and polishing are not included under this definition."

4. Painting for MFHAP Control

Comment: Two commenters stated that the requirement for spray booths or spray rooms for painting objects under 15 feet is excessively burdensome for facilities in the Fabricated Structural Metal Manufacturing source category (SIC 3441 and NAICS 332312). They indicated that custom paint work performed in this source category differs greatly from other industries, which they claim use assembly lines to manufacture and paint standard products with a minimum of variation. The commenters reported that these shops deal with large and small pieces, and the specifications often change with each job. They cited numerous significant logistical difficulties with implementation of paint booths or spray rooms, including issues associated with material movement, drying/curing time, shop size, and costs (production and equipment costs). Specifically, they noted: (1) Regardless of their size, the structural metal objects being painted are very heavy and typically must be moved with cranes; (2) there is a two to eight hour curing time for the paint to dry, during which the objects must be turned over to paint the other side; (3) moving the work pieces into and out of paint booths might add 25 percent to the cost; (4) the use of paint booths for some objects (regardless of the exact size cut-off) would require adding an entirely new process line incorporating the booths, which would take up large amounts of scarce space on the factory floor. One of the commenters also offered several reasons that the enclosure requirement is unlikely to have a significant positive impact on emissions from facilities in this SIC/NAICS code: (1) The paints used by facilities in the Fabricated Structural Metal Manufacturing source category do not contain high levels of metal HAP; (2) the facilities will be using spray guns meeting the standards of the proposed regulation; and (3) only a small percentage of the work pieces are under 15 feet. The commenter states that the minor emission reductions do not justify the high cost of creating an alternate paint process to comply, if such an alternate is feasible at all. In conclusion, these commenters recommended that the paint booth requirement for objects less than 15 feet be removed in its entirety.

Another commenter stated that the proposed requirement to conduct painting of parts less than or equal to 15 feet in any dimension within enclosed, filtered spray booths or spray rooms was incompatible with the requirements of aerospace manufacturing, and is not required by existing EPA or OSHA regulations. One of their points was that in its recent hexavalent chromium standard, OSHA recognized that some aerospace parts are so large that they must be painted in "oversized workspaces."

Response: We did not accept the recommendation to delete the paint booth requirements entirely, as was suggested by the commenter. We determined that the use of spray booth equipped with filters was generally available for most painting operations present at the source categories addressed by this rulemaking. However, we did recognize that there were circumstances where booths or spray rooms were not feasible. Based on our information gathering efforts prior to proposal (which included site visits and other information gathering for the Fabricated Structural Metal Manufacturing source category), we believed that these situations could be adequately characterized based on object size, and we selected 15 feet as the cutoff that represented these situations. However, based on the information provided by these commenters, we now recognize the uniqueness of this industry with regard to the type of process and their ability to install and operate paint booths or spray rooms with filters to reduce MFHAP emissions for spray painting operations. Therefore, we have revised this final rule to remove that requirement for spray painting affected sources in the Fabricated Structural Metal Manufacturing source category, which is comprised solely of facilities in NAICS 332312, to comply with the requirements for paint booths or spray rooms with filters to reduce MFHAP emissions as set out in § 63.11516(d)(1), "What are my standards and management practices?". However, these affected sources will be subject to the management practices in § 63.11516(d)(2) through (9).

With regard to the aerospace manufacturing comment, we would first point out that aerospace manufacturing facilities are not among the area source categories covered under this subpart (XXXXXX). As discussed earlier, specific language has been added to the applicability provisions to make this clear. However, we also reiterate that we believe that the provisions in the proposed rule (which were retained in this final rule) where objects greater than 15 feet need not comply with the spray booth PM filter requirement is a valid difference in the final rule requirements. We believe differentiation is consistent with the "oversized workspaces" concept recognized by OSHA.

Comment: One commenter suggested that surface coating operations that do not utilize coatings containing HAP or at the minimum MFHAP should be exempted from the regulation. Although the proposed rule includes a pollution prevention regulation for these operations (3.0 pounds (lb) VOHAP per gallon (gal) paint solids), the commenter believes that EPA should provide additional incentive by including an exemption for coating operations that utilize non-HAP coatings.

Response: As described in more detail above (in section V.C., Scope of Rule) the spray painting provisions only apply to spray painting operations which use paints that contain MFHAP.

Comment: One commenter said that there is a new ASHRAE method (52.2) procedure to demonstrate filter efficiency that was similar to ASHRAE 52.1 that was required in the proposed rule. The commenter stated that this new ASHRAE method has the additional benefit of considering particle size and is also very similar to proposed EPA Method 319 that was referenced in the NESHAP for Aerospace Manufacturing and Rework Facilities (40 CFR, part 63 subpart GG).

Response: This final rules states that: "* * * the procedure used to demonstrate filter efficiency must be consistent with the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Method 52.1, 'Gravimetric and Dust-Spot Procedures for Testing Air-Cleaning Devices Used in General Ventilation for Removing Particulate

Matter, June 4, 1992' (incorporated by reference, see § 63.14)." Therefore, another method can be used if it is "consistent" with ASHRAE 52.1. We believe that the new method, ASHRAE 52.2, is very likely to be consistent with ASHRAE 52.1. Since EPA Method 319 is only proposed at this time, it would be premature for EPA to include the new method by ASHRAE that relies on the proposed EPA method. We do not believe that requiring ASHRAE 52.1 in this final rule will be a hardship for the commenter since we believe that the commenter will be able to demonstrate, through the process described above, that the new ASHRAE 52.2 is "consistent" with ASHRAE 52.1. Therefore, we have not revised this final rule requirement to determine filter equivalency to include this new ASHRAE method.

5. Painting—VOHAP

Comment: One commenter indicated that EPA has not satisfied the statutory prerequisites to regulate VOHAP emissions from spray painting operations in this rulemaking. According to the commenter, none of the nine categories were listed for VOHAP, and none of the VOHAP are on EPA's list of 30 urban air toxics. The commenter stated that EPA cited CAA section 112(k)(3)(C) as providing the discretion to regulate these HAP in order to reduce the public health risk posed by the release of any HAP, but the commenter says that this passage is plainly not an independent grant of authority to EPA. The commenter further stated that this CAA section is only a directive to EPA as to the level of cancer risk reduction to be achieved by EPA and the states through the applicable rulemaking provision in the CAA. The commenter further noted that even if CAA section 112(k)(3)(C) could be interpreted as a general grant of discretionary regulatory authority, it cannot be interpreted to override the specific provisions of CAA section 112(k) regarding area sources, including CAA sections 112(c)(3) and 112(k)(3)(B), and 112(f)(1) and (2). The commenter argued that specific terms must be controlling over general terms. The commenter requested that all references to VOHAP be eliminated, and that the spray paint provisions apply only when coatings containing MFHAP are being spray applied.

Response: We proposed to set GACT for VOHAP emissions from spray painting because we found that VOHAP emissions from painting were over 60 percent of the total HAP emissions from the metal fabrication and finishing area source categories in the 2002 EPA National Emission Inventory. We also found that some facilities currently have state permits that allow them to emit high levels of VOHAP from their metal fabrication and finishing painting processes, although their actual emissions are currently lower. CAA section 112(c)(3) provides EPA with the authority to regulate any of the section 112(b) listed HAP upon certain findings being made.

Nonetheless, given the interest in this issue as expressed by the commenter, we have decided not to regulate VOHAP as part of this final rule. Accordingly, we have revised this final rule to remove the VOHAP control requirements.

6. Welding

Comment: Several commenters stated that the proposed welding standard is vague with respect to the need to comply with some or all of the management practices. They emphasized the relationship between emissions and other weld procedure inputs such as quality and safety in the selection of process variables. They suggest that the rule be revised to make it more explicit that weld quality need not be compromised in an attempt to reduce fume. The commenters emphasized that for many welding applications weld quality can be an issue of public safety.

One commenter also suggested that the proposed rule could be interpreted to require that each of the individual welding management practices in § 63.11516(f)(2), "What are my standards and management practices?", be implemented. Another objected to the use of the language "whenever possible." Several commenters questioned the use of the word "practicable" in the proposed welding rule text, saying that it invites differing interpretations of what is practicable, in particular the importance of considering welding codes and standards. Finally, a commenter noted that the requirement to "minimize" emissions of MFHAP is impractical, and that the word "reduce" would be more proper. They pointed out that changes implemented solely to minimize fume generation rates may have unintended consequences on product quality.

Response: We understand the commenter's concerns and did not intend for the welding provisions to adversely impact product quality, or that the facility be required to implement *all* of the management practices. The inclusion of the phrase "as practicable" was intended to convey this. However, to avoid any potential confusion, we have amended the language as follows: "implement one or more of the management practices... to minimize emissions of MFHAP as practicable, while concurrently maintaining the required welding quality through the application of sound welding engineering judgment." Finally, we believe that the use of the word "minimize" is appropriate. We believe that replacement of "minimize" with "reduce" would imply that affected facilities that are already implementing management practices and pollution prevention techniques would be required to implement additional measures to further "reduce" their MFHAP emissions. Further, we believe that the combination of "minimize" and "as practicable" makes the balance between weld quality, sound welding engineering principles, and emission reductions clear.

Comment: One commenter described several highly technical issues with the specific welding management practices proposed, including use of shielding gases, use of "low fume welding processes", inert carrier gases, 90° welding angles, and electrode diameter. They summed up by stating that welding is a complex science with many competing objectives, which may also be inconsistent. This commenter provided alternative management practices that incorporate the emission reduction concepts in the proposed rule in a more general manner. Their proposed management practices included: (1) Utilization of welding processes with reduced fume generation capabilities; (2) utilization of welding process variations, if available, such as pulsed GMAW, which can reduce fume generation rates; (3) utilization of welding filler metals and shielding gases which are capable of reduced welding fume generation; and (4) utilization of welding procedures (electrode diameter, voltage, amperage, travel speed, etc.) that reduce the amount of welding fume generated.

The commenter stated that their proposed alternative management practices capture all the technically justified items from the proposed list of eleven items, and present the items in a manner consistent with how a manufacturing or welding engineer would approach such a task. According to the commenter, the alternative method will more effectively achieve the intended results. The commenter stated that only by considering each individual welding situation can the appropriate engineering controls be implemented. Finally, the commenter noted that the format of their list highlights the importance that weld quality not be compromised, reducing

the likelihood of the unintended negative consequences that could result.

Response: While we do not necessarily agree with the commenter's technical criticisms of the 11 proposed welding management practices, we believe that their suggested approach improves the flexibility of the rule without changing the requirement to identify and implement emission minimization practices. We also believe that it will be beneficial in the future, as it provides the necessary flexibility to include emerging technologies that may not be necessarily included in the more explicit practices in the proposed rule. Therefore, we have revised this final rule accordingly.

Comment: Two commenters questioned whether the 85 percent capture requirement for welding fume specified in the proposal is possible, and requested that it be removed. One commenter suggested that it may be more difficult to capture a high percentage of the fume with some welding processes, but the amount of fume released with these welding types could be less compared to other types of welding, even considering a lower capture percentage. They also noted the possibility of capture systems interfering with shielding gases.

One commenter noted that use of fume control systems, both area-wide and localized, is not always possible for the types of operations covered by the rule, for various logistical reasons. They added that local systems have a limited range of coverage and may be too big to reach smaller spaces.

Response: We understand the commenter's objection, and have removed the requirement for a specific numeric efficiency for fume capture and control systems. Our original determination was that such systems represented one of the generally available measures available to reduce MFHAP emissions from welding operations. Accordingly, we have revised the welding provisions of this final rule to make the use of a fume capture and control system one of the list of management practices that may be used to minimize MFHAP emissions, as practicable, as long as the capture and control devices are operated according to the manufacturer's specifications and the specifications are kept on-site, nearby the equipment and readily available for inspector review. However, if the facility uses 2,000 pounds or more of MFHAP-containing welding rod annually, on a rolling 12 month basis, they must also conduct visible emissions tests. If the facility has a problem meeting the requirement of no visible emissions and they are operating a control device, the capture and/or control efficiency of the control systems may need to be improved so that they can meet the visible emissions requirement.

Comment: One commenter stated that it would be desirable to require application of welding controls only after determination of HAP in the fume, but as a compromise, they proposed application of controls only after determination of visible fugitive emissions.

Response: We believe that the requirement to apply welding management practices or controls to minimize emissions from welding "as practicable" allows significant flexibility to welding affected sources. If measures are being implemented that do not result in any visible emissions, we believe that sufficient welding management practices or controls are already in effect.

Comment: One commenter noted that sometimes, although rarely, facilities may perform a small amount of welding on a component after its construction is finalized and has been moved outdoors. According to the commenter, the large size of some components could make it difficult, if not impossible, to move them back inside to perform the welding. For this reason, the commenter proposed that EPA revise the regulation to allow a limited amount of welding, 30 minutes per month, to occur outdoors. Another commenter noted that at large facilities, with complex manufacturing processes, spot welding may be performed along an assembly line; they suggested that the rule should allow for this.

Response: We believe that the flexibility provided by the language described above ("as practicable, while maintaining required weld quality and using sound welding engineering principles") allows for the operations the commenters describe. Note that the rule contains no prohibition against outdoor welding or welding along an assembly line, it just requires that you must implement management practices to minimize emissions of MFHAP as practicable.

F. Monitoring

Comment: Several commenters objected to the requirements that affected sources demonstrate that the applicable management practices are being implemented through the visual determination of fugitive emissions using Method 22 and, for some welding affected sources, Method 9. These commenters' objections were based on the opinion that these requirements would be overly burdensome and unnecessary, especially if EPA is correct in its assumption that no additional emissions reductions will take place. One commenter indicated that facilities which have previously not been permitted will not have capabilities to perform visible emissions determinations. They added that if permitted sources are not required to use these methods, it is unreasonable to require it of area sources. Another commenter indicated that these daily monitoring requirements would be very burdensome, particularly for welding, where Method 9 may also be required. They indicated that the training required to perform these determinations may be burdensome, particularly for small businesses. One commenter suggested that these requirements be removed for all types of affected sources. Another commenter was more specific to machining metal fabrication and finishing affected sources, as they noted that EPA indicated that HAP emissions from machining are minimal because of use of enclosures and cutting liquids.

Response: The proposed rule required visual determinations of fugitive emissions using Method 22 from all types of dry abrasive blasting operations, all machining operations, all grinding and polishing operations, and all welding operations. These determinations were initially required to be performed daily, and then could be reduced to less frequent intervals (weekly, monthly) if no visual emissions were present. For welding sources, there were additional requirements to conduct opacity measurements using Method 9 in situations where visible emissions were identified using Method 22.

The purpose of these visual determination requirements was to demonstrate that the specified management practices were being implemented to minimize fugitive MFHAP emissions. These management practices consist of three basic types: (1) Requirements to operate equipment properly (e.g., in accordance with manufacturer's specifications); (2) practices or operating procedures to minimize emissions (e.g., keep work areas free of excess MFHAP material); and (3) requirements to capture emissions and vent them to a filtration control device. Upon consideration of these comments, we have determined that it is not necessary to perform visual determinations of fugitive emissions from operations that are required to capture emissions and vent them to a filtration control device. This final rule requires capture/filtration control for dry abrasive blasting performed in

vented chambers and dry grinding and dry polishing with machines. Therefore, we eliminated the visual determination of fugitive emissions requirements for these operations. In addition, we agree with the commenter that visual determinations for machining operations is not necessary because the metal waste produced by the machining process is composed of relatively large pieces which immediately fall to the floor, and because the majority of machining operations are performed under cutting oils or lubricants, which entrain any metal waste. We have therefore removed these visual determination requirements for those affected sources.

Fugitive emissions from abrasive blasting operations that are not performed in vented chambers are not required to be captured and vented to a filtration control device. We continue to believe that it is important that visual determinations be conducted to ensure that fugitive MFHAP emissions are minimized via the management practices. Therefore, this final rule maintains the requirement to conduct visual determinations of fugitive emissions using Method 22 for these sources.

Fugitive MFHAP emissions from welding operations are not subject to the capture/filtration control requirements. Therefore, we believe it is important that the proposed visual determinations be conducted to ensure that fugitive MFHAP emissions are being minimized. However, due to our concern with the impact that these requirements could have on small businesses, we have removed the visual determination requirements for smaller welding operations that emit less MFHAP. Specifically, this final rule requires that welding operations that annually use 2,000 pounds or more of welding rod containing one or more MFHAP perform visual determinations. Welding operations that use less than this amount of welding rod are subject only to the GACT management practices.

VI. Impacts of the Final Standards

A. What are the air impacts?

Since 1990, facilities in these nine metal fabrication and finishing source categories have reduced their air impacts by voluntary controls that were likely motivated by concerns for worker safety. These controls would have reduced approximately 122 tons of the MFHAP (cadmium, chromium, lead, manganese, and nickel) attributed to this industry in the 1990 urban HAP inventory. Although there are no additional air emission reductions as a result of this final rule, we believe that this final rule will assure that the emission reductions made by the industry since 1990 will be maintained.

Along with the HAP described above, there is an undetermined amount of VOHAP, VOC, PM, and other HAP that have been co-controlled in the metal fabrication and finishing processes that contributed to criteria pollutant emissions in 1990.

B. What are the cost impacts?

For all metal fabrication and finishing processes except painting, all facilities are expected to be achieving the level of control required by the final standard. Therefore, no additional air pollution control devices or systems would be required. No capital costs are associated with this final rule, and no operational and maintenance costs are expected because facilities are already following the manufacturer's instructions for operation and maintenance of pollution control devices and systems. Many of the management practices required by this final rule are pollution prevention and have the co-benefit to provide a cost savings for facilities.

The annual cost of monitoring, reporting, and recordkeeping for this final rule is estimated at approximately $569 per facility per year after the first year with an additional $384 per facility for one-time costs in the first year. While most of these facilities are small, the costs are expected to be less than 0.01 percent of revenues. This cost estimate includes an estimate of 10 hours per year per facility, on the average, for labor to perform the visible emissions or opacity tests required by the rule for up to two affected operations. This estimate includes performance of the visible emissions or opacity test as well as documentation of the results. The labor estimate also includes 16 hours for preparation of a Site-specific Welding Management Plan (SWMP) by the approximately 60 facilities estimated to require the SWMP in any one year of compliance.

C. What are the economic impacts?

The only measurable costs attributable to these final standards are associated with the monitoring, recordkeeping, and reporting requirements. These final standards are estimated to impact a total of 5,800 area source facilities. We estimate that over 5,300 of these facilities are small entities. Our analysis indicates that this final rule would not impose a significant adverse impact on any facilities, large or small since these costs are approximately 0.01 percent of revenues.

D. What are the non-air health, environmental, and energy impacts?

No detrimental secondary impacts are expected to occur from the non-painting sources because all facilities are currently achieving the GACT level of control. No facilities would be required to install and operate new or additional control devices or systems, or install and operate monitoring devices or systems. No additional solid waste would be generated as a result of the PM emissions collected and there are no additional energy impacts associated with operation of control devices or monitoring systems for the non-painting sources.

We expect no increase in generation of wastewater or other water quality impacts. None of the control measures considered for this final rule generates a wastewater stream. The installation of spray booths or spray rooms and enclosed gun washers, and increased worker training in the proper use and handling of coating materials should reduce worker exposure to harmful chemicals in the workplace. This should have a positive benefit on worker health, but this benefit cannot be quantified in the scope of this rulemaking.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The recordkeeping and reporting requirements in this final rule are based on the requirements in EPA's NESHAP General Provisions (40 CFR part 63, subpart A). The recordkeeping and reporting requirements in the General Provisions are mandatory pursuant to section 114 of the CAA (42 U.S.C. 7414). All information other than emissions data submitted to EPA pursuant to the information collection requirements for which a claim of confidentiality is made is safeguarded according to CAA section 114(c) and the Agency's implementing regulations at 40 CFR part 2, subpart B.

This final NESHAP will require area sources in the nine metal fabrication and finishing source categories to submit an Initial Notification and a Notification of Compliance Status according to the requirements in 40 CFR 63.9 of the General Provisions (subpart A). Records will be required to demonstrate compliance with operation and maintenance of capture and control devices, and other management practices. The owner or operator of a metal fabrication and finishing facility also is subject to notification and recordkeeping requirements in 40 CFR 63.9 and 63.10 of the General Provisions (subpart A). Annual certification and compliance and annual exceedence reports will be required instead of the semiannual excess emissions reports required by the NESHAP General Provisions.

The annual burden for this information collection averaged over the first three years of this ICR is estimated to be a total of 20,566 labor hours per year at a cost of $655,501 or approximately $339 per facility. The average annual reporting burden is 11 hours per response, with one response per facility for 1,933 respondents. The only costs attributable to these final standards are associated with the monitoring, recordkeeping, and reporting requirements. There are no capital, operating, maintenance, or purchase of services costs expected as a result of this final rule.

Although it is possible that some facilities would initially be required by this final rule to record the results of daily visual emissions or opacity testing, the graduated compliance test schedule of this final rule allows for decrease in frequency to quarterly if emissions are not found. Also, the requirement for preparation of a SWMP is expected to result in a maximum of three exceedences from one percent (58) of the facilities because of the pollution prevention focus of the SWMP. Burden is defined at 5 CFR 1320.3(b).

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 part 63 are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act 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 would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of this final rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses, as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule is estimated to impact a total of 5,800 area source metal fabrication and finishing facilities; over 5,300 of these facilities are estimated to be small entities. We have determined that small entity compliance costs, as assessed by the facilities' cost-to-sales ratio, are expected to be less than 0.01 percent. The analysis also shows that none of the small entities would incur economic impacts exceeding three percent of its revenue. Although this final rule contains requirements for new area sources, we are not aware of any new area sources being constructed now or planned in the next 3 years, and consequently, we did not estimate any impacts for new sources.

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 final rule on small entities. The standards represent practices and controls that are common throughout the sources engaged in metal fabrication and finishing. The standards also require minimal amount of recordkeeping and reporting needed to demonstrate and verify compliance. These standards were developed based on information obtained from small businesses in our surveys, consultation with small business representatives on the state and national level, and industry representatives that are affiliated with small businesses.

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 by state, local, and tribal governments, in the aggregate, or by 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 this 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.

This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for state, local, or tribal governments or of the private sector. This final rule is not expected to impact state, local, or tribal governments. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. This final rule contains no requirements that apply to such

governments, and impose no obligations upon them. Therefore, this final rule is not subject to section 203 of the UMRA.

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."

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This final rule does not impose any requirements on state and local governments. Thus, Executive Order 13132 does not apply to this final rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

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

Executive Order 13175 (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This final rule does not have tribal implications, as specified in Executive Order 13175. This final rule imposes no requirements on tribal governments. Thus, Executive Order 13175 does not apply to this rule

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

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

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

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) 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. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action involves technical standards. The Agency conducted a search to identify potentially applicable VCS. No VCS were identified. Therefore, we are citing ASHRAE Method 52.1, "Gravimetric and Dust-Spot Procedures for Testing Air-Cleaning Devices Used in General Ventilation for Removing Particulate Matter, June 4, 1992," to measure paint booth filter efficiency and to measure the control efficiency of paint overspray arrestors with spray-applied paintings. This method will enable owner/operators to determine their facility's compliance with the spray booth filter requirement of this rule.

We are also using two methods from the California South Coast Air Quality Management District: "Spray Equipment Transfer Efficiency Test Procedure for Equipment User, May 24, 1989," and "Guidelines for Demonstrating Equivalency with District Approved Transfer Efficient Spray Guns, September 26, 2002," as methods to demonstrate the equivalency of spray gun transfer efficiency for spray guns that do not meet the definition of HVLP, airless spray, or electrostatic spray. These methods will enable owner/operators to determine their facility's compliance with the HVLP requirement of this rule.

Under § 63.7(f) and § 63.8(f) of subpart A of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This final rule establishes national standards for nine area source categories.

K. 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. EPA will submit a report containing this 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 this final rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule will be effective on July 23, 2008.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporations by reference, Reporting and recordkeeping requirements.

Dated: June 13, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

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

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

Subpart A—[Amended]

■ 2. Section 63.14 is amended as follows:

■ a. By removing the heading in paragraph (d) introductory text.

■ b. By revising paragraphs (d)(7) and (8).

■ c. By revising paragraph (l)(1)

§ 63.14 Incorporations by reference.

* * * * *

(d) * * *

(7) California South Coast Air Quality Management District's "Spray Equipment Transfer Efficiency Test Procedure for Equipment User, May 24, 1989," IBR approved for § 63.11173(e) and § 63.11516(d).

(8) California South Coast Air Quality Management District's "Guidelines for Demonstrating Equivalency with District Approved Transfer Efficient Spray Guns, September 26, 2002," Revision 0, IBR approved for §§ 63.11173(e) and 63.11516(d).

* * * * *

(l) * * *

(1) American Society of Heating, Refrigerating, and Air Conditioning Engineers Method 52.1, "Gravimetric and Dust-Spot Procedures for Testing Air-Cleaning Devices Used in General Ventilation for Removing Particulate Matter, June 4, 1992," IBR approved for §§ 63.11173(e) and 63.11516(d).

* * * * *

■ 3. Part 63 is amended by adding subpart XXXXXX consisting of §§ 63.11514 through 63.11523 and tables 1 through 2 to read as follows:

Subpart XXXXXX—National Emission Standards for Hazardous Air Pollutants Area Source Standards for Nine Metal Fabrication and Finishing Source Categories

Subpart XXXXXX—National Emission Standards for Hazardous Air Pollutants Area Source Standards for Nine Metal Fabrication and Finishing Source Categories

Applicability and Compliance Dates

§ 63.11514 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate an area source that is primarily engaged in the operations in one of the nine source categories listed in paragraphs (a)(1) through (9) of this section. Descriptions of these source categories are shown in Table 1 of this subpart. "Primarily engaged" is defined in § 63.11522, "What definitions apply to this subpart?"

(1) Electrical and Electronic Equipment Finishing Operations;

(2) Fabricated Metal Products;

(3) Fabricated Plate Work (Boiler Shops);

(4) Fabricated Structural Metal Manufacturing;

(5) Heating Equipment, except Electric;

(6) Industrial Machinery and Equipment Finishing Operations;

(7) Iron and Steel Forging;

(8) Primary Metal Products Manufacturing; and

(9) Valves and Pipe Fittings.

(b) The provisions of this subpart apply to each new and existing affected source listed and defined in paragraphs (b)(1) through (5) of this section if you use materials that contain or have the potential to emit metal fabrication or finishing metal HAP (MFHAP), defined to be the compounds of cadmium, chromium, lead, manganese, and nickel, or any of these metals in the elemental form with the exception of lead. Materials that contain MFHAP are defined to be materials that contain greater than 0.1 percent for carcinogens, as defined by OSHA at 29 CFR 1910.1200(d)(4), and greater than 1.0 percent for noncarcinogens. For the MFHAP, this corresponds to materials that contain cadmium, chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (of the metal), and materials that contain manganese in amounts greater than or equal to 1.0 percent by weight (of the metal), as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material.

(1) A dry abrasive blasting affected source is the collection of all equipment and activities necessary to perform dry abrasive blasting operations which use materials that contain MFHAP or that have the potential to emit MFHAP.

(2) A machining affected source is the collection of all equipment and activities necessary to perform machining operations which use materials that contain MFHAP. as defined in § 63.11522, "What definitions apply to this subpart?", or that have the potential to emit MFHAP.

(3) A dry grinding and dry polishing with machines affected source is the collection of all equipment and activities necessary to perform dry grinding and dry polishing with machines operations which use materials that contain MFHAP, as defined in § 63.11522, "What definitions apply to this subpart?", or have the potential to emit MFHAP.

(4) A spray painting affected source is the collection of all equipment and activities necessary to perform spray-applied painting operations using paints which contain MFHAP. A spray painting affected source includes all equipment used to apply cleaning materials to a substrate to prepare it for paint application (surface preparation) or to remove dried paint; to apply a paint to a substrate (paint application) and to dry or cure the paint after application; or to clean paint operation equipment (equipment cleaning). Affected source(s) subject to the requirements of this paragraph are not subject to the miscellaneous surface coating provisions of subpart HHHHHH of this part, "National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources."

(5) A welding affected source is the collection of all equipment and activities necessary to perform welding operations which use materials that

contain MFHAP, as defined in § 63.11522, "What definitions apply to this subpart?", or have the potential to emit MFHAP.

(c) An affected source is existing if you commenced construction or reconstruction of the affected source, as defined in § 63.2, "General Provisions" to part 63, before April 3, 2008.

(d) An affected source is new if you commenced construction or reconstruction of the affected source, as defined in § 63.2, "General Provisions" to part 63, on or after April 3, 2008.

(e) This subpart does not apply to research or laboratory facilities, as defined in section 112(c)(7) of the Clean Air Act (CAA).

(f) This subpart does not apply to tool or equipment repair operations, facility maintenance, or quality control activities as defined in § 63.11522, "What definitions apply to this subpart?"

(g) This subpart does not apply to operations performed on site at installations owned or operated by the Armed Forces of the United States (including the Coast Guard and the National Guard of any such state), the National Aeronautics and Space Administration, or the National Nuclear Security Administration.

(h) This subpart does not apply to operations that produce military munitions, as defined in § 63.11522, "What definitions apply to this subpart?", manufactured by or for the Armed Forces of the United States (including the Coast Guard and the National Guard of any such state), or equipment directly and exclusively used for the purposes of transporting military munitions.

(i) You are exempt from the obligation to obtain a permit under 40 CFR part 70 or 40 CFR part 71, provided you are not otherwise required by law to obtain a permit under 40 CFR 70.3(a) or 40 CFR 71.3(a). Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart.

§ 63.11515 What are my compliance dates?

(a) If you own or operate an existing affected source, you must achieve compliance with the applicable provisions in this subpart by July 25, 2011.

(b) If you own or operate a new affected source, you must achieve compliance with the applicable provisions in this subpart by July 23, 2008, or upon startup of your affected source, whichever is later.

Standards and Compliance Requirements

§ 63.11516 What are my standards and management practices?

(a) *Dry abrasive blasting standards.* If you own or operate a new or existing dry abrasive blasting affected source, you must comply with the requirements in paragraphs (a)(1) through (3) of this section, as applicable, for each dry abrasive blasting operation that uses materials that contain MFHAP, as defined in § 63.11522, "What definitions apply to this subpart?", or has the potential to emit MFHAP. These requirements do not apply when abrasive blasting operations are being performed that do not use any materials containing MFHAP or do not have the potential to emit MFHAP.

(1) *Standards for dry abrasive blasting of objects performed in totally enclosed and unvented blast chambers.* If you own or operate a new or existing dry abrasive blasting affected source which consists of an abrasive blasting chamber that is totally enclosed and unvented, as defined in § 63.11522, "What definitions apply to this subpart?", you must implement management practices to minimize emissions of MFHAP. These management practices are the practices specified in paragraph (a)(1)(i) and (ii) of this section.

(i) You must minimize dust generation during emptying of abrasive blasting enclosures; and

(ii) You must operate all equipment associated with dry abrasive blasting operations according to the manufacturer's instructions.

(2) *Standards for dry abrasive blasting of objects performed in vented enclosures.* If you own or operate a new or existing dry abrasive blasting affected source which consists of a dry abrasive blasting operation which has a vent allowing any air or blast material to escape, you must comply with the requirements in paragraphs (a)(2)(i) and (ii) of this section. Dry abrasive blasting operations for which the items to be blasted exceed 8 feet (2.4 meters) in any dimension, may be performed subject to the requirements in paragraph (a)(3) of this section.

(i) You must capture emissions and vent them to a filtration control device. You must operate the filtration control device according to manufacturer's instructions, and you must demonstrate compliance with this requirement by maintaining a record of the manufacturer's specifications for the filtration control devices, as specified by the requirements in § 63.11519(c)(4), "What are my notification, recordkeeping, and reporting requirements?"

(ii) You must implement the management practices to minimize emissions of MFHAP as specified in paragraphs (a)(2)(ii)(A) through (C) of this section.

(A) You must take measures necessary to minimize excess dust in the surrounding area to reduce MFHAP emissions, as practicable; and

(B) You must enclose dusty abrasive material storage areas and holding bins, seal chutes and conveyors that transport abrasive materials; and

(C) You must operate all equipment associated with dry abrasive blasting operations according to manufacturer's instructions.

(3) *Standards for dry abrasive blasting of objects greater than 8 feet (2.4 meters) in any one dimension.* If you own or operate a new or existing dry abrasive blasting affected source which consists of a dry abrasive blasting operation which is performed on objects greater than 8 feet (2.4 meters) in any one dimension, you may implement management practices to minimize emissions of MFHAP as specified in paragraph (a)(3)(i) of this section instead of the practices required by paragraph (a)(2) of this section. You must demonstrate that management practices are being implemented by complying with the requirements in paragraphs (a)(3)(ii) through (iv) of this section.

(i) Management practices for dry abrasive blasting of objects greater than 8 feet (2.4 meters) in any one dimension are specified in paragraphs (a)(3)(i)(A) through (E) of this section.

(A) You must take measures necessary to minimize excess dust in the surrounding area to reduce MFHAP emissions, as practicable; and

(B) You must enclose abrasive material storage areas and holding bins, seal chutes and conveyors that transport abrasive material; and

(C) You must operate all equipment associated with dry abrasive blasting operations according to manufacturer's instructions; and

(D) You must not re-use dry abrasive blasting media unless contaminants (i.e., any material other than the base metal, such as paint residue) have been removed by filtration or screening, and the abrasive material conforms to its original size; and

(E) Whenever practicable, you must switch from high particulate matter (PM)-emitting blast media (e.g., sand) to low PM-emitting blast media (e.g., crushed glass, specular hematite, steel shot, aluminum oxide), where PM is a surrogate for MFHAP.

(ii) You must perform visual determinations of fugitive emissions, as specified in § 63.11517(b), "What are my monitoring requirements?", according to paragraphs (a)(3)(ii)(A) or (B) of this section, as applicable.

(A) For abrasive blasting of objects greater than 8 feet (2.4 meters) in any one dimension that is performed outdoors, you must perform visual determinations of fugitive emissions at the fenceline or property border nearest to the outdoor dry abrasive blasting operation.

(B) For abrasive blasting of objects greater than 8 feet (2.4 meters) in any one dimension that is performed indoors, you must perform visual determinations of fugitive emissions at the primary vent, stack, exit, or opening from the building containing the abrasive blasting operations.

(iii) You must keep a record of all visual determinations of fugitive emissions along with any corrective action taken in accordance with the requirements in § 63.11519(c)(2), "What are my notification, recordkeeping, and reporting requirements?"

(iv) If visible fugitive emissions are detected, you must perform corrective actions until the visible fugitive emissions are eliminated, at which time you must comply with the requirements in paragraphs (a)(3)(iv)(A) and (B) of this section.

(A) You must perform a follow-up inspection for visible fugitive emissions in accordance with § 63.11517(a), "Monitoring Requirements."

(B) You must report all instances where visible emissions are detected, along with any corrective action taken and the results of subsequent follow-up inspections for visible emissions, with your annual certification and compliance report as required by § 63.11519(b)(5), "Notification, recordkeeping, and reporting requirements."

(b) *Standards for machining.* If you own or operate a new or existing machining affected source, you must implement management practices to minimize emissions of MFHAP as specified in paragraph (b)(1) and (2) of this section for each machining operation that uses materials that contain MFHAP, as defined in § 63.11522, "What definitions apply to this subpart?", or has the potential to emit MFHAP. These requirements do not apply when machining operations are being performed that do not use any materials containing MFHAP and do not have the potential to emit MFHAP.

(1) You must take measures necessary to minimize excess dust in the surrounding area to reduce MFHAP emissions, as practicable; and

(2) You must operate all equipment associated with machining according to manufacturer's instructions.

(c) *Standards for dry grinding and dry polishing with machines.* If you own or operate a new or existing dry grinding and dry polishing with machines affected source, you must comply with the requirements of paragraphs (c)(1) and (2) of this section for each dry grinding and dry polishing with machines operation that uses materials that contain MFHAP, as defined in § 63.11522, "What definitions apply to this subpart?", or has the potential to emit MFHAP. These requirements do not apply when dry grinding and dry polishing operations are being performed that do not use any materials containing MFHAP and do not have the potential to emit MFHAP.

(1) You must capture emissions and vent them to a filtration control device. You must demonstrate compliance with this requirement by maintaining a record of the manufacturer's specifications for the filtration control devices, as specified by the requirements in § 63.11519(c)(4), "Notification, recordkeeping, and reporting Requirements."

(2) You must implement management practices to minimize emissions of MFHAP as specified in paragraphs (c)(2)(i) and (ii) of this section.

(i) You must take measures necessary to minimize excess dust in the surrounding area to reduce MFHAP emissions, as practicable;

(ii) You must operate all equipment associated with the operation of dry grinding and dry polishing with machines, including the filtration control device, according to manufacturer's instructions.

(d) *Standards for control of MFHAP in spray painting.* If you own or operate a new or existing spray painting affected source, as defined in § 63.11514 (b)(4), "Am I subject to this subpart?," you must implement the management practices in paragraphs (d)(1) through (9) of this section when a spray-applied paint that contains MFHAP is being applied. These requirements do not apply when spray-applied paints that do not contain MFHAP are being applied.

(1) *Standards for spray painting for MFHAP control.* All spray-applied painting of objects must meet the requirements of paragraphs (d)(1)(i) through (iii) of this section. These requirements do not apply to affected sources located at Fabricated Structural Metal Manufacturing facilities, as described in Table 1, "Description of Source Categories Affected by this Subpart," or affected sources that spray paint objects greater than 15 feet (4.57 meters), that are not spray painted in spray booths or spray rooms.

(i) Spray booths or spray rooms must have a full roof, at least two complete walls, and one or two complete side curtains or other barrier material so that all four sides are covered. The spray booths or spray rooms must be ventilated so that air is drawn into the booth and leaves only though the filter. The roof may contain narrow slots for connecting fabricated products to overhead cranes, and/or for cords or cables.

(ii) All spray booths or spray rooms must be fitted with a type of filter technology that is demonstrated to achieve at least 98 percent capture of MFHAP. The procedure used to demonstrate filter efficiency must be consistent with the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Method 52.1, "Gravimetric and Dust-Spot Procedures for Testing Air-Cleaning Devices Used in General Ventilation for Removing Particulate Matter, June 4, 1992" (incorporated by reference, see § 63.14). The test coating for measuring filter efficiency shall be a high-solids bake enamel delivered at a rate of at least 135 grams per minute from a conventional (non-High Volume Low Pressure) air-atomized spray gun operating at 40 psi air pressure; the air flow rate across the filter shall be 150 feet per minute. Owners and operators may use published filter efficiency data provided by filter vendors to demonstrate compliance with this requirement and are not required to perform this measurement.

(iii) You must perform regular inspection and replacement of the filters in all spray booths or spray rooms according to manufacturer's instructions, and maintain documentation of these activities, as detailed in § 63.11519(c)(5), "Notification, recordkeeping, and reporting requirements."

(iv) As an alternative compliance requirement, spray booths or spray rooms equipped with a water curtain, called "waterwash" or "waterspray" booths or spray rooms that are operated and maintained according to the manufacturer's specifications and that achieve at least 98 percent control of MFHAP, may be used in lieu of the spray booths or spray rooms requirements of paragraphs (d)(1)(i) through (iii) of this section.

(2) *Standards for spray painting application equipment of all objects painted for MFHAP control.* All paints applied via spray-applied painting must

be applied with a high-volume, low-pressure (HVLP) spray gun, electrostatic application, airless spray gun, air-assisted airless spray gun, or an equivalent technology that is demonstrated to achieve transfer efficiency comparable to one of these spray gun technologies for a comparable operation, and for which written approval has been obtained from the Administrator. The procedure used to demonstrate that spray gun transfer efficiency is equivalent to that of an HVLP spray gun must be equivalent to the California South Coast Air Quality Management District's "Spray Equipment Transfer Efficiency Test Procedure for Equipment User, May 24, 1989" and "Guidelines for Demonstrating Equivalency with District Approved Transfer Efficient Spray Guns, September 26, 2002", Revision 0 (incorporated by reference, see § 63.14).

(3) *Spray system recordkeeping.* You must maintain documentation of the HVLP or other high transfer efficiency spray paint delivery methods, as detailed in § 63.11519(c)(7), "Notification, recordkeeping, and reporting requirements."

(4) *Spray gun cleaning.* All cleaning of paint spray guns must be done with either non-HAP gun cleaning solvents, or in such a manner that an atomized mist of spray of gun cleaning solvent and paint residue is not created outside of a container that collects the used gun cleaning solvent. Spray gun cleaning may be done with, for example, by hand cleaning of parts of the disassembled gun in a container of solvent, by flushing solvent through the gun without atomizing the solvent and paint residue, or by using a fully enclosed spray gun washer. A combination of these non-atomizing methods may also be used.

(5) *Spray painting worker certification.* All workers performing painting must be certified that they have completed training in the proper spray application of paints and the proper setup and maintenance of spray equipment. The minimum requirements for training and certification are described in paragraph (d)(6) of this section. The spray application of paint is prohibited by persons who are not certified as having completed the training described in paragraph (d)(6) of this section. The requirements of this paragraph do not apply to the students of an accredited painting training program who are under the direct supervision of an instructor who meets the requirements of this paragraph. The requirements of this paragraph do not apply to operators of robotic or automated painting operations.

(6) *Spray painting training program content.* Each owner or operator of an affected spray painting affected source must ensure and certify that all new and existing personnel, including contract personnel, who spray apply paints are trained in the proper application of paints as required by paragraph (d)(5) of this section. The training program must include, at a minimum, the items listed in paragraphs (d)(6)(i) through (iii) of this section.

(i) A list of all current personnel by name and job description who are required to be trained;

(ii) Hands-on, or in-house or external classroom instruction that addresses, at a minimum, initial and refresher training in the topics listed in paragraphs (d)(6)(ii)(A) through (D) of this section.

(A) Spray gun equipment selection, set up, and operation, including measuring paint viscosity, selecting the proper fluid tip or nozzle, and achieving the proper spray pattern, air pressure and volume, and fluid delivery rate.

(B) Spray technique for different types of paints to improve transfer efficiency and minimize paint usage and overspray, including maintaining the correct spray gun distance and angle to the part, using proper banding and overlap, and reducing lead and lag spraying at the beginning and end of each stroke.

(C) Routine spray booth and filter maintenance, including filter selection and installation.

(D) Environmental compliance with the requirements of this subpart.

(iii) A description of the methods to be used at the completion of initial or refresher training to demonstrate, document, and provide certification of successful completion of the required training. Alternatively, owners and operators who can show by documentation or certification that a painter's work experience and/or training has resulted in training equivalent to the training required in paragraph (d)(6)(ii) of this section are not required to provide the initial training required by that paragraph to these painters.

(7) *Records of spray painting training.* You must maintain records of employee training certification for use of HVLP or other high transfer efficiency spray paint delivery methods as detailed in § 63.11519(c)(8), "Notification, recordkeeping, and reporting requirements."

(8) *Spray painting training dates.* As required by paragraph (d)(5) of this section, all new and existing personnel at an affected spray painting affected source, including contract personnel, who spray apply paints must be trained by the dates specified in paragraphs (d)(8)(i) and (ii) of this section.

(i) If your source is a new source, all personnel must be trained and certified no later than January 20, 2009, 180 days after startup, or 180 days after hiring, whichever is later. Training that was completed within 5 years prior to the date training is required, and that meets the requirements specified in paragraph (d)(6)(ii) of this section satisfies this requirement and is valid for a period not to exceed 5 years after the date the training is completed.

(ii) If your source is an existing source, all personnel must be trained and certified no later than July 25, 2011, or 180 days after hiring, whichever is later. Worker training that was completed within 5 years prior to the date training is required, and that meets the requirements specified in paragraph (d)(6)(ii) of this section, satisfies this requirement and is valid for a period not to exceed 5 years after the date the training is completed.

(9) *Duration of training validity.* Training and certification will be valid for a period not to exceed 5 years after the date the training is completed. All personnel must receive refresher training that meets the requirements of this section and be re-certified every 5 years.

(e) [Reserved]

(f) *Standards for welding.* If you own or operate a new or existing welding affected source, you must comply with the requirements in paragraphs (f)(1) and (2) of this section for each welding operation that uses materials that contain MFHAP, as defined in § 63.11522, "What definitions apply to this subpart?", or has the potential to emit MFHAP. If your welding affected source uses 2,000 pounds or more per year of welding rod containing one or more MFHAP (calculated on a rolling 12-month basis), you must demonstrate that management practices or fume control measures are being implemented by complying with the requirements in paragraphs (f)(3) through (8) of this section. The requirements in paragraphs (f)(1) through (8) of this section do not apply when welding operations are being performed that do not use any materials containing MFHAP or do not have the potential to emit MFHAP.

(1) You must operate all equipment, capture, and control devices associated with welding operations according to manufacturer's instructions. You must demonstrate compliance with this requirement by maintaining a record of the manufacturer's specifications for the

capture and control devices, as specified by the requirements in § 63.11519(c)(4), "Notification, recordkeeping, and reporting requirements."

(2) You must implement one or more of the management practices specified in paragraphs (f)(2)(i) through (v) of this section to minimize emissions of MFHAP, as practicable, while maintaining the required welding quality through the application of sound engineering judgment.

(i) Use welding processes with reduced fume generation capabilities (e.g., gas metal arc welding (GMAW)—also called metal inert gas welding (MIG));

(ii) Use welding process variations (e.g., pulsed current GMAW), which can reduce fume generation rates;

(iii) Use welding filler metals, shielding gases, carrier gases, or other process materials which are capable of reduced welding fume generation;

(iv) Optimize welding process variables (e.g., electrode diameter, voltage, amperage, welding angle, shield gas flow rate, travel speed) to reduce the amount of welding fume generated; and

(v) Use a welding fume capture and control system, operated according to the manufacturer's specifications.

(3) *Tier 1 compliance requirements for welding.* You must perform visual determinations of welding fugitive emissions as specified in § 63.11517(b), "Monitoring requirements," at the primary vent, stack, exit, or opening from the building containing the welding operations. You must keep a record of all visual determinations of fugitive emissions along with any corrective action taken in accordance with the requirements in § 63.11519(c)(2), "Notification, recordkeeping, and reporting requirements."

(4) *Requirements upon initial detection of visible emissions from welding.* If visible fugitive emissions are detected during any visual determination required in paragraph (f)(3) of this section, you must comply with the requirements in paragraphs (f)(4)(i) and (ii) of this section.

(i) Perform corrective actions that include, but are not limited to, inspection of welding fume sources, and evaluation of the proper operation and effectiveness of the management practices or fume control measures implemented in accordance with paragraph (f)(2) of this section. After completing such corrective actions, you must perform a follow-up inspection for visible fugitive emissions in accordance with § 63.11517(a), "Monitoring Requirements," at the primary vent, stack, exit, or opening from the building containing the welding operations.

(ii) Report all instances where visible emissions are detected, along with any corrective action taken and the results of subsequent follow-up inspections for visible emissions, and submit with your annual certification and compliance report as required by § 63.11519(b)(5), "Notification, recordkeeping, and reporting requirements."

(5) *Tier 2 requirements upon subsequent detection of visible emissions.* If visible fugitive emissions are detected more than once during any consecutive 12 month period (notwithstanding the results of any follow-up inspections), you must comply with paragraphs (f)(5)(i) through (iv) of this section.

(i) Within 24 hours of the end of the visual determination of fugitive emissions in which visible fugitive emissions were detected, you must conduct a visual determination of emissions opacity, as specified in § 63.11517(c), "Monitoring requirements," at the primary vent, stack, exit, or opening from the building containing the welding operations.

(ii) In lieu of the requirement of paragraph (f)(3) of this section to perform visual determinations of fugitive emissions with EPA Method 22, you must perform visual determinations of emissions opacity in accordance with § 63.11517(d), "Monitoring Requirements," using EPA Method 9, at the primary vent, stack, exit, or opening from the building containing the welding operations.

(iii) You must keep a record of each visual determination of emissions opacity performed in accordance with paragraphs (f)(5)(i) or (ii) of this section, along with any subsequent corrective action taken, in accordance with the requirements in § 63.11519(c)(3), "Notification, recordkeeping, and reporting requirements."

(iv) You must report the results of all visual determinations of emissions opacity performed in accordance with paragraphs (f)(5)(i) or (ii) of this section, along with any subsequent corrective action taken, and submit with your annual certification and compliance report as required by § 63.11519(b)(6), "Notification, recordkeeping, and reporting requirements."

(6) *Requirements for opacities less than or equal to 20 percent but greater than zero.* For each visual determination of emissions opacity performed in accordance with paragraph (f)(5) of this section for which the average of the six-minute average opacities recorded is 20 percent or less but greater than zero, you must perform corrective actions, including inspection of all welding fume sources, and evaluation of the proper operation and effectiveness of the management practices or fume control measures implemented in accordance with paragraph (f)(2) of this section.

(7) *Tier 3 requirements for opacities exceeding 20 percent.* For each visual determination of emissions opacity performed in accordance with paragraph (f)(5) of this section for which the average of the six-minute average opacities recorded exceeds 20 percent, you must comply with the requirements in paragraphs (f)(7)(i) through (v) of this section.

(i) You must submit a report of exceedence of 20 percent opacity, along with your annual certification and compliance report, as specified in § 63.11519(b)(8), "Notification, recordkeeping, and reporting requirements," and according to the requirements of § 63.11519(b)(1), "Notification, recordkeeping, and reporting requirements."

(ii) Within 30 days of the opacity exceedence, you must prepare and implement a Site-Specific Welding Emissions Management Plan, as specified in paragraph (f)(8) of this section. If you have already prepared a Site-Specific Welding Emissions Management Plan in accordance with this paragraph, you must prepare and implement a revised Site-Specific Welding Emissions Management Plan within 30 days.

(iii) During the preparation (or revision) of the Site-Specific Welding Emissions Management Plan, you must continue to perform visual determinations of emissions opacity, beginning on a daily schedule as specified in § 63.11517(d), "Monitoring Requirements," using EPA Method 9, at the primary vent, stack, exit, or opening from the building containing the welding operations.

(iv) You must maintain records of daily visual determinations of emissions opacity performed in accordance with paragraph (f)(7)(iii) of this section, during preparation of the Site-Specific Welding Emissions Management Plan, in accordance with the requirements in § 63.11519(b)(9), "Notification, recordkeeping, and reporting requirements."

(v) You must include these records in your annual certification and compliance report, according to the requirements of § 63.11519(b)(1), "Notification, recordkeeping, and reporting requirements."

(8) *Site-Specific Welding Emissions Management Plan.* The Site-Specific Welding Emissions Management Plan

must comply with the requirements in paragraphs (f)(8)(i) through (iii) of this section.

(i) Site-Specific Welding Emissions Management Plan must contain the information in paragraphs (f)(8)(i)(A) through (F) of this section.

(A) Company name and address;

(B) A list and description of all welding operations which currently comprise the welding affected source;

(C) A description of all management practices and/or fume control methods in place at the time of the opacity exceedence;

(D) A list and description of all management practices and/or fume control methods currently employed for the welding affected source;

(E) A description of additional management practices and/or fume control methods to be implemented pursuant to paragraph (f)(7)(ii) of this section, and the projected date of implementation; and

(F) Any revisions to a Site-Specific Welding Emissions Management Plan must contain copies of all previous plan entries, pursuant to paragraphs (f)(8)(i)(D) and (E) of this section.

(ii) The Site-Specific Welding Emissions Management Plan must be updated annually to contain current information, as required by paragraphs (f)(8)(i)(A) through (C) of this section, and submitted with your annual certification and compliance report, according to the requirements of § 63.11519(b)(1), "Notification, recordkeeping, and reporting requirements."

(iii) You must maintain a copy of the current Site-Specific Welding Emissions Management Plan in your records in a readily-accessible location for inspector review, in accordance with the requirements in § 63.11519(c)(12), "Notification, recordkeeping, and reporting requirements."

§ 63.11517 What are my monitoring requirements?

(a) *Visual determination of fugitive emissions, general.* Visual determination of fugitive emissions must be performed according to the procedures of EPA Method 22, of 40 CFR part 60, Appendix A–7. You must conduct the EPA Method 22 test while the affected source is operating under normal conditions. The duration of each EPA Method 22 test must be at least 15 minutes, and visible emissions will be considered to be present if they are detected for more than six minutes of the fifteen minute period.

(b) *Visual determination of fugitive emissions, graduated schedule.* Visual determinations of fugitive emissions must be performed in accordance with paragraph (a) of this section and according to the schedule in paragraphs (b)(1) through (4) of this section.

(1) *Daily Method 22 Testing.* Perform visual determination of fugitive emissions once per day, on each day the process is in operation, during operation of the process.

(2) *Weekly Method 22 Testing.* If no visible fugitive emissions are detected in consecutive daily EPA Method 22 tests, performed in accordance with paragraph (b)(1) of this section for 10 days of work day operation of the process, you may decrease the frequency of EPA Method 22 testing to once every five days of operation of the process (one calendar week). If visible fugitive emissions are detected during these tests, you must resume EPA Method 22 testing of that operation once per day during each day that the process is in operation, in accordance with paragraph (b)(1) of this section.

(3) *Monthly Method 22 Testing.* If no visible fugitive emissions are detected in four consecutive weekly EPA Method 22 tests performed in accordance with paragraph (b)(2) of this section, you may decrease the frequency of EPA Method 22 testing to once per 21 days of operation of the process (one calendar month). If visible fugitive emissions are detected during these tests, you must resume weekly EPA Method 22 in accordance with paragraph (b)(2) of this section.

(4) *Quarterly Method 22 Testing.* If no visible fugitive emissions are detected in three consecutive monthly EPA Method 22 tests performed in accordance with paragraph (b)(3) of this section, you may decrease the frequency of EPA Method 22 testing to once per 60 days of operation of the process (3 calendar months). If visible fugitive emissions are detected during these tests, you must resume monthly EPA Method 22 in accordance with paragraph (b)(3) of this section.

(c) *Visual determination of emissions opacity for welding Tier 2 or 3, general.* Visual determination of emissions opacity must be performed in accordance with the procedures of EPA Method 9, of 40 CFR part 60, Appendix A–4, and while the affected source is operating under normal conditions. The duration of the EPA Method 9 test shall be thirty minutes.

(d) *Visual determination of emissions opacity for welding Tier 2 or 3, graduated schedule.* You must perform visual determination of emissions opacity in accordance with paragraph (c) of this section and according to the schedule in paragraphs (d)(1) through (5) of this section.

(1) *Daily Method 9 testing for welding, Tier 2 or 3.* Perform visual determination of emissions opacity once per day during each day that the process is in operation.

(2) *Weekly Method 9 testing for welding, Tier 2 or 3.* If the average of the six minute opacities recorded during any of the daily consecutive EPA Method 9 tests performed in accordance with paragraph (d)(1) of this section does not exceed 20 percent for 10 days of operation of the process, you may decrease the frequency of EPA Method 9 testing to once per five days of consecutive work day operation. If opacity greater than 20 percent is detected during any of these tests, you must resume testing every day of operation of the process according to the requirements of paragraph (d)(1) of this section.

(3) *Monthly Method 9 testing for welding Tier 2 or 3.* If the average of the six minute opacities recorded during any of the consecutive weekly EPA Method 9 tests performed in accordance with paragraph (d)(2) of this section does not exceed 20 percent for four consecutive weekly tests, you may decrease the frequency of EPA Method 9 testing to once per every 21 days of operation of the process. If visible emissions opacity greater than 20 percent is detected during any monthly test, you must resume testing every five days of operation of the process according to the requirements of paragraph (d)(2) of this section.

(4) *Quarterly Method 9 testing for welding Tier 2 or 3.* If the average of the six minute opacities recorded during any of the consecutive weekly EPA Method 9 tests performed in accordance with paragraph (d)(3) of this section does not exceed 20 percent for three consecutive monthly tests, you may decrease the frequency of EPA Method 9 testing to once per every 120 days of operation of the process. If visible emissions opacity greater than 20 percent is detected during any quarterly test, you must resume testing every 21 days (month) of operation of the process according to the requirements of paragraph (d)(3) of this section.

(5) *Return to Method 22 testing for welding, Tier 2 or 3.* If, after two consecutive months of testing, the average of the six minute opacities recorded during any of the monthly EPA Method 9 tests performed in accordance with paragraph (d)(3) of this section does not exceed 20 percent, you may resume EPA Method 22 testing as in paragraphs (b)(3) and (4) of this section. In lieu of this, you may elect to continue performing EPA Method 9 tests in

accordance with paragraphs (d)(3)and (4) of this section.

§ 63.11518 [Reserved]

§ 63.11519 What are my notification, recordkeeping, and reporting requirements?

(a) *What notifications must I submit?*

(1) *Initial Notification.* If you are the owner or operator of an area source in one of the nine metal fabrication and finishing source categories, as defined in § 63.11514 "Am I subject to this subpart?," you must submit the Initial Notification required by § 63.9(b) "General Provisions," for a new affected source no later than 120 days after initial startup or November 20, 2008, whichever is later. For an existing affected source, you must submit the Initial Notification no later than July 25, 2011. Your Initial Notification must provide the information specified in paragraphs (a)(1)(i) through (iv) of this section.

(i) The name, address, phone number and e-mail address of the owner and operator;

(ii) The address (physical location) of the affected source;

(iii) An identification of the relevant standard (i.e., this subpart); and

(iv) A brief description of the type of operation. For example, a brief characterization of the types of products (e.g., aerospace components, sports equipment, etc.), the number and type of processes, and the number of workers usually employed.

(2) *Notification of compliance status.* If you are the owner or operator of an existing affected source, you must submit a notification of compliance status on or before November 22, 2011. If you are the owner or operator of a new affected source, you must submit a notification of compliance status within 120 days after initial startup, or by November 20, 2008, whichever is later. You are required to submit the information specified in paragraphs (a)(2)(i) through (iv) of this section with your notification of compliance status:

(i) Your company's name and address;

(ii) A statement by a responsible official with that official's name, title, phone number, e-mail address and signature, certifying the truth, accuracy, and completeness of the notification and a statement of whether the source has complied with all the relevant standards and other requirements of this subpart;

(iii) If you operate any spray painting affected sources, the information required by § 63.11516(e)(3)(vi)(C), "Compliance demonstration," or § 63.11516(e)(4)(ix)(C), "Compliance demonstration," as applicable; and

(iv) The date of the notification of compliance status.

(b) *What reports must I prepare or submit?*

(1) *Annual certification and compliance reports.* You must prepare and submit annual certification and compliance reports for each affected source according to the requirements of paragraphs (b)(2) through (7) of this section. The annual certification and compliance reporting requirements may be satisfied by reports required under other parts of the CAA, as specified in paragraph (b)(3) of this section.

(2) *Dates.* Unless the Administrator has approved or agreed to a different schedule for submission of reports under § 63.10(a), "General Provisions," you must prepare and submit each annual certification and compliance report according to the dates specified in paragraphs (b)(2)(i) through (iii) of this section. Note that the information reported for each of the months in the reporting period will be based on the last 12 months of data prior to the date of each monthly calculation.

(i) The first annual certification and compliance report must cover the first annual reporting period which begins the day after the compliance date and ends on December 31.

(ii) Each subsequent annual certification and compliance report must cover the subsequent semiannual reporting period from January 1 through December 31.

(iii) Each annual certification and compliance report must be prepared and submitted no later than January 31 and kept in a readily-accessible location for inspector review. If an exceedence has occurred during the year, each annual certification and compliance report must be submitted along with the exceedence reports, and postmarked or delivered no later than January 31.

(3) *Alternate dates.* For each affected source that is subject to permitting regulations pursuant to 40 CFR part 70 or 40 CFR part 71, "Title V."

(i) If the permitting authority has established dates for submitting annual reports pursuant to 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), "Title V," you may prepare or submit, if required, the first and subsequent compliance reports according to the dates the permitting authority has established instead of according to the date specified in paragraph (b)(2)(iii) of this section.

(ii) If an affected source prepares or submits an annual certification and compliance report pursuant to this section along with, or as part of, the monitoring report required by 40 CFR 70.6(a)(3)(iii)(A) or 40 CFR 71.6(a)(3)(iii)(A), "Title V," and the compliance report includes all required information concerning exceedences of any limitation in this subpart, its submission will be deemed to satisfy any obligation to report the same exceedences in the annual monitoring report. However, submission of an annual certification and compliance report shall not otherwise affect any obligation the affected source may have to report deviations from permit requirements to the permitting authority.

(4) *General requirements.* The annual certification and compliance report must contain the information specified in paragraphs (b)(4)(i) through (iii) of this section, and the information specified in paragraphs (b)(5) through (7) of this section that is applicable to each affected source.

(i) Company name and address;

(ii) Statement by a responsible official with that official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report; and

(iii) Date of report and beginning and ending dates of the reporting period. The reporting period is the 12-month period ending on December 31. Note that the information reported for the 12 months in the reporting period will be based on the last 12 months of data prior to the date of each monthly calculation.

(5) *Visual determination of fugitive emissions requirements.* The annual certification and compliance report must contain the information specified in paragraphs (b)(5)(i) through (iii) of this section for each affected source which performs visual determination of fugitive emissions in accordance with § 63.11517(a), "Monitoring requirements."

(i) The date of every visual determination of fugitive emissions which resulted in detection of visible emissions;

(ii) A description of the corrective actions taken subsequent to the test; and

(iii) The date and results of the follow-up visual determination of fugitive emissions performed after the corrective actions.

(6) *Visual determination of emissions opacity requirements.* The annual certification and compliance report must contain the information specified in paragraphs (b)(6)(i) through (iii) of this section for each affected source which performs visual determination of emissions opacity in accordance with § 63.11517(c), "Monitoring requirements."

(i) The date of every visual determination of emissions opacity;

(ii) The average of the six-minute opacities measured by the test; and

(iii) A description of any corrective action taken subsequent to the test.

(7) [Reserved]

(8) *Exceedences of 20 percent opacity for welding affected sources.* As required by § 63.11516(f)(7)(i), "Requirements for opacities exceeding 20 percent," you must prepare an exceedence report whenever the average of the six-minute average opacities recorded during a visual determination of emissions opacity exceeds 20 percent. This report must be submitted along with your annual certification and compliance report according to the requirements in paragraph (b)(1) of this section, and must contain the information in paragraphs (b)(8)(iii)(A) and (B) of this section.

(A) The date on which the exceedence occurred; and

(B) The average of the six-minute average opacities recorded during the visual determination of emissions opacity.

(9) *Site-specific Welding Emissions Management Plan reporting.* You must submit a copy of the records of daily visual determinations of emissions recorded in accordance with § 63.11516(f)(7)(iv), "Tier 3 requirements for opacities exceeding 20 percent," and a copy of your Site-Specific Welding Emissions Management Plan and any subsequent revisions to the plan pursuant to § 63.11516(f)(8), "Site-specific Welding Emission Management Plan," along with your annual certification and compliance report, according to the requirements in paragraph (b)(1) of this section.

(c) *What records must I keep?*

You must collect and keep records of the data and information specified in paragraphs (c)(1) through (13) of this section, according to the requirements in paragraph (c)(14) of this section.

(1) *General compliance and applicability records.* Maintain information specified in paragraphs (c)(1)(i) through (ii) of this section for each affected source.

(i) Each notification and report that you submitted to comply with this subpart, and the documentation supporting each notification and report.

(ii) Records of the applicability determinations as in § 63.11514(b)(1) through (5), "Am I subject to this subpart," listing equipment included in its affected source, as well as any changes to that and on what date they occurred, must be maintained for 5 years and be made available for inspector review at any time.

(2) *Visual determination of fugitive emissions records.* Maintain a record of the information specified in paragraphs (c)(2)(i) through (iii) of this section for each affected source which performs visual determination of fugitive emissions in accordance with § 63.11517(a), "Monitoring requirements."

(i) The date and results of every visual determination of fugitive emissions;

(ii) A description of any corrective action taken subsequent to the test; and

(iii) The date and results of any follow-up visual determination of fugitive emissions performed after the corrective actions.

(3) *Visual determination of emissions opacity records.* Maintain a record of the information specified in paragraphs (c)(3)(i) through (iii) of this section for each affected source which performs visual determination of emissions opacity in accordance with § 63.11517(c), "Monitoring requirements."

(i) The date of every visual determination of emissions opacity; and

(ii) The average of the six-minute opacities measured by the test; and

(iii) A description of any corrective action taken subsequent to the test.

(4) Maintain a record of the manufacturer's specifications for the control devices used to comply with § 63.11516, "What are my standards and management practices?"

(5) *Spray paint booth filter records.* Maintain a record of the filter efficiency demonstrations and spray paint booth filter maintenance activities, performed in accordance with § 63.11516(d)(1)(ii) and (iii), "Requirements for spray painting objects in spray booths or spray rooms."

(6) Waterspray booth or water curtain efficiency tests. Maintain a record of the water curtain efficiency demonstrations performed in accordance with § 63.11516(d)(1)(ii), "Requirements for spray painting objects in spray booths or spray rooms."

(7) *HVLP or other high transfer efficiency spray delivery system documentation records.* Maintain documentation of HVLP or other high transfer efficiency spray paint delivery systems, in compliance with § 63.11516(d)(3), "Requirements for spray painting of all objects." This documentation must include the manufacturer's specifications for the equipment and any manufacturer's operation instructions. If you have obtained written approval for an alternative spray application system in accordance with § 63.11516(d)(2), "Spray painting of all objects," you must maintain a record of that approval along with documentation of the demonstration of equivalency.

(8) *HVLP or other high transfer efficiency spray delivery system employee training documentation records.* Maintain certification that each worker performing spray painting operations has completed the training specified in § 63.11516(d)(6), "Requirements for spray painting of all objects," with the date the initial training and the most recent refresher training was completed.

(9) [Reserved]

(10) [Reserved]

(11) *Visual determination of emissions opacity performed during the preparation (or revision) of the Site-Specific Welding Emissions Management Plan.* You must maintain a record of each visual determination of emissions opacity performed during the preparation (or revision) of a Site-Specific Welding Emissions Management Plan, in accordance with § 63.11516(f)(7)(iii), "Requirements for opacities exceeding 20 percent."

(12) *Site-Specific Welding Emissions Management Plan.* If you have been required to prepare a plan in accordance with § 63.11516(f)(7)(iii), "Site-Specific Welding Emissions Management Plan," you must maintain a copy of your current Site-Specific Welding Emissions Management Plan in your records and it must be readily available for inspector review.

(13) *Manufacturer's instructions.* If you comply with this subpart by operating any equipment according to manufacturer's instruction, you must keep these instructions readily available for inspector review.

(14) Welding Rod usage. If you operate a new or existing welding affected source which is not required to comply with the requirements of § 63.11516(f)(3) through (8) because it uses less than 2,000 pounds per year of welding rod (on a rolling 12-month basis), you must maintain records demonstrating your welding rod usage on a rolling 12-month basis.

(15) Your records must be maintained according to the requirements in paragraphs (c)(14)(i) through (iii) of this section.

(i) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1), "General Provisions." Where appropriate, the records may be maintained as electronic spreadsheets or as a database.

(ii) As specified in § 63.10(b)(1), "General Provisions," you must keep each record for 5 years following the date of each occurrence, measurement, corrective action, report, or record.

(iii) You must keep each record on-site for at least 2 years after the date of each occurrence, measurement, corrective action, report, or record according to § 63.10(b)(1), "General Provisions." You may keep the records off-site for the remaining 3 years.

§ 63.11520 [Reserved]

Other Requirements and Information

§ 63.11521 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by EPA or a delegated authority such as your state, local, or tribal agency. If the EPA Administrator has delegated authority to your state, local, or tribal agency, then that agency, in addition to EPA, has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if implementation and enforcement of this subpart is delegated to your state, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a state, local, or tribal agency under 40 CFR part 63, subpart E, the authorities contained in paragraph (c) of this section are retained by the EPA Administrator and are not transferred to the state, local, or tribal agency.

(c) The authorities that cannot be delegated to state, local, or tribal agencies are specified in paragraphs (c)(1) through (5) of this section.

(1) Approval of an alternative non-opacity emissions standard under § 63.6(g), of the General Provisions of this part.

(2) Approval of an alternative opacity emissions standard under § 63.6(h)(9), of the General Provisions of this part.

(3) Approval of a major change to test methods under § 63.7(e)(2)(ii) and (f), of the General Provisions of this part. A "major change to test method" is defined in § 63.90.

(4) Approval of a major change to monitoring under § 63.8(f), of the General Provisions of this part. A "major change to monitoring" under is defined in § 63.90.

(5) Approval of a major change to recordkeeping and reporting under § 63.10(f), of the General Provisions of this part. A "major change to recordkeeping/reporting" is defined in § 63.90.

§ 63.11522 What definitions apply to this subpart?

The terms used in this subpart are defined in the CAA; and in this section as follows:

Adequate emission capture methods are hoods, enclosures, or any other duct intake devices with ductwork, dampers, manifolds, plenums, or fans designed to draw greater than 85 percent of the airborne dust generated from the process into the control device.

Capture system means the collection of components used to capture gases and fumes released from one or more emissions points and then convey the captured gas stream to a control device or to the atmosphere. A capture system may include, but is not limited to, the following components as applicable to a given capture system design: duct intake devices, hoods, enclosures, ductwork, dampers, manifolds, plenums, and fans.

Cartridge collector means a type of control device that uses perforated metal cartridges containing a pleated paper or non-woven fibrous filter media to remove PM from a gas stream by sieving and other mechanisms. Cartridge collectors can be designed with single use cartridges, which are removed and disposed after reaching capacity, or continuous use cartridges, which typically are cleaned by means of a pulse-jet mechanism.

Confined abrasive blasting enclosure means an enclosure that includes a roof and at least two complete walls, with side curtains and ventilation as needed to insure that no air or PM exits the enclosure while dry abrasive blasting is performed. Apertures or slots may be present in the roof or walls to allow for mechanized transport of the blasted objects with overhead cranes, or cable and cord entry into the dry abrasive blasting chamber.

Control device means equipment installed on a process vent or exhaust system that reduces the quantity of a pollutant that is emitted to the air.

Dry abrasive blasting means cleaning, polishing, conditioning, removing or preparing a surface by propelling a stream of abrasive material with compressed air against the surface. Hydroblasting, wet abrasive blasting, or other abrasive blasting operations which employ liquids to reduce emissions are not dry abrasive blasting.

Dry grinding and dry polishing with machines means grinding or polishing without the use of lubricating oils or fluids in fixed or stationary machines. Hand grinding, hand polishing, and bench top dry grinding and dry polishing are not included under this definition.

Fabric filter means a type of control device used for collecting PM by filtering a process exhaust stream through a filter or filter media; a fabric filter is also known as a baghouse.

Facility maintenance means operations performed as part of the routine repair or renovation of process equipment, machinery, control equipment, and structures that comprise the infrastructure of the affected facility and that are necessary for the facility to function in its intended capacity. Facility maintenance also includes operations associated with the installation of new equipment or structures, and any processes as part of janitorial activities. Facility maintenance includes operations on stationary structures or their appurtenances at the site of installation, to portable buildings at the site of installation, to pavements, or to curbs. Facility maintenance also includes operations performed on mobile equipment, such as fork trucks, that are used in a manufacturing facility and which are maintained in that same facility. Facility maintenance does not include spray-applied coating of motor vehicles, mobile equipment, or items that routinely leave and return to the facility, such as delivery trucks, rental equipment, or containers used to transport, deliver, distribute, or dispense commercial products to customers, such as compressed gas canisters.

Filtration control device means a control device that utilizes a filter to reduce the emissions of MFHAP and other PM.

Grinding means a process performed on a workpiece to remove undesirable material from the surface or to remove burrs or sharp edges. Grinding is done using belts, disks, or wheels consisting of or covered with various abrasives.

Machining means dry metal turning, milling, drilling, boring, tapping, planing, broaching, sawing, cutting, shaving, shearing, threading, reaming, shaping, slotting, hobbing, and chamfering with machines. Shearing operations cut materials into a desired shape and size, while forming operations bend or conform materials into specific shapes. Cutting and shearing operations include punching, piercing, blanking, cutoff, parting, shearing and trimming. Forming operations include bending, forming, extruding, drawing, rolling, spinning, coining, and forging the metal. Processes specifically excluded are hand-held devices and any process employing fluids for lubrication or cooling.

Material containing MFHAP means a material containing one or more MFHAP. Any material that contains cadmium, chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), and contains manganese in amounts greater than or equal to 1.0 percent by weight (as the metal), as shown in formulation data provided by the manufacturer or

supplier, such as the Material Safety Data Sheet for the material, is considered to be a material containing MFHAP.

Metal fabrication and finishing HAP (MFHAP) means any compound of the following metals: Cadmium, chromium, lead, manganese, or nickel, or any of these metals in the elemental form, with the exception of lead.

Metal fabrication and finishing source categories are limited to the nine metal fabrication and finishing source categories with the activities described in Table 1, "Description of Source Categories Affected by this Subpart." Metal fabrication or finishing operations means dry abrasive blasting, machining, spray painting, or welding in any one of the nine metal fabrication and finishing area source categories listed in Table 1, "Description of Source Categories Affected by this Subpart."

Military munitions means all ammunition products and components produced or used by or for the U.S. Department of Defense (DoD) or for the U.S. Armed Services for national defense and security, including military munitions under the control of the DoD, the U.S. Coast Guard, the National Nuclear Security Administration (NNSA), U.S. Department of Energy (DOE), and National Guard personnel. The term military munitions includes: Confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DoD components, including bulk explosives and chemical warfare agents, chemical munitions, biological weapons, rockets, guided and ballistic missiles, bombs, warheads, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, nonnuclear components of nuclear weapons, wholly inert ammunition products, and all devices and components of any items listed in this definition.

Paint means a material applied to a substrate for decorative, protective, or functional purposes. Such materials include, but are not limited to, paints, coatings, sealants, liquid plastic coatings, caulks, inks, adhesives, and maskants. Decorative, protective, or functional materials that consist only of protective oils for metal, acids, bases, or any combination of these substances, or paper film or plastic film which may be pre-coated with an adhesive by the film manufacturer, are not considered paints for the purposes of this subpart.

Polishing with machines means an operation which removes fine excess metal from a surface to prepare the surface for more refined finishing procedures prior to plating or other processes. Polishing may also be employed to remove burrs on castings or stampings. Polishing is performed using hard-faced wheels constructed of muslin, canvas, felt or leather, and typically employs natural or artificial abrasives. Polishing performed by hand without machines or in bench top operations are not considered polishing with machines for the purposes of this subpart.

Primarily engaged means the manufacturing, fabricating, or forging of one or more products listed in one of the nine metal fabrication and finishing source category descriptions in Table 1, "Description of Source Categories Affected by this Subpart," where this production represents at least 50 percent of the production at a facility, and where production quantities are established by the volume, linear foot, square foot, or other value suited to the specific industry. The period used to determine production should be the previous continuous 12 months of operation. Facilities must document and retain their rationale for the determination that their facility is not "primarily engaged" pursuant to § 63.10(b)(3) of the General Provisions.

Quality control activities means operations that meet all of the following criteria:

(1) The activities are intended to detect and correct defects in the final product by selecting a limited number of samples from the operation, and comparing the samples against specific performance criteria.

(2) The activities do not include the production of an intermediate or final product for sale or exchange for commercial profit; for example, parts that are not sold and do not leave the facility.

(3) The activities are not a normal part of the operation;

(4) The activities do not involve fabrication of tools, equipment, machinery, and structures that comprise the infrastructure of the facility and that are necessary for the facility to function in its intended capacity; that is, the activities are not facility maintenance.

Responsible official means responsible official as defined in 40 CFR 70.2.

Spray-applied painting means application of paints using a hand-held device that creates an atomized mist of paint and deposits the paint on a substrate. For the purposes of this subpart, spray-applied painting does not include the following materials or activities:

(1) Paints applied from a hand-held device with a paint cup capacity that is less than 3.0 fluid ounces (89 cubic centimeters).

(2) Surface coating application using powder coating, hand-held, non-refillable aerosol containers, or non-atomizing application technology, including, but not limited to, paint brushes, rollers, hand wiping, flow coating, dip coating, electrodeposition coating, web coating, coil coating, touch-up markers, or marking pens.

(3) Painting operations that normally require the use of an airbrush or an extension on the spray gun to properly reach limited access spaces; the application of paints that contain fillers that adversely affect atomization with HVLP spray guns, and the application of paints that normally have a dried film thickness of less than 0.0013 centimeter (0.0005 in.).

(4) Thermal spray operations (also known as metallizing, flame spray, plasma arc spray, and electric arc spray, among other names) in which solid metallic or non-metallic material is heated to a molten or semi-molten state and propelled to the work piece or substrate by compressed air or other gas, where a bond is produced upon impact.

Spray booth or spray room means an enclosure with four sides and a roof where spray paint is prevented from leaving the booth during spraying by the enclosure. The roof of the spray booth or spray room may contain narrow slots for connecting the parts and products to overhead cranes, or for cord or cable entry into the spray booth or spray room.

Tool or equipment repair means equipment and devices used to repair or maintain process equipment or to prepare molds, dies, or other changeable elements of process equipment.

Totally enclosed and unvented means enclosed so that no air enters or leaves during operation.

Totally enclosed and unvented dry abrasive blasting chamber means a dry abrasive blasting enclosure which has no vents to the atmosphere, thus no emissions. A typical example of this sort of abrasive blasting enclosure is a small "glove box" enclosure, where the worker places their hands in openings or gloves that extend into the box and enable the worker to hold the objects as they are being blasted without allowing air and blast material to escape the box.

Vented dry abrasive blasting means dry abrasive blasting where the blast material is moved by air flow from within the chamber to outside the chamber into the atmosphere or into a control device.

Welding means a process which joins two metal parts by melting the parts at the joint and filling the space with molten metal.

Welding rod containing MFHAP means a welding rod that contains cadmium, chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), or that contains manganese in amounts greater than or equal to 1.0 percent by weight (as the metal), as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the welding rod.

§ 63.11523 What General Provisions apply to this subpart?

The provisions in 40 CFR part 63, subpart A, applicable to sources subject to § 63.11514(a) are specified in Table 2 of this subpart.

TABLE 1 TO SUBPART XXXXXX OF PART 63—DESCRIPTION OF SOURCE CATEGORIES AFFECTED BY THIS SUBPART

Metal fabrication and finishing source category	Description
Electrical and Electronic Equipment Finishing Operations.	Establishments primarily engaged in manufacturing motors and generators; and electrical machinery, equipment, and supplies, not elsewhere classified. The electrical machinery equipment and supplies industry sector of this source category includes establishments primarily engaged in high energy particle acceleration systems and equipment, electronic simulators, appliance and extension cords, bells and chimes, insect traps, and other electrical equipment and supplies not elsewhere classified. The motors and generators sector of this source category includes establishments primarily engaged in manufacturing electric motors (except engine starting motors) and power generators; motor generator sets; railway motors and control equipment; and motors, generators and control equipment for gasoline, electric, and oil-electric buses and trucks.
Fabricated Metal Products	Establishments primarily engaged in manufacturing fabricated metal products, such as fire or burglary resistive steel safes and vaults and similar fire or burglary resistive products; and collapsible tubes of thin flexible metal. Also, establishments primarily engaged in manufacturing powder metallurgy products, metal boxes; metal ladders; metal household articles, such as ice cream freezers and ironing boards; and other fabricated metal products not elsewhere classified.
Fabricated Plate Work (Boiler Shops)	Establishments primarily engaged in manufacturing power marine boilers, pressure and nonpressure tanks, processing and storage vessels, heat exchangers, weldments and similar products.
Fabricated Structural Metal Manufacturing	Establishments primarily engaged in fabricating iron and steel or other metal for structural purposes, such as bridges, buildings, and sections for ships, boats, and barges.
Heating Equipment, except Electric	Establishments primarily engaged in manufacturing heating equipment, except electric and warm air furnaces, including gas, oil, and stoker coal fired equipment for the automatic utilization of gaseous, liquid, and solid fuels. Products produced in this source category include low-pressure heating (steam or hot water) boilers, fireplace inserts, domestic (steam or hot water) furnaces, domestic gas burners, gas room heaters, gas infrared heating units, combination gas-oil burners, oil or gas swimming pool heaters, heating apparatus (except electric or warm air), kerosene space heaters, gas fireplace logs, domestic and industrial oil burners, radiators (except electric), galvanized iron nonferrous metal range boilers, room heaters (except electric), coke and gas burning salamanders, liquid or gas solar energy collectors, solar heaters, space heaters (except electric), mechanical (domestic and industrial) stokers, wood and coal-burning stoves, domestic unit heaters (except electric), and wall heaters (except electric).
Industrial Machinery and Equipment Finishing Operations.	Establishments primarily engaged in construction machinery manufacturing; oil and gas field machinery manufacturing; and pumps and pumping equipment manufacturing. The construction machinery manufacturing industry sector of this source category includes establishments primarily engaged in manufacturing heavy machinery and equipment of types used primarily by the construction industries, such as bulldozers; concrete mixers; cranes, except industrial plant overhead and truck-type cranes; dredging machinery; pavers; and power shovels. Also establishments primarily engaged in manufacturing forestry equipment and certain specialized equipment, not elsewhere classified, similar to that used by the construction industries, such as elevating platforms, ship cranes, and capstans, aerial work platforms, and automobile wrecker hoists. The oil and gas field machinery manufacturing industry sector of this source category includes establishments primarily engaged in manufacturing machinery and equipment for use in oil and gas fields or for drilling water wells, including portable drilling rigs. The pumps and pumping equipment manufacturing sector of this source category includes establishments primarily engaged in manufacturing pumps and pumping equipment for general industrial, commercial, or household use, except fluid power pumps and motors. This category includes establishments primarily engaged in manufacturing domestic water and sump pumps.
Iron and Steel Forging	Establishments primarily engaged in the forging manufacturing process, where purchased iron and steel metal is pressed, pounded or squeezed under great pressure into high strength parts known as forgings. The forging process is different from the casting and foundry processes, as metal used to make forged parts is never melted and poured.
Primary Metals Products Manufacturing	Establishments primarily engaged in manufacturing products such as fabricated wire products (except springs) made from purchased wire. These facilities also manufacture steel balls; nonferrous metal brads and nails; nonferrous metal spikes, staples, and tacks; and other primary metals products not elsewhere classified.
Valves and Pipe Fittings	Establishments primarily engaged in manufacturing metal valves and pipe fittings; flanges; unions, with the exception of purchased pipes; and other valves and pipe fittings not elsewhere classified.

Instructions for Table 2—As required in § 63.11523, "General Provisions Requirements," you must meet each requirement in the following table that applies to you.

TABLE 2—TO SUBPART XXXXXX OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO METAL FABRICATION OR FINISHING AREA SOURCES

Citation	Subject
63.1[1]	Applicability.
63.2	Definitions.
63.3	Units and abbreviations.
63.4	Prohibited activities.
63.5	Construction/reconstruction.
63.6(a), (b)(1)–(b)(5), (c)(1), (c)(2), (c)(5), (g), (i), (j)	Compliance with standards and maintenance requirements.
63.9(a)–(d)	Notification requirements.
63.10(a), (b) except for (b)(2), (d)(1), (d)(4)	Recordkeeping and reporting.
63.12	State authority and delegations.
63.13	Addresses of State air pollution control agencies and EPA regional offices.
63.14	Incorporation by reference.
63.15	Availability of information and confidentiality.
63.16	Performance track provisions.

[1] § 63.11514(g), "Am I subject to this subpart?" exempts affected sources from the obligation to obtain title V operating permits.

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Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Part 2550

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Proposed Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB07

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

AGENCY: Employee Benefits Security Administration.

ACTION: Proposed regulation.

SUMMARY: This document contains a proposed regulation under the Employee Retirement Income Security Act of 1974 (ERISA) that, upon adoption, would require the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans (e.g., 401(k) plans). This proposal is intended to ensure that all participants and beneficiaries in participant-directed individual account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. This document also contains proposed conforming changes to the regulations applicable to ERISA section 404(c) plans (29 CFR 2550.404c–1). Upon adoption, these proposals will affect plan sponsors, fiduciaries, participants and beneficiaries of participant-directed individual account plans, as well as providers of services to such plans.

DATES: Written comments on the proposed regulation should be received by the Department of Labor on or before September 8, 2008.

ADDRESSES: To facilitate the receipt and processing of comment letters, the Employee Benefits Security Administration (EBSA) encourages interested persons to submit their comments electronically by e-mail to *e-ORI@dol.gov* (enter into subject line: Participant Fee Disclosure Project) or by using the Federal eRulemaking portal at *http://www.regulations.gov*. Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting paper copies should send or deliver their comments to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Participant Fee Disclosure Project, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. All comments will be available to the public, without charge, online at *http://www.regulations.gov* and *http://www.dol.gov/ebsa* and at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Susan M. Halliday or Kristen L. Zarenko, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

According to the Department's most recent data, there are an estimated 437,000 participant-directed individual account plans, covering an estimated 65 million participants, and holding almost $2.3 trillion in assets.[1] With the proliferation of these plans, which afford participants and beneficiaries the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants and beneficiaries are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants and beneficiaries may not have access to, or if accessible, may not be considering information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses.

Under ERISA, the investment of plan assets is a fiduciary act governed by the fiduciary standards in ERISA section 404(a)(1)(A) and (B), which require fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries. Where a plan assigns investment responsibilities to the plan's participants and beneficiaries, it is the view of the Department that plan fiduciaries must take steps to ensure that participants and beneficiaries are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses, and designated investment alternatives, including fees and expenses attendant thereto, to make informed decisions about the management of their individual accounts. To some extent, such disclosures are already required by plans that elect to comply with the requirements of section 404(c) (see § 2550.404c–1(b)(2)(i)(B)). However, compliance with section 404(c)'s disclosure requirements is voluntary and does not extend to participants and beneficiaries in all participant-directed individual account plans.

The Department believes that all participants and beneficiaries with the right to direct the investment of assets held in their individual plan accounts should have access to basic plan and investment information. For this reason, the Department is issuing this proposed regulation under section 404(a), with conforming amendments to the regulations under section 404(c). These proposals would establish uniform, basic disclosures for such participants and beneficiaries, without regard to whether the plan in which they participate is a section 404(c) plan. In addition, the proposal would require participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among investment options.

To facilitate the development of a proposed regulation, the Department published, on April 25, 2007, a Request for Information (RFI) in the **Federal Register**[2] requesting suggestions, comments and views from interested persons on a variety of issues relating to the disclosure of plan and investment-related fee and expense and other information to participants and beneficiaries in participant-directed individual account plans. The Department received and reviewed 106 comment letters on these important issues. Copies of these letters are posted on the Department's Web site at *http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html*.

The RFI encouraged persons preparing comments to consider a 2004 report and recommendations of a working group of the ERISA Advisory Council. The Employee Welfare and Pension Benefit Plans' Working Group on Fee and Related Disclosures to Participants reviewed the disclosure requirements applicable to participant-directed individual account plans. The Working Group assessed the adequacy and usefulness of such requirements and recommended changes to the requirements to help participants more effectively manage their retirement savings.[3]

[1] 2005 Form 5500 Data, U.S. Department of Labor. The estimated 437,000 plans include plans that permit participants to direct the investment of all or a portion of their individual accounts.

[2] 72 FR 20457 (April 25, 2007).

[3] This report may be accessed at *http://www.dol.gov/ebsa/publications/AC_111704_report.html*.

Additionally, the RFI encouraged commenters to consider the Government Accountability Office's (GAO) 2006 report and recommendations contained in "Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees." [4] Also relevant to the Department's consideration was the work of the Securities and Exchange Commission (Commission). The Commission has proposed, among other matters, the use of a summary prospectus with additional information provided on an Internet Web site. The proposal is intended to improve mutual fund disclosure by providing investors with key information in plain English in a clear and concise format, while enhancing the means of delivering more detailed information to investors.[5] Following consultation with the Commission, the Department's proposal is coordinated with the Commission's summary prospectus approach where feasible. As ERISA plan investment options include many products not subject to the Commission's disclosure requirements, the Department seeks comments addressing the application of this proposed regulation to funds and investment products not subject to the securities laws.

B. Overview of Proposal § 2550.404a–5

1. General

Paragraph (a) of proposed § 2550.404a–5 sets forth the general principle that, where documents and instruments governing an individual account plan provide for the allocation of investment responsibilities to participants and beneficiaries, plan fiduciaries, consistent with ERISA section 404(a)(1)(A) and (B), must take steps to ensure that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including plan fees and expenses, and regarding designated investment alternatives available under the plan, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts. As discussed below, the proposal addresses the information that must be provided participants and beneficiaries, as well as timeframes for providing that information.

Paragraph (b) of the proposal addresses the disclosure requirements that must be met by plan fiduciaries for plan years beginning on or after January 1, 2009. Under this paragraph, plan fiduciaries must comply with the requirements of paragraph (c), dealing with plan-related information, and paragraph (d), dealing with investment-related information. Paragraph (e) describes the form in which the required information may be disclosed, such as via the plan's summary plan description, a quarterly benefit statement, or the use of the provided model, depending on the specific information. Paragraph (e) merely recognizes various acceptable means of disclosure; it does not preclude other means for satisfying disclosure duties under the proposed regulation. Fiduciaries that meet the requirements of paragraphs (c) and (d) will have satisfied the duty to make the regular and periodic disclosures described in paragraph (a) of this section.

The Department believes, as an interpretive matter, that ERISA section 404(a)(1)(A) and (B) impose on fiduciaries of all participant-directed individual account plans a duty to furnish participants and beneficiaries information necessary to carry out their account management and investment responsibilities in an informed manner. In the case of plans that elected to comply with section 404(c) before finalization of this proposal, the requirements of section 404(a)(1)(A) and (B) typically would have been satisfied by compliance with the disclosure requirements set forth at 29 CFR § 2550.404c–1(b)(2)(i)(B). However, the Department expresses no view with respect to plans that did not comply with section 404(c) and the regulations thereunder as to the specific information that should have been furnished to participants and beneficiaries in any time period before this regulation is finalized.

2. Plan-Related Information

In general, paragraph (c) of the proposal sets forth what is characterized as "plan-related" information. This information falls into three categories—general plan information, administrative expense information and individual expense information. Paragraph (c) also describes when this information must be provided to participants and beneficiaries and requires that it be based on the latest information available to the plan.

First, paragraph (c)(1) of the proposal provides for the disclosure of general plan information regarding: How participants and beneficiaries may give investment instructions; any specified limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative; the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights; the specific designated investment alternatives offered under the plan; and any designated investment managers to whom participants and beneficiaries may give investment directions. Under the proposal, this information is required to be furnished to an individual on or before the date he or she becomes eligible to be a participant or beneficiary under the plan and at least annually thereafter. In addition, the proposal requires that participants and beneficiaries be furnished a description of any material changes to the required information not later than 30 days after the date of adoption of such changes. The Department believes that, by referencing the "date of adoption," the regulation will increase the likelihood that participants and beneficiaries will be provided notification of material changes in advance of the changes becoming effective, thereby putting them in a better position to consider such changes (e.g., changes in designated investment alternatives) in managing their accounts. Paragraph (e)(1) of the proposal provides that the disclosures required by this paragraph (c)(1) may be made as part of the plan's summary plan description, provided that the applicable timing requirements are satisfied.

Second, paragraph (c)(2)(i) sets out the required disclosures for administrative expenses. Specifically, it provides that, on or before the date of an individual's eligibility to become a participant or beneficiary under the plan, and at least annually thereafter, participants and beneficiaries must be furnished an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not included in investment-related fees and expenses, may be charged against the individual accounts of participants or beneficiaries and the basis on which such charges will be allocated to, or affect the balance of, each individual account (e.g., pro rata, per capita). This requirement is intended to ensure that the plan fiduciary informs all participants and beneficiaries about the plan's day-to-day operational expenses that will be charged against their accounts. Because of its general nature,

[4] The GAO report, GAO–07–21, referenced above may be accessed at *http://www.gao.gov/htext/d0721.html*.

[5] 72 FR 67790 (November 30, 2007).

the information described in paragraph (c)(2)(i) may, pursuant to paragraph (e)(1) of the proposal, be disclosed as part of the plan's summary plan description, provided that the applicable timing requirements are met.

In addition to the general disclosures concerning plan administrative expenses, paragraph (c)(2)(ii) of the proposal requires that, at least quarterly, participants and beneficiaries be furnished statements of the dollar amounts actually charged during the preceding quarter to the participants' or beneficiaries' accounts for administrative services, and general descriptions of the services to which the charges relate. The statements should be sufficiently specific to inform the participants or beneficiaries of the actual charge(s) to their accounts and enable them to distinguish the administrative services from other charges and services that may be assessed against their accounts. An identification of the total administrative fees and expenses assessed during the quarter, with, for example, an indication that the charges for plan administrative expenses include legal, accounting, and recordkeeping costs to the plan, would be sufficient. The Department does not believe that it is necessary, or particularly useful, for participants to have administrative charges broken out and listed on a service-by-service basis. Commenters on the Department's RFI argued that an overly detailed breakdown of administrative fees may overwhelm participants and that meaningful information would not be conveyed by such a breakdown. Many commenters explicitly supported the disclosure of "aggregate" or summary fees. The requirement to furnish the information described in paragraph (c)(2)(ii) of the proposal may be satisfied by including the information as part of a quarterly benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i). See paragraph (e)(2) of the proposal.

Third, paragraph (c)(3) describes the required disclosures for individual expenses. This is identical to paragraph (c)(2) except that it focuses on the disclosure of information relating to individual expenses, i.e., expenses that are assessed on an individual-by-individual, rather than plan-wide, basis. Such expenses might be attendant to a qualified domestic relations order, a participant loan, or investment advice services. Paragraph (c)(3)(i) requires the disclosure of information concerning what expenses might be assessed and paragraph (c)(3)(ii) requires the disclosure of amounts actually assessed and identification of the service to which an expense relates. Also, like paragraph (c)(2), information described in paragraph (c)(3)(i) may be disclosed in the plan's summary plan description and the information described in paragraph (c)(3)(ii) may be included in a quarterly benefit statement.

The Department invites comments on the type of information required to be disclosed, the timing of the information required to be disclosed and the form in which the information may be disclosed.

3. Investment-Related Information

Paragraph (d) of the proposal sets forth the investment-related information required to be furnished or made accessible to participants and beneficiaries in participant-directed individual account plans. Paragraph (d)(1) sets forth the investment-related information required to be automatically furnished to each participant and beneficiary. Paragraph (d)(2) addresses the format of the required information. Paragraph (d)(3) addresses the furnishing of post-investment information. And paragraph (d)(4) sets forth information required to be furnished only upon the request of a participant or beneficiary.

Paragraph (d)(1) provides that, on or before the date of eligibility and at least annually thereafter, participants and beneficiaries must be furnished certain basic information with respect to each designated investment alternative offered under the plan. For purposes of the proposal, paragraph (h)(1) defines the term "designated investment alternative" to mean any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term "designated investment alternative" does not include "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

For purposes of identifying the information essential for participants and beneficiaries to consider in evaluating their investment choices under the plan, the Department carefully reviewed the many comments received in response to the RFI, as well as the Commission's proposal for a summary prospectus. The majority of RFI commenters believe that, in addition to basic fee and expense information, participants and beneficiaries need additional disclosure to put fee-related information into context and to educate them about a plan's investment alternatives. On the basis of its review, the Department concluded that fee and expense information, although important, is only one of the factors to be considered in making informed investment decisions along with investment performance and other information relating to a designated investment alternative. Also, the Department is persuaded by RFI commenters that most participants and beneficiaries will probably not review large amounts of detailed investment information. Information that is too detailed may overwhelm participants, and commenters are concerned that the costs associated with providing overly detailed information, which ultimately will be borne by participants, significantly outweigh any possible benefits. However, the Department also is persuaded that the form in which information is required to be presented should serve to encourage and facilitate its review by participants and beneficiaries. Many commenters on the RFI, for example, supported the disclosure of fee information in a format that would facilitate comparison across a plan's investment alternatives. For this reason, paragraph (d)(2) of the proposal, as discussed later, requires the investment-related information set forth in paragraph (d)(1) to be presented in a comparative format.

Specifically, paragraph (d)(1) requires the following disclosures with respect to each designated investment alternative under the plan:

Paragraph (d)(1)(i) requires, among other items, the name and category (e.g., money market mutual fund, balanced fund, index fund, and whether the investment alternative is actively or passively managed) of the designated investment alternative and an Internet Web site address that is sufficiently specific to lead participants and beneficiaries to supplemental information regarding the investment alternative, including its principal strategies, risks, performance and costs. For example, such information may be contained in a Commission-required prospectus (or other document) made available at a Web site address. The Department believes that ready access to such information via the Internet alleviates the need to automatically furnish otherwise important, detailed investment-related information directly to every participant and beneficiary. This accommodates different levels of participant interest in such information. The Department recognizes that, while many investment fund providers do maintain Web sites to inform interested investors concerning specific investment funds, other providers of

investment funds and products may not. The Department specifically invites comments on what, if any, challenges this proposed requirement may present for service providers and employers, such as in the case of in-house managed funds that might be offered as a designated investment alternative under a plan. The Department also is interested in comments on whether this proposed requirement raises any issues under the Department's rules on the use of electronic media (29 CFR 2520.104b–1(c)), given that plan fiduciaries may, in some cases, have to provide paper copies of the supplemental information listed in this requirement (i.e., information that would otherwise be accessible through the Internet Web site address) to participants who fail to affirmatively consent to receiving such information electronically.

Paragraph (d)(1)(ii) of the proposal requires the disclosure of specified performance data for each of the plan's designated investment alternatives. For designated investment alternatives with respect to which the return is not fixed, e.g., an equity index fund, the fiduciary (or designee) must provide the average annual total return (expressed as a percentage) of the investment for the following periods, if available: 1-year, 5-year, and 10-year, measured as of the end of the applicable calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future. For this purpose, the term "if available" is intended merely to reflect that some plan investments may not have been in existence for 1, 5, or 10 years. In such cases, plans are expected to explain that the data is not available for this reason (e.g., "not applicable" or "not available"). In the case of designated investment alternatives for which the return is fixed for the term of the investment, e.g., a guaranteed investment contract, the fiduciary (or designee) must provide both the fixed rate of return and the term of the investment. For purposes of paragraph (d)(1)(ii), the term "average annual total return" is defined in section (h)(2) of the proposal by reference to standards applicable to open-end management investment companies registered under the Investment Company Act of 1940 (the 1940 Act). The Department specifically invites comments on what, if any, problems the proposed definition presents for investment funds and products that are not subject to the 1940 Act and, if problematic, suggestions for alternative definitions or approaches.

As a corollary to the disclosure of performance data, paragraph (d)(1)(iii) requires disclosure of performance data for an appropriate broad-based benchmark over time periods that are comparable to the performance data periods required under paragraph (d)(1)(ii). As structured, the proposal provides flexibility in identifying an appropriate benchmark. In general, the Department expects that most plans will simply identify the performance benchmark already being used for the investment option pursuant to the Commission's prospectus requirements, if applicable. The Department seeks comments on whether and how the proposed requirement may need to be modified to include a more narrowly based index that reflects the financial market sector for ERISA plan investment options that are not subject to the securities laws.

Paragraph (d)(1)(iv) specifically addresses the disclosure of fees and expenses attendant to the purchase, holding and sale of each of the plan's designated investment alternatives. For designated investment alternatives with respect to which the return is not fixed, the fiduciary (or designee) must provide: (A) The amount and a description of each shareholder-type fee (i.e., fees charged directly against a participant's or beneficiary's investment), such as sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees; (B) the total annual operating expenses of the investment expressed as a percentage (e.g., expense ratio); and (C) a statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, the fiduciary (or designee) must provide the amount and a description of any shareholder-type fees that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part. The description of each shareholder-type fee must include the amount on which the charge is applied, e.g., 4% of amount invested. For purposes of paragraph (d)(1)(iv), the term "total annual operating expenses" is defined in paragraph (h)(3) of the proposal by reference to standards applicable to open-end management investment companies registered under the 1940 Act. The Department specifically invites comments on what, if any, problems the proposed definition presents for investment funds and products that are not subject to the 1940 Act and, any suggestions for alternative definitions or approaches.

The Department has differentiated the fee and expense disclosures required for designated investment alternatives with returns that vary over time from alternatives with fixed returns based on the financial nature of each of these investment types. While the disclosure requirements for investments with respect to which the return is not fixed are more comprehensive, the Department decided that the most essential information for participants who choose to invest in fixed investment alternatives is the contractual interest rate paid to their accounts and the term of the investment during which their monies are shielded from market price fluctuations and reinvestment risks. Any fees assessed, of course, are factored into determining the contractual interest rate and RFI commentary suggested that there would be little benefit to participants to disclosing such fees for investments with fixed returns.

Paragraph (d)(1)(v) provides that, for purposes of the requirement that participants be provided information on or before the date they are eligible to be covered under the plan, plan fiduciaries may provide such participants the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1), in addition to any material changes to the information described in paragraph (c)(1)(i). This provision ensures that new participants receive at least the same information that has been furnished to other plan participants and beneficiaries with respect to the designated investment alternatives under the plan. It also avoids the possible burdens and costs of a requirement that fiduciaries update the required disclosures for each new plan participant, which could result in a daily updating requirement for many plans.

Paragraph (d)(2) of the proposal requires the fiduciary to furnish the information required by paragraph (d)(1) in a chart or similar format that will permit straightforward comparison of the plan's designated investment alternatives by participants and beneficiaries. Many commenters on the RFI supported this requirement and agreed that any required disclosure should enable participants and beneficiaries to easily compare data across a plan's menu of designated investment alternatives. Further, GAO indicated in its 2006 report that plan sponsors should be required to disclose fee information on each 401(k) investment option in a way that

facilitates comparison among the options.[6] The fiduciary's name and contact information must also be provided so that participants and beneficiaries may request the additional information listed in paragraph (d)(4). The chart or similar document also must include a statement informing participants and beneficiaries that more current information about a designated investment alternative, including performance and cost updates, may be available on the Web site for the investment alternative.

In response to commenters on the RFI, the Department has developed a model disclosure form that can be used for purposes of satisfying the disclosure requirements of paragraph (d)(2) of the proposal. The model appears in the Appendix to this regulation. Paragraph (e)(3) of the proposal specifically provides that a fiduciary that uses and accurately completes the model format set forth in the Appendix will be deemed to have satisfied the requirements of paragraph (d)(2) relating to the disclosure of the information in paragraph (d)(1) in a comparative form.[7] The Department notes that the proposal would not mandate use of the model as the exclusive means for satisfying the requirement to provide a chart or similar format that facilitates comparison. This proposal provides fiduciaries with the flexibility to create a chart or comparative format of their own design, provided the required information is displayed in a manner facilitating comparisons.

Paragraph (d)(3) of the proposal requires that when a plan provides for the pass-through of voting, tender and similar rights, the fiduciary must furnish participants and beneficiaries who have invested in a designated investment alternative with these features any materials about such rights that have been provided to the plan. This requirement is similar to the requirement currently applicable to section 404(c) plans. See § 2550.404c–1(b)(2)(i)(B)(*1*)(*ix*).

Paragraph (d)(4) of the proposal requires a fiduciary to furnish certain identified information either automatically or upon request by participants and beneficiaries, based on the latest information available to the plan. This provision is modeled on the requirements currently applicable to section 404(c) plans with respect to information to be furnished upon request of a participant or beneficiary. See § 2550.404c–1(b)(2)(i)(B)(*2*).

4. Timing of Disclosures

As discussed above, each of the various disclosures must be made within specific timeframes. The plan-related information concerning certain administrative procedures and expenses required by subparagraphs (c)(1)(i), (c)(2)(i), (c)(3)(i), and the investment-related information required by subparagraph (d)(1) must be provided to each participant or beneficiary "on or before the date of plan eligibility" and "at least annually thereafter." The proposal defines "at least annually thereafter" in paragraph (h)(4) to mean at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

The proposal also requires that certain information be provided to participants and beneficiaries on a more frequent basis. Specifically, the actual dollar amounts charged to an individual's account during the preceding quarter for administrative and individual services must be disclosed in a statement to participants and beneficiaries "at least quarterly" pursuant to subparagraphs (c)(2)(ii) and (c)(3)(ii) of the proposal. The proposal defines "at least quarterly" in paragraph (h)(5) to mean at least once in any 3-month period.

5. Other Fiduciary Duties

Paragraph (f) makes clear that nothing in the regulation would relieve a fiduciary of its responsibilities to prudently select and monitor service providers to the plan and the investments made available under the plan (i.e., designated investment alternatives).[8]

C. Proposed Amendments to § 2550.404c–1

Also included in this notice are proposed amendments to the regulation under section 404(c) of ERISA, 29 CFR § 2550.404c–1. The proposed amendments to section 2550.404c–1(b), (c) and (f) would integrate the disclosure requirements in the section 404(c) regulation with the new proposed section 2550.404a–5 disclosure requirements and thereby avoid having different disclosure rules for plans intending to comply with the section 404(c) requirements. In brief, the proposed amendments to the section 404(c) regulation eliminate references to disclosures encompassed in the new § 2550.404a–5 proposal and incorporate cross-references to the new proposal, thereby establishing a uniform disclosure framework for all participant-directed individual account plans. The Department also is taking this opportunity to reiterate its long held position that the relief afforded by section 404(c) and the regulation thereunder does not extend to a fiduciary's duty to prudently select and monitor designated investment managers and designated investment alternatives under the plan. Accordingly, it is the Department's view that a fiduciary breach or an investment loss in connection with the plan's selection of a designated investment alternative is not afforded relief under section 404(c) because it is not the result of a participant's or beneficiary's exercise of control.[9] The Department is proposing to amend paragraph (d)(2) (entitled "Limitation on liability of plan fiduciaries") of § 2550.404c–1 to add a new subparagraph (iv) providing that, "[P]aragraph (d)(2)(i) does not relieve a fiduciary from the duty to prudently select and monitor any designated investment manager or designated investment alternative offered under the plan."

D. Effective Date

The Department proposes that the regulations and amendments contained in this notice be effective for plan years beginning on or after January 1, 2009. The Department specifically invites comments on the earliest date on which the proposed regulation and amendments can or should be effective, addressing any administrative or programming costs or other issues that should be considered in establishing an effective date.

[6] *See supra* note 4.

[7] The Department notes that the model set forth in the Appendix includes information and statements that are merely illustrative of the type of information that might appear in the required disclosure. It is the responsibility of each plan fiduciary to assure itself that the information contained in its disclosure statement is complete and accurate. However, such fiduciaries shall not be liable for their reasonable and good faith reliance on information furnished by their service providers with respect to those disclosures required by paragraph (d)(1).

[8] Also, with regard to ERISA's general fiduciary standards, it should be noted that there may be extraordinary situations when fiduciaries will have a disclosure obligation beyond those addressed by this regulation. For example, if a plan fiduciary knew that, due to a fraud, information contained in a public financial report would mislead investors concerning the value of a designated investment alternative, the fiduciary would have an obligation to take appropriate steps to protect the plan's participants, such as disclosing the information or preventing additional investments in that alternative by plan participants until the relevant information is made public. *See also Varity Corp. v. Howe*, 516 U.S. 489 (1996) (plan fiduciary has a duty not to misrepresent to participants and beneficiaries material information relating to a plan).

[9] See 57 FR 46906, 46924. n.27 (preamble to § 2550.404c–1) (October 13, 1992).

E. Regulatory Impact Analysis

As discussed in the preceding sections, the proposed regulation would establish a uniform basic disclosure regime for participant-directed plans. Many of the disclosures contained in the proposed regulation are similar to those required for participant-directed individual account plans that currently comply with section 404(c) and the Department's regulations issued thereunder. For other participant-directed plans which choose not to be section 404(c) compliant there is some uncertainty as to what information is provided to participants; accordingly, the Department is assuming for purposes of this analysis that for some of the plans that choose not to be 404(c) compliant the proposal's disclosure requirements are new.

Given the foregoing assumptions, the average incremental costs and benefits for participants in plans that provide section 404(c) compliant or similar disclosures will be smaller than for those in plans that do not provide this information. Participants in section 404(c) compliant plans or in plans that provide similar information will not receive as large an added benefit from the proposal's new disclosure requirements because they are already receiving some of the information that would be required under the proposed regulation.

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Department has determined that this action is "significant" under section 3(f)(1) because it is likely to have an effect on the economy of more than $100 million in any one year.

Accordingly, the Department has undertaken, as described below, an analysis of the costs and benefits of the proposed regulation in satisfaction of the requirements of the Executive Order and OMB Circular A–4. The Department believes that the proposed regulation's benefits justify its costs. The present value of the benefits over the ten year period is expected to be about $6.9 billion. The present value of the costs over the same time period is expected to be $759 million. Overall, the Department estimates that the proposed regulation will generate a net present value (or net present benefit) of almost $6.1 billion over the time period 2009–2018, as is shown in Table 1.

TABLE 1.—SUMMARY OF DISCOUNTED BENEFITS AND COSTS

Year	Benefits ($millions/year)	Costs ($millions/year)
1 2009	914.9	127.3
2 2010	855.0	90.7
3 2011	799.1	84.7
4 2012	746.8	79.2
5 2013	698.0	74.0
6 2014	652.3	69.2
7 2015	609.6	64.7
8 2016	569.8	60.4
9 2017	532.5	56.5
10 2018	497.6	52.8
Total with 7% Discounting	6875.6	759.4
Net Present Value 7% Discounting		6,116
Net Present Value 3% Discounting		7,158

Need for Regulatory Action

A growing number of workers are preparing for retirement by participating in ERISA governed retirement plans that allow for participant direction of investments. How well plan participants are prepared for retirement is partly determined by how well they have invested their retirement savings. Among the key determinants of the return on an investment are fees and expenses. A one percentage point difference in fees can result in an 18 percent difference in savings.[10]

In developing this proposed regulation, the Department considered why the market alone does not provide transparent fee disclosure to participants comparable to that prescribed by this regulation. In general, the market delivers products that are deemed valuable by consumers. The lack of transparent fee disclosure in this market suggests to the Department that individuals may underestimate the impact that fees and expenses can have on their account balances, and thus undervalue transparent fee disclosure. The Department believes that this causes individuals to make uninformed investment decisions that result in inferior outcomes to those that would result from making investment decisions based on full information. Retirement plan characteristics, including disclosure practices, are shaped in significant measure by labor market forces. Employers want to attract and retain productive employees and minimize cost. If employees undervalue disclosure, plans sponsors might under-provide it. Sub-optimal levels of disclosure translate into inefficiencies in participant's choices of investment products and services. Evidence for this

[10] The Commission reported that a $10,000 investment with an expense ratio of 1.5% invested for 20 years and having an annual return of 10% before fees will return roughly $49,725, while a similar investment with lower fees of 0.5% will return $60,858—an 18% difference. Invest Wisely: An Introduction to Mutual Funds, *http://www.sec.gov/investor/pubs/inwsmf.htm.*

undervaluation includes a wide dispersion of fees paid in 401(k) plans. As supported by a report of the Investment Company Institute,[11] the fees that plans pay vary over a wide range. According to their study, 23% of 401(k) stock mutual fund assets are in funds with an expense ratio of less than 50 basis points, while an equal amount of assets are in funds with an expense ratio of over 100 basis points. Some of this variation could be explained by the varying amount of assets in plans and their accompanying economies of scale. In addition, some plans might offer more, or more expensive, plan features. The Department believes, however, that a significant portion of the variation in plan fees is due to market inefficiencies.

Understanding and comparing investment options available in a 401(k) plan can be complicated and confusing for many participants. The magnitude of complexity and confusion may be defined by reference to the number of available investment options and the materials utilized for communicating investment-related information. For example, in plans that offer a large number of investment options, for which the primary communication is a full prospectus-like disclosure, understanding and comparing investment options may be challenging for the less financially savvy or less interested plan participants.[12] Moreover, the process of gathering and comparing information may itself be time consuming.

The proposed regulation will help a large number of plan participants by placing investment-related information in a format that facilitates comparison of investment alternatives. This simplified format will make it easier and less time consuming for participants to find and compare the needed information. As a result, plan participants may make better investment decisions and may be better financially prepared for retirement.

[11] Investment Company Institute, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2006," *http://www.ici.org/pdf/fm-v16n4.pdf.*

[12] For example, the ERISA Advisory Council Working group reported that "The Working Group questions the utility of the prospectus as a source of investment information. While its delivery is required under SEC rules for investment, it lacks any marginal utility to a plan participant in terms of making an investment decision," Report of the Working Group on Prudent Investment Process, 2006, *http://www.dol.gov/ebsa/publications/AC_1106A_report.html.* The Department also received similar comments in response to its Request of Information regarding Fee Disclosures to 401(k) Plan Participants from service providers and trade organizations. These comments can be accessed at *http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html.*

Benefits

The proposed regulation's disclosure requirements will provide important benefits to society. The provision of investment-related information in a comparative format is a new requirement for all participant directed individual account plans, including section 404(c) compliant plans, and is anticipated to be especially beneficial to plan participants. The Department believes that such information will enable participants to make better decisions on how to structure their investments on a prospective basis. These benefits with respect to the provision of investment-related information are quantified in more detail below.

(a) Reduction in Fees

A review of the relevant literature suggests that plan participants on average pay fees that are higher than necessary by 11.3 basis points per year.[13] The proposal's required disclosure of fees and expenses is expected to result in the payment of lower fees for many participants, assuming that participants will more consistently pick the lower cost comparable investment alternatives under their plans.[14] Selection of the lower cost comparable investment alternatives will, in turn, result in increased plan participant account investment returns. In addition, the required disclosure could lead to reduced fees[15] in the investment alternatives market as more fee transparency fosters more price competition in the market. Furthermore, the fee disclosure requirements may lead plan fiduciaries to give additional scrutiny to fees, and consequently to select less expensive comparable investment alternatives.

Although participants in section 404(c) compliant plans already receive much of the information that would be required under the proposed regulation, they are expected to receive a substantial incremental benefit. Participants in section 404(c) compliant plans, as well as many participants in plans that are not choosing to be section 404(c) compliant, who invest in mutual funds that are designated investment alternatives under the plan already receive the fee information in the related funds' prospectuses. The proposal's required disclosure of a summary of fee and performance information in a comparable format may nevertheless be beneficial in assisting plan participants to make better investment decisions. Thus, the Department assumes that participants in plans that are not providing disclosures similar to that required under section 404(c) receive a larger added benefit from the proposal's disclosures than plan participants that receive section 404(c) compliant or similar disclosures.[16]

The Department estimates that there will be assets of about $2.6 trillion in participant-directed individual account

[13] "Higher than necessary" here means that the participant could have obtained equal value without incurring the expense. This calculation, based on fees paid in 401(k) plans, assumes that participants on average pay 11 or more basis points in unnecessary fees and expenses, in the form of expense ratios or loads. This assumption is conservative in light of evidence on the distribution of investor expense levels presented in: Brad M. Barber, Terrance Odean and Lu Zheng, "Out of Sight, Out of Mind, The Effects of Expenses on Mutual Fund Flows," Journal of Business Vol. 79, No. 6 p. 2095–2119 (2005); James J. Choi, David I. Laibson, and Brigitte C. Madrian, "Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds," NBER Working Paper No. W12261 (May 2006); Report, Deloitte Financial Advisory Services LLP. "Fees and Revenue Sharing in Defined Contribution Retirement Plans," (December 6, 2007) (on file with the Department); Edwin J. Elton, Martin J. Gruber, and Jeffrey A. Busse, "Are Investors Rational? Choices Among Index Funds," NYU Working Paper, Social Science Research Network Abstract 340482 (June 2002); Sarah Holden and Michael Hadley, Investment Company Institute, "The Economics of Providing 401(k) Plans: Services, Fees and Expenses 2006," 16 Research Fundamentals, No. 4. (September 2007). This estimate of excess expense does not take into account less visible expenses such as mutual funds' internal transaction costs (including explicit brokerage commissions and implicit trading costs), which are sometimes larger than funds' expense ratios. Deloitte, supra; Jason Karceski, Miles Livingston, and Edward O'Neal, "Portfolio Transactions Costs at U.S. Equity Mutual Funds," University of Florida Working Paper (2004) at *http://thefloat.typepad.com/the_float/files/2004_zag_study_on_mutual_fund_trading_costs.pdf.*

[14] While increased disclosure to plan participants is expected to reduce fees, it is not clear by how much. Some participants may not make optimal use of the disclosed information to reduce fees when making investment decisions. Also, the proposal's disclosures are limited to plan's designated investment alternatives chosen by plan fiduciaries rather than by plan participants.

[15] In their mutual fund experiment, Choi et al. found that presenting the participants with a comparison fee chart, and not just a prospectus, reduced the fees paid by 12% to 49% depending on the group studied.

James J. Choi, David I. Laibson, and Brigitte C. Madrian. May 2006. "Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds." NBER Working Paper No. W12261.

[16] The Department assumes that plan participants that already receive the section 404(c) required information will receive a benefit from the proposal that is two-thirds of that received by participants that do not already receive this information. In addition, the Department assumes that at least 80% of participants in plans that choose not to be 404(c) compliant, nevertheless, receive similar disclosures to participants in section 404(c) compliant plans. The Department specifically requests comments on the percentage of participants that already receive this information and the additional benefits that plan participants will receive due to the proposed regulation.

plans in 2009[17] and that about $3.0 billion in higher than necessary fees are being paid by plan participants. Assuming the proposal's fee disclosures will reduce the amount of higher than necessary fees paid on average (a) by 10% (11.3 basis points*10%=1.13 basis points)[18] for participants in section 404(c) compliant plans or plans that provide similar information, and (b) by 15% (11.3 basis points*15%=1.70 basis points) for participants in plans that do not receive section 404(c) compliant or similar information, the Department believes that the proposal's fee disclosures will result in $307 million in fee savings for plan participants in 2009 as shown in Table 2.

TABLE 2.—BENEFITS DUE TO REDUCTION IN FEES (2009)

Type of plan	Total amount of assets in plans (in millions of 2009 dollars) (A)	Basis points of higher than necessary fees (B)	Percent correction due to disclosure (C)	Benefits from reduction in fees (percent) (A * B * C)
404(c) Plans and Plans with Similar Information	2,500,000	0.11	10	$282,754,000
Non-404(c) Plans without Similar Information	144,000	0.11	15	24,487,000
Total Undiscounted Benefits				307,241,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

There is some question as to whether some reductions in fees might represent transfers (such as consumer surpluses being recaptured by participants from investment managers) rather than efficiency gains. The Department believes that fee reductions attributable to this proposed regulation will mostly reflect efficiency gains, especially in the longer run. Downward pressure on fees will favor more efficient means of producing investment and other plan services. It will also reflect a diminution of the market for services whose costs exceeds their benefits (such as movement from more active to more passive investment management in cases where the latter is more efficient). However, it is possible that some fraction of reduced fees could reflect a transfer.[19] The Department invites comments on this possibility. Since a purpose of the proposed regulation is to help plan participants increase their retirement savings, and because the expected fee reduction furthers this goal, the Department's motivation is the same irrespective of whether fee savings reflect transfers or efficiency gains. In the absence of information of what portion of fee savings might reflect transfers, for purposes of this assessment all such savings is counted as benefits.

(b) Reduction in Participant Search Time

The proposed regulation will benefit plan participants by reducing the time they spend searching for and compiling fee and expense information. Although it is possible that all of these 65 million participants in participant directed individual account plans could benefit from increased disclosure, only a subset will choose to act on the disclosed information. The Department estimates that about at least 29 percent of plan participants will spend time researching their plans' designated investment alternatives fee and expense information and are, therefore, likely to benefit from reduced search time and corresponding reduced costs. This estimate is based on an EBRI survey[20] which found that 29 percent of the respondents that received educational materials from their plans read the materials and made a change in their retirement plan investments. This assumption results in nearly 19 million plan participants that could benefit from reduced search costs. The Department seeks comments on the extent to which this proposal may increase the percentage of plan participants who will spend time researching their plans.

The same EBRI study found that respondents spent 19 hours per year on average planning for retirement. Of these 19 hours, the Department assumes that one-and-a-half hours could be saved on average for participants that are not receiving information like that required in section 404(c) and one hour for participants that are receiving section 404(c) compliant or similar disclosures based on the proposal's increased fee disclosure information. This assumption results in approximately 19 million hours being saved by affected plan participants as a result of the proposed regulation. The Department seeks comments on this assumption.

In order to convert the time-savings into a dollar estimate, the Department estimated how much the average participants would value the time saved. Since the search time is assumed to be spent during leisure time and in order to adjust for the difference that plan participants attribute to leisure time versus work time, an average total wage rate for private sector workers participating in a pension plan with individual accounts was reduced by 10 percent to derive at an average value rate of leisure time.[21] Using a wage rate of a little less than $35[22] for private

[17] The Department estimates, using 2005 Form 5500 data, that in 2005 $2.3 trillion in assets were held in participant directed accounts. To arrive at a 2009 dollar estimate, this number is then adjusted for inflation. This estimate does not include growth due to new participants or contributions and it also ignores increases or decreases due to the returns on the assets. Overall, the Department believes it under estimates the total amount of assets in 2009.

[18] Choi et al. (2006) found that providing comparative fee information to the treatment groups reduced fees by 12% to 49%. While this estimate originated from an experiment using young educated subjects, the Department believes that the assumptions made here are reasonable as they were selected from the lower range of values.

[19] Fees vary due to the number and type of investment alternatives selected by the plan fiduciary. Nevertheless, plan participants can still influence the amount of fees they pay. Participants can choose among, on average almost 19 alternatives (Vanguard. "How America Saves 2006.") in the plan and select lower cost investment options or change their allocation percentages. Participants can also ask the plan fiduciaries to offer lower cost alternatives.

[20] Employee Benefit Research Institute Issue Brief #292, April, 2006.

[21] Feather and Shaw (1999), using an econometric model, found that the opportunity cost of leisure time is 10 percent less than observed wages for employed workers. See Feather, P. and Shaw, W.D., "Estimating the Cost of Leisure Time for Recreation Demand Models," *Journal of Environmental Economics and Management*, Volume 38, Issue 1, July 1999, Pages 49–65.

[22] This wage rate estimate is based on hourly wages from Panel 7 of the 2001 wave from the Survey of Income Program Participation (SIPP) and

Continued

sector workers participating in a pension plan with individual accounts results in an average value of an hour of leisure time of $31 for 2009. Thus, the benefits from reduced search time for plan participants are estimated at $608 million for 2009 as shown in Table 3 below.

TABLE 3.—BENEFITS FROM REDUCED PARTICIPANT SEARCH TIME (2009)

Type of plan	Number of (affected) participants in participant-directed Accounts (A)	Percentage of participants predicted to make a change in allocation to lower fee investments (B)	Number of search hours saved by participant (C)	Average hourly value of participants' leisure time (in 2009 Dollars) (D)	Total benefits from reduced participant search time (A * B * C * D)
404(c) Plans and Plans with Similar Information	62,058,000	29	1.0	$31.33	$563,884,000
Non-404(c) Plans without Similar Information	3,211,000	29	1.5	$31.33	43,770,000
Total Undiscounted Benefits					607,654,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

(c) Summary of Benefits

The quantified benefits of the proposed regulation consist of benefits from the reduction in fees and from the reductions in search time for participants seeking information on fees, which will occur primarily as a result of the comparative disclosure of investment-related information, and secondarily due to the disclosure of non-investment-related fee and expense disclosures. Estimates of these total benefits due to prospective fee disclosure are presented in Table 4 and amount to a total net present value of $6.9 billion over the 10-year period.

TABLE 4.—TOTAL DISCOUNTED BENEFITS OF THE PROPOSAL

Year	Benefits from reduction in fees (A)	Benefits from reduced participant search time (B)	Total benefits (A + B)
2009	$307,241,000	$607,654,000	$914,895,000
2010	287,141,000	567,901,000	855,042,000
2011	268,356,000	530,748,000	799,105,000
2012	250,800,000	496,027,000	746,827,000
2013	234,393,000	463,576,000	697,969,000
2014	219,059,000	433,249,000	652,308,000
2015	204,728,000	404,905,000	609,633,000
2016	191,334,000	378,416,000	569,751,000
2017	178,817,000	353,660,000	532,477,000
2018	167,119,000	330,523,000	497,642,000
Total with 7% Discounting			6,875,649,000
Total with 3% Discounting			8,038,368,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

In addition to the benefits that will derive from the disclosure of investment-related information in a comparative format, which are quantified above, participants also will benefit from a retrospective disclosure of plan administrative fees actually charged to their accounts in the prior quarter. The Department believes that participants who are trying to plan for retirement are entitled to a comprehensive disclosure that includes not only information about fees and expenses that may occur depending on investment options selected, but also information on other fees that were actually assessed against their accounts in the previous quarter. RFI commentary indicates that participant advocates, plan sponsors and service providers, support such a disclosure requirement.[23] Information about actual charges to participants' accounts may, among other things, help participants understand their current reported account balance, help detect errors in prior charges by the plan, help them in relation to their general household budgeting and retirement planning, and help insure the reasonableness of the charges. The Department seeks comments that would help quantify the benefits of the retrospective disclosure.

Costs

The regulation may result in increased administrative burdens and costs for plans (or plan sponsors).

(a) Increased Administrative Burden

on wage growth data for private-sector workers that participate in a pension plan with individual accounts from the Bureau of Labor Statistics (BLS).

[23] These comments can be found under *http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html.*

Costs Due to Upfront Review and Updating of Plan Documents

Plans are likely to incur administrative burdens and costs in order to comply with the requirements of the regulation. The proposed regulation will require each plan to incur an upfront cost to have the regulation reviewed by professionals, such as lawyers. This cost will be incurred by all participant-directed individual account plans. The Department assumes it will require a professional to spend one half hour to perform the review.[24] Using in-house labor rates for a legal professional of nearly $113,[25] the up-front legal review cost is estimated at $24.6 million. In addition, the Department estimates that each plan will spend one-half hour of clerical time at an (in-house) hourly rate of $26 preparing the disclosures. This would result in a cost of $5.7 million for 2009. The costs of reviewing and preparing plan related information are summarized in Table 5. The Department seeks comments on its assumptions regarding hourly rates and number of hours in the table below.

TABLE 5.—REVIEW AND PREPARE PLAN RELATED INFORMATION, (2009)

Year	Number of participant-directed plans (A)	Legal professional hours required to review each plan (B)	Hourly labor cost for legal professional (in 2009 dollars) (C)	Clerical professional hours required to prepare plan documents (D)	Hourly labor cost for clerical professional (in 2009 dollars) (E)	Review cost (A*B*C) + (A*D*E)
2009	436,862	0.5	$113	0.5	$26	$30,322,591
Total Undiscounted Costs						30,322,591

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Based on the 2005 Form 5500 data, the Department estimates that approximately 59,000 new participant-directed individual account plans would be required to disclose general plan information each year. The Department assumes that writing a new disclosure notice for these plans would require, on average, one-half hour of legal professional time and one-half hour of clerical time per plan leading to a cost estimate of $4 million annually. The Department estimates that about 378,000 existing plans will require one-quarter hour of legal professional time and one-quarter hour of clerical staff time to update plan documents to take into account plan changes, such as new investment alternatives, in subsequent years. This results in a cost of approximately $13 million as summarized in Table 6. The Department seeks comments on the assumptions used to develop this figure.

TABLE 6.—REVIEW AND UPDATE PLAN RELATED INFORMATION, (SUBSEQUENT YEARS)

Type of plan	Number of participant-directed plans (A)	Legal professional hours required to review each plan (B)	Hourly labor cost for legal professional (in 2009 dollars) (C)	Clerical professional hours required to prepare plan documents (D)	Hourly labor cost for clerical professional (in 2009 dollars) (E)	Review cost (A*B*C) + (A*D*E)
Existing Plans	378,000	0.25	$113	0.25	$26	$13,107,000
New Plans	59,000	0.50	113	0.50	26	4,109,000
Total undiscounted costs						17,216,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Costs Due to Production of Quarterly Dollar Amount Disclosures

The proposed regulation will require plan administrators to send out disclosures about administrative charges—on a plan-wide as well as a participant-specific basis—to participants' accounts and engage in record keeping. The increase in administrative costs resulting from disclosing actual dollar fee and expense disclosure is derived from a GAO report that measures the cost of the disclosures of the actual dollar amount of mutual fund investment expenses on a participant level.[26] The GAO report estimates the initial cost to generate these disclosures in 2001 at $1 per account,[27] and the annual cost of continued compliance at $0.35 per account.[28] The cost to plans to calculate

[24] This estimate reflects that plans may employ service providers for making disclosures and that these service providers are likely to spread fixed and start-up costs across many plan clients.

[25] EBSA wage estimates are based on the National Occupational Employment Survey (May 2006, Bureau of Labor Statistics) and the Employment Cost Index (March, 2007, Bureau of Labor Statistics), unless otherwise noted.

[26] GAO–03–551T, "Mutual Funds: Information on Trends in Fees and Their Related Disclosure," March 12, 2003, p. 14.

[27] As a reference, Investment Management Consultants (IMC) has indicated that the cost to plan sponsors of producing an Internet report to comply with PPA ranges from $0.50 per participant per year for the largest plans to $3.00 per participant per year for the smallest plans. This cost, representing what IMC charges plan sponsors for industry-wide information on fees, is based on their data set containing 15,000 plans through September 2007, but does not include costs associated with printing reports, such as postage, stationary, and envelopes.

[28] The GAO report estimates that implementing specific dollar disclosures of fees would cost $1.00

Continued

administrative fees for purposes of this proposed regulation is expected to be less, because most of the expense information to be disclosed under the regulation is already tracked. The Department assumes it will cost both section 404(c) compliant and non-section 404(c) compliant plans one-third of the costs of disclosure of investment costs by mutual funds to disclose actual dollars charged, leading to cost estimates of about $0.41 per plan participant in the first year and $0.14 thereafter.[29] Thus, the cost to produce the actual dollar disclosure is estimated at $26.5 million for 2009 as shown in Table 7.[30] The Department invites comments on the cost to plans to produce actual dollar disclosures of the required fees, including the extent to which the costs differ for plans that are already making actual dollar disclosures and plans that are not.

TABLE 7.—COST OF ADDITIONAL RECORD KEEPING AND OF PRODUCING ACTUAL DOLLAR DISCLOSURES

Year	Number of (affected) participants in participant-directed accounts (A)	Per participant cost from GAO report (B)	Percent of cost for calculating administrative fees (C)	Cost of record keeping and of producing actual dollar disclosures (A * B * C)
2009	65,269,000	$1.22	33	$26,543,000
Subsequent year	65,269,000	0.43	33	9,355,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Costs Due to Consolidation of Fee Information

Additional administrative burdens and costs are likely to arise because of the need for plans to consolidate information from more than one source to prepare the required comparative chart. The Department estimates that it takes a staff person with some financial background about one hour per plan to consolidate the information from multiple sources for the comparative chart. Using a wage rate of about $60 for such an employee, results in estimated costs for the consolidation of fee information from multiple sources of approximately $26 million for 2009 as shown in Table 8.

TABLE 8.—COST OF CONSOLIDATION OF FEE INFORMATION

Year	Number of participant-directed plans (A)	Average plan staff time (hours) required to consolidate fee information from multiple sources for comparative format (B)	Accountant hourly labor cost (in 2009 dollars) (C)	Cost of consolidation of fee information for comparative format (A * B * C)
2009	437,000	1	$60	$26,290,000
Total Undiscounted Costs				26,290,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Costs of Distribution and Materials Due to the Disclosure of Plan and Fee Information

These disclosures must be sent to plan participants on an annual or quarterly basis.[31] The Department assumes that it takes clerical staff two additional minutes to assemble and send out disclosures. The Department also assumes that 38% of disclosures will be sent electronically and therefore require only a *de minimis* amount of time to prepare. With wage rates of about $26 for clerical personnel, these dissemination labor costs are estimated at $35.1 million in 2009, as shown in Table 9.

Following a participant's investment in an investment alternative, the plan must provide any materials it receives regarding voting, tender or similar rights in the alternative ("pass-through materials") (29 CFR 2550.404a–5(d)(3)). This information is already required for 404(c) compliant plans and by the Department's Qualified Default Investment Alternative regulation. In addition, a large majority of plans voluntarily provide this information to its participants. As a result only an estimated number of 699,000 participants will be receiving this

per participant in the initial year (in 2001 dollars). In subsequent years this would annually cost about $0.35 (in 2001 dollars). This cost estimate includes the cost to enhance the current data processing systems, modify investor communication systems and media, develop new policies and procedures and implement employee training and customer support programs. This estimate does not include the reportedly significant costs that would be borne by third party financial institutions that maintain accounts on behalf of individual mutual fund shareholders.

[29] The Department used (a) historical CPI data to inflate the $1.00 estimate to $1.19 (in 2007 dollars) and the $0.35 estimate to $0.42 (in 2007 dollars) and (b) the projected inflation rate from the November 2007 President's Economic Forecast for 2008 (2.1 percent) to inflate the $1.19 value to $1.22 and the $0.42 value to $0.43 (in 2009 dollars). The President's Economic Forecast can be found at: *http://www.whitehouse.gov/cea/econ-outlook20071129.html*.

[30] The Department did not account for additional paper costs, given that no additional pages need be added as long as this information is included as part of the quarterly benefit statement.

[31] This section does not include distribution or material costs for the disclosures of administrative fees charged to participants' accounts as the Department assumes that this information can be included as part of the quarterly benefit statement.

information for the first time because of the proposed regulation.

The Department assumes that clerical staff will prepare and send the required materials. It may take the clerical staff on average one and one-half minutes to prepare and mail the post-investment materials. The Department assumes that this information will be sent annually resulting in nearly 699,000 disclosures. The Department expects that 38 percent of the disclosures will be sent electronically. Table 9 reports the cost of $283,000 to prepare and send the required post-investment information.

TABLE 9.—COST OF DISTRIBUTING DISCLOSURES

Type of disclosure	Number of disclosures to be sent (A)	Percentage of disclosures not transmitted via e-mail (B)	Hourly labor cost (in 2009 dollars) (C)	Hours per disclosure (D)	Materials costs for distribution of disclosures (A * B * C * D)
Annual Disclosures	65,269,000	62	$26.07	0.033	$35,166,000
Pass-Though Materials	699,000	62	26.07	0.025	283,000
Total Undiscounted Costs					35,448,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

In addition to labor costs associated with the disclosure, plans will also bear materials and postage costs. The annual disclosure is assumed to include 13 pages for plans that are not already providing disclosures similar to section 404(c) disclosures. Plans already providing section 404(c) compliant or similar disclosures are assumed to already be making annual disclosure of information and are therefore assumed to need to add only three pages of additional information to what they are already disclosing to participants.[32] The pass-through information is assumed to be ten pages and sent on an annual basis to plan participants as described above. Paper and printing costs are assumed to be $0.05 a page and mailing costs to be $0.42.[33] It is further assumed that 38 percent of statements will be available electronically. In total, this leads to an estimate for materials and postage of $8.2 million in 2009 for the annual disclosures as shown in Table 10 and $473,000 for the post-investment pass-through information as shown in Table 11.

TABLE 10.—ANNUAL DISCLOSURES MATERIALS AND POSTAGE COSTS (2009)

Type of plan	Number of (affected) participants in participant-directed accounts (A)	Percentage of disclosures not transmitted via e-mail (B)	Number of pages for annual disclosure (C)	Paper and printing cost per page (D)	Mailing costs (E)	Materials costs for distribution of disclosures (A * B) * (C * D + E)
404(c) Plans and Plans with Similar Information	62,058,000	62	3	$0.05	$0.00	$5,771,000
Non-404(c) Plans without Similar Information	3,211,000	62	13	0.05	0.59	2,468,000
Total Undiscounted Costs						8,240,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

TABLE 11.—PASS-THROUGH MATERIALS AND POSTAGE COSTS (2009)

Number of disclosures to be sent	Percentage of disclosures not transmitted via e-mail (A)	Number of pages for annual disclosure (B)	Paper and printing cost per page (C)	Mailing costs (D) (E)	Materials costs for distribution of disclosures (A * B) * (C * D + E)
699,000	62	10	$0.05	$0.59	$473,000
Total Undiscounted Costs					473,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

[32] The proposed regulation would amend the regulation under ERISA section 404(c), 29 CFR 2550.404c–1, to make the disclosure requirements for section 404(c) compliant plans consistent with those that would apply to participant directed individual account plans generally. The Department assumes for purposes of the economic and paperwork analysis that the disclosure costs of 404(c) compliant plans under the amended regulation would be similar to those absent the proposed regulation.

[33] The postage rate for First-Class Mail is increasing to $0.42 as of May 12, 2008 (*http://pe.usps.com/2008_RateCase/RateCharts/R08_Rate_Charts.htm*).

In total, the Department estimates that in 2009 participant-directed plans incur increased administrative costs of approximately $127 million.

(b) Discouragement of Some Employers From Sponsoring a Retirement Plan

Increased administrative burdens may discourage some employers, particularly small employers, from sponsoring a retirement plan. For small plan sponsors, the administrative burden is felt disproportionately because of their limited resources. Small business owners who do not have the resources to analyze plan fees or to hire an analyst may be discouraged from offering a plan at all.

Regulatory burden is one among many reasons for small businesses not to sponsor a retirement plan. According to the 2000, 2001, and 2002 Employee Benefit Research Institute (EBRI)'s Small Employer Retirement Surveys, about 2.7 percent of small employers cited "too many government regulations" as the most important reason for not offering a retirement plan.[34] Due to very limited data in this area, the Department is not able to quantitatively estimate this impact. The Department seeks comments on the extent to which this proposal discourages small employers from offering retirement plans.

(c) Summary of Costs

The quantified total costs of the proposed regulation include costs due to the increased administrative burden. Columns (A) and (B) of Table 12 below show the estimated costs of up-front review of the regulation and updating of plan documents. Column (C) shows the costs of producing quarterly Dollar amounts for administrative fees charged to participant accounts. The largest cost of the regulation, though, results from the disclosure of the administrative expenses and investment-related fees that may be charged to participants' accounts—the consolidation of fee information costs, and the distribution and material costs as can be seen in columns (D), (E), and (F). Table 12 reports that the total present value of these costs is estimated at $759 million over the ten-year period.

TABLE 12.—TOTAL DISCOUNTED COSTS OF PROPOSAL

Year	Up-front review cost	Update plan documents	Consolidation of fee information	Production of quarterly dollar amount disclosures	Distribution materials costs	Staff cost to distribute disclosures	Total costs
	(A)	(B)	(C)	(D)	(E)	(F)	(A + B + C + D + E + F)
2009	$30,323,000	0	$26,290,000	$26,543,000	$8,713,000	$35,448,000	$127,317,000
2010	3,840,000	$12,250,000	24,570,000	8,743,000	8,143,000	33,129,000	90,675,000
2011	3,589,000	11,448,000	22,963,000	8,171,000	7,610,000	30,962,000	84,743,000
2012	3,353,000	10,699,000	21,461,000	7,637,000	7,112,000	28,936,000	79,199,000
2013	3,134,000	9,999,000	20,057,000	7,137,000	6,647,000	27,043,000	74,018,000
2014	2,929,000	9,345,000	18,745,000	6,670,000	6,212,000	25,274,000	69,176,000
2015	2,738,000	8,734,000	17,518,000	6,234,000	5,806,000	23,621,000	64,650,000
2016	2,559,000	8,162,000	16,372,000	5,826,000	5,426,000	22,075,000	60,421,000
2017	2,391,000	7,628,000	15,301,000	5,445,000	5,071,000	20,631,000	56,468,000
2018	2,234,000	7,129,000	14,300,000	5,089,000	4,739,000	19,281,000	52,774,000
Total with 7% Discounting							759,440,000
Total with 3% Discounting							880,339,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Summary

As shown in Table 1 above, the Department concludes that the estimated benefits ($6.9 billion) of the proposed regulation outweigh its estimated costs ($759 million) by almost $6.1 billion over the ten-year period.

Uncertainty

Although the Department sought to anchor its analysis on empirical evidence, there are a number of variables that are subject to uncertainty. While the Department is confident that increased fee disclosures can induce changes in participant behavior and reductions in plan fees, it is uncertain about the exact magnitude of these changes. The variables with the most uncertainty in the analysis are:

- The percentage of plan fees that could be saved,
- The percentage of participants that would save search time for fee information,
- The amount of search time saved per participant,
- The time required for legal professionals, clerical professionals[35] and accountants to perform their tasks,
- And the cost to obtain the actual dollar amounts of participant's plan and administrative expenses.

To estimate the influence of these variables on the analysis, the Department re-estimated the costs and benefits of the proposed regulation under different assumptions for these uncertain variables.

Table 13 presents the effects of changing the variables of interest. The first two variables on the list were decreased, while the remaining variables were increased. Changing the variables of concern by 25 percent still resulted in a net present value of $5.1 billion. Changing the variables by 50 percent still resulted in a net present value of $3.6 billion. Even after changing the key variables by 75 percent the net present value of the proposed regulation was $1.5 billion. The Department, however, does not believe that a change of 75% in these variables is a very likely scenario.

[34] The survey defines small employers as those having up to 100 full-time workers. Other reasons small employers do not offer a retirement plan are that workers prefer wages or other benefits, that a large portion of employees are seasonal, part-time, or high turnover, and that revenue is too low or uncertain. See *http://www.ebri.org/surveys/sers* for more detail.

[35] The clerical time to distribute disclosures remains unchanged in this sensitivity analysis.

TABLE 13.—SENSITIVITY OF BENEFITS AND COSTS TO KEY VARIABLES

Percent change in variables	Benefits ($millions/year)	Costs ($millions/year)	Net present value ($millions/year)
25	6,013	866	5,147
50	4,579	973	3,606
75	2,575	1,080	1,495

Note: The displayed numbers are rounded to the nearest million.

Regulatory Alternatives

Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives. The Department considered the following alternatives to the proposed regulation, and will also briefly discuss the status quo baseline:

- Extending the existing section 404(c) regulation disclosure requirements to all participant-directed individual account plans;
- Establishing a general, nonspecific disclosure requirement; or
- Requiring more extensive and detailed disclosures.

These alternatives, and the status quo baseline, are described further below:

- Keeping the status quo

OMB Circular A–4 recommends that "benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a 'no action' baseline: what the world will be like if the proposed rule is not adopted." The Department followed this recommendation, and weighed the option of keeping the status quo and relying on the current regulatory framework. By definition, as the regulatory baseline, this "alternative" would have zero costs and benefits; however, the Department feels it is useful to briefly describe the status quo, and the reasons for rejecting it in favor of a regulation, before we discuss regulatory alternatives. As stated above, regulations already exist specifying the information that must be provided to participants of 404(c) compliant plans in order to relieve plan fiduciaries of responsibility for participant investment decisions (see § 2550.404c–1(b)(2)(i)(B)). Many of the proposal's disclosures are identical or similar to the required disclosures of section 404(c) and the regulations issued thereunder. However, compliance with section 404(c) is elective and according to 2005 Form 5500 data only about 275,000 plans covering 49 million participants and beneficiaries make this election. About 16 million participants and beneficiaries are participating in 49,000 participant-directed individual account plans that are choosing not to be section 404(c) compliant and a significant number of these individuals may not receive disclosures in compliance with section 404(c), and, therefore, may not receive the information the Department believes they need to make informed account management and investment decisions.[36] More importantly, the section 404(c) disclosure of investment-related information is not required to be in a comparative format that encourages and facilitates review by plan participants and beneficiaries. Neither does such a requirement exist for any other type of participant-directed individual account plan.

- Extending the existing 404(c) disclosure requirements to all participant-directed individual account plans

The Department considered requiring all participant-directed individual account plans to comply with section 404(c) and the regulations issued thereunder. This would not have required any additional disclosures to participants in existing section 404(c) compliant plans, and, therefore, may have required less extensive effort by such plans, such as review of the proposed regulation and development of materials in order to come into compliance. Participants and Beneficiaries, however, would also not have had the benefit of receiving critical information in a comparative chart.[37]

Compared to the status quo, only participants in participant-directed individual account plans that do not receive similar information to the required 404(c) disclosures would experience additional benefits by extending the existing 404(c) disclosures. As noted above, the Department assumes that only 20% of the participants of plans that are presently not choosing to be section 404(c) compliant are not receiving similar information. These participants would experience benefits from a reduction in fees (5% of 0.113% of their assets, as shown in Table 14 below) and from a reduction in their search time (0.5 hour for 29% of the affected participants, as shown in Table 15 below). This would lead to annual benefits of approximately $8.1 million due to the reduction in fees and of about $14.6 million for the reduction in participant search time. In total, benefits add up to about $22.8 million, a much smaller amount than the expected benefits of the proposal.

TABLE 14.—ANNUAL BENEFITS DUE TO MANDATORY 404(C) COMPLIANCE, REDUCTION IN FEES

Type of plan	Total amount of assets in affected plans (in millions of 2009 dollars) (A)	Basis points of higher than necessary fees (B)	Percent correction due to 404(c) disclosure (C)	Benefits from reduction in fees due to 404(c) disclosures (A * B * C)
Non-404(c) Plans without Similar Information	144,000	0.11%	5%	$8,162,000

[36] However, the Department recognizes that many plan participants in participant-directed individual account plans that choose not to comply with all of the section 404(c) requirements are receiving similar information to what they would receive if the plans had chosen to comply with all requirements of section 404(c).

[37] Under the proposal, plans would be required to disclose specified identifying information, past performance data, comparable benchmark returns, and fee and expense information for each investment alternative. Under the existing 404(c) rule, plans only have to provide past performance data and operating expense information directly or upon request and benchmark returns do not have to be provided.

TABLE 14.—ANNUAL BENEFITS DUE TO MANDATORY 404(C) COMPLIANCE, REDUCTION IN FEES—Continued

Type of plan	Total amount of assets in affected plans (in millions of 2009 dollars) (A)	Basis points of higher than necessary fees (B)	Percent correction due to 404(c) disclosure (C)	Benefits from reduction in fees due to 404(c) disclosures (A * B * C)
Total Undiscounted Benefits				8,162,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

TABLE 15.—ANNUAL BENEFITS DUE TO MANDATORY 404(C) COMPLIANCE, REDUCED PARTICIPANT SEARCH TIME

Type of plan	Number of (affected) participants in participant-directed accounts (A)	Percentage of participants predicted to make a change in allocation to lower fee investments (B)	Number of search hours saved by participant (C)	Average hourly value of participants' leisure time (in 2009 dollars) (D)	Total benefits from reduced participant search time due to 404(c) disclosures (A * B * C * D)
Non-404(c) Plans without Similar Information	3,211,000	29%	0.5	$31.33	$14,590,000
Total Undiscounted Benefits					14,590,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Additional costs for review, update and preparation of related information, as compared to the status quo, would fall on all participant-directed individual account plans that are presently not choosing to comply with section 404(c).[38] The Department estimates that these costs would amount to about $11.3 million in the first year and would fall to $9.0 million in subsequent years, as shown in Table 16 below.

TABLE 16.—ANNUAL COSTS DUE TO ADDITIONAL REVIEW, UPDATE, AND PREPARATION OF PLAN RELATED INFORMATION

Type of plan	Number of affected participant-directed plans (A)	Legal professional hours required to review each plan (B)	Hourly labor cost for legal professional (in 2009 dollars) (C)	Clerical professional hours required to prepare plan documents (D)	Hourly labor cost for clerical professional (in 2009 dollars) (E)	Review cost (A * B * C) + (A * D * E)
First Year (2009)						
Existing and New Plans	162,000	0.5	$113	0.5	$26	$11,250,000
Total Undiscounted Costs First Year						11,250,000
Subsequent Years, Annually						
Existing Plans	140,000	0.25	$113	0.25	$26	$4,863,000
New Plans	59,000	0.5	113	0.5	26	4,109,000
Total Undiscounted Costs Subsequent Years						8,971,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

In addition to costs for review, updating, and preparation of information, plans would also incur material and postage costs and labor costs for sending out the required disclosures to participants that presently are not receiving similar information and would receive the disclosures by mail, rather than via electronic means. As shown in Table 17 and Table 18 below, the Department estimates postage and material costs of about $2.6 million and labor costs of about $2 million.

[38] In subsequent years, these costs fall on newly created 404(c) plans and reduced costs for updates are expected for existing 404(c) plans.

TABLE 17.—ANNUAL COSTS FOR ANNUAL ADDITIONAL DISCLOSURES MATERIALS AND POSTAGE AND PASS-THROUGH MATERIALS

Type of plan	Number of (affected) participants in participant-directed accounts (A)	Percentage of disclosures not transmitted via e-mail (percent) (B)	Number of pages for annual disclosure (C)	Paper and printing cost per page (D)	Mailing costs (E)	Materials costs for distribution of disclosures (A * B) * (C * D + E)
Annual Disclosures	3,211,000	62	10	$0.05	$0.59	$2,170,000
Pass Through Material	699,000	62	10	0.05	0.59	473,000
Total Undiscounted Costs						2,643,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

TABLE 18.—ANNUAL COSTS OF ADDITIONAL DISTRIBUTING DISCLOSURES

Type of disclosure	Number of disclosures to be sent (A)	Percentage of disclosures not transmitted via e-mail (percent) (B)	Hourly labor cost (in 2009 dollars) (C)	Hours per disclosure (D)	Materials costs for distribution of disclosures (A * B * C * D)
Annual Disclosures	3,211,000	62	$26	0.033	$1,730,000
Pass-Though Materials	699,000	62	26	0 025	283,000
Total Undiscounted Costs					2,013,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Table 19 below shows the annual costs and benefits and Table 20 below presents the net present benefit. The Department estimates that extending the existing 404(c) requirements would have resulted in ten-year costs of about $105 million and benefits of approximately $171 million. The ten-year net present value would have been about $66 million (in 2009 dollars).

TABLE 19.—ADDITIONAL BENEFITS AND COSTS OF MANDATORY 404(C) COMPLIANCE FOR ALL PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS

	2009 Annual	2010–2018 Annual
Benefits		
Fee Reduction	$8,162,000	$8,162,000
Reduction in Participant Search Time	14,590,000	14,590,000
Total Benefits	22,752,000	22,752,000
Costs		
Review, Update, and Preparation of Documents	11,250,000	8,971,000
Annual Disclosures and Pass-Through Information	2,643,000	2,643,000
Distribution	2,013,000	2,013,000
Total Costs	15,905,000	13,627,000
Net Benefits in 2009	6,847,000	

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

TABLE 20.—TOTAL (ADDITIONAL) DISCOUNTED BENEFITS OF THE ALTERNATIVE

Year	Additional benefits from extending 404(c), 7% discounting (A)	Additional costs from extending 404(c), 7% discounting (B)	Additional net benefits, 7% discounting (A–B)
2009	$22,752,000	$15,905,000	$6,847,000
2010	21,264,000	12,736,000	8,528,000
2011	19,873,000	11,902,000	7,970,000
2012	18,573,000	11,124,000	7,449,000

TABLE 20.—TOTAL (ADDITIONAL) DISCOUNTED BENEFITS OF THE ALTERNATIVE—Continued

Year	Additional benefits from extending 404(c), 7% discounting (A)	Additional costs from extending 404(c), 7% discounting (B)	Additional net benefits, 7% discounting (A–B)
2013	17,358,000	10,396,000	6,962,000
2014	16,222,000	9,716,000	6,506,000
2015	15,161,000	9,080,000	6,081,000
2016	14,169,000	8,486,000	5,683,000
2017	13,242,000	7,931,000	5,311,000
2018	12,376,000	7,412,000	4,964,000
Total with 7% Discounting	170,989,000	104,689,000	66,301,000
Total with 3% Discounting	199,905,000	122,007,000	77,898,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

• Establishing a general non-specific disclosure requirement

The Department considered establishing a general, non-specific disclosure rule requiring that plan fiduciaries take steps to ensure that participants and beneficiaries of participant-directed individual account plans are provided sufficient information to make informed decisions about the management of their individual accounts without further specifying what information would have to be disclosed. This alternative would have provided fiduciaries with more flexibility in providing disclosures to participants and beneficiaries, but may have also created uncertainty as to the scope of the required disclosures. It is possible that the costs to fiduciaries, and consequently plans, would be lower than the costs under the proposed regulation, but not all participants and beneficiaries may have received the critical information required under the proposed regulation. This approach also may have had the negative effect of having fiduciaries err on the side of being conservative and providing more, but not necessarily useful or meaningful, information to plan participants, creating a disincentive for participants and beneficiaries to review the furnished material.

• Requiring more extensive and detailed disclosures

The Department considered requiring more extensive and detailed prospectus-like disclosure of investment-related information to participants and beneficiaries. However, based on a review of RFI comments and the Commission's summary prospectus initiative, the Department concluded that a user-friendly summary of key information would be more beneficial than more extensive and detailed disclosures. In this regard, the Department attempted to define the most essential information about available investment options that should be automatically furnished in a comparative format to participants and beneficiaries, and included that information in the proposal. That information includes historical and benchmark performance, and fees and expenses. In addition, the Department considered including information on risk, but believes that risk information is not easily translated into a simple uniform comparative format that can be described in a regulatory standard. The Department notes that in most cases more detailed information, including information on risk is readily available to participants and beneficiaries through Internet Web sites, should they decide to review such information in assessing the various investment options available under their plan. Importantly, under the proposed regulation participants and beneficiaries will be advised that risks exist, and will be directed and encouraged to review more detailed information prior to making decisions concerning the investment options most appropriate for them. The Department invites comments on any additional information that should be required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions. For purposes of analysis under the RFA, EBSA proposes to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.[39]

Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of these proposed rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). EBSA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of these proposed rules on small entities. EBSA

[39] Under ERISA section 104(a)(3), the Secretary may also provide exemptions or simplified reporting and disclosure requirements for welfare benefit plans. Pursuant to the authority of ERISA section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21; 2520.104–41, 2520.104–46, and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, that cover fewer than 100 participants and satisfy certain other requirements.

has consulted with the SBA Office of Advocacy concerning use of this participant count standard for RFA purposes. See 13 CFR 121.902(b)(4).

The Department prepared an initial RFA of the proposal because, although the Department considers it unlikely that the rule will have a significant effect on a substantial number of small plans, the Department does not have enough information to certify to that effect. The following subsections address specific requirements of the RFA.

(a) Reasons for and Objectives of the Proposal

A growing number of workers are preparing for retirement by participating in participant-directed plans that are governed by ERISA. Key determinants of the return on an investment include the fees and expenses paid. This proposal is intended to improve the information that is available to participants in participant-directed individual account plans and thereby enable participants to make good investment decisions.

The reasons for and objectives of this proposed regulation are discussed in detail in Section A of this preamble, "Background," and in section "Need for Regulatory Action" of the Regulatory Impact analysis (RIA) above. The legal basis for the proposal is set forth in the "Authority" section of this preamble, below.

(b) Estimating Compliance Requirements for Small Entities/Plans

The Department believes that the effects of this proposed regulation will be to increase retirement savings by reducing investment fees paid by participants. The Department also believes that small plans will benefit from the proposal, because it will clarify what information must be disclosed to plan participants.

While small and large plans will incur administrative costs due to the proposed regulation, these costs are reasonable compared to the benefits and will probably be borne by the participants who will also receive the benefits of the proposed regulation. From industry comments, the Department inferred that participants in larger plans more often than participants in smaller plans have access to needed investment information. The Department believes that participants in small plans need as much information about their plan investments as participants in larger plans.

Some expenses, like the legal review of the proposal that plans may incur due to the disclosure requirements of the regulation do not increase proportionally with plan size. Nonetheless, it is possible that small plans incur smaller costs per participant than larger plans. In general, small plans offer fewer and less complex plan investment options than large plans. Less complex plan investments require less extensive disclosures and make disclosures less expensive. Thus, it is possible that smaller plans will experience lower per-participant disclosure costs than larger plans. The Department invites comments on the validity of this hypothesis.

Assuming that the plan incurs the average costs for all disclosure activities that are considered in the RIA section above, the following calculation illustrates how large the costs of the disclosures would be for a very small plan (one-participant plan). As can be seen in Table 21, the total cost of compliance for a one-participant plan amounts to less than $134 in the first year and less than that amount in the subsequent years. The costs in 2009 include a review cost of about $69 per plan (one-half hour of a legal professional's time plus one-half hour of a clerical professional's time), labor costs of $60 for consolidating the information for the comparative chart (one hour), costs of on average $0.40 per participant for record keeping and disclosure of information, additional annual labor cost for distribution of $0.90 in section 404(c) compliant plans or plans that already provide similar information ($1.50 in plans that do not already provide section 404(c) compliant or similar information), and material and postage costs of $0.15 in 404(c) compliant plans or plans that already provide similar information ($2.30 in plans that do not already provide section 404(c) compliant or similar information).

TABLE 21.—COSTS FOR ONE-PARTICIPANT PLAN (UNDISCOUNTED)

Type of cost	404(c) plans and plans with similar information		Non-404(c) plans without similar information	
	Initial year	Subsequent year	Initial year	Subsequent year
Plan Review	$69.00	$35.00	$69.00	$35.00
Consolidation of Information	60.00	60.00	60.00	60.00
Actual Dollar Disclosure	0.40	0.15	0.40	0.15
Labor Cost for Distribution	0.90	0.90	1.50	1.50
Material Cost	0.15	0.15	2.30	2.30
Total	131.00	96.00	134.00	99.00

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

(c) Considered Alternatives

The Department considered several alternatives that would have required broader or narrower disclosures and which in turn would have increased or decreased the burden on plans. Exempting small plans from the disclosure requirements or limiting the disclosures from small plans would have reduced the costs small plans may incur, but would have also failed to ensure that participants in small plans receive the information that they need to make good investment decisions.

(d) Duplicative, Overlapping, and Conflicting Rules

ERISA section 404(c) and the regulations thereunder contain disclosure requirements for plan fiduciaries of certain participant-directed account plans that are to some extent similar to the ones that are contained in the proposed regulation. As explained in more detail in section "A. Background" of this preamble the Department amended the regulations under section 404(c) in order to establish a uniform set of basic disclosure requirements and to ensure that all participants and beneficiaries in participant-directed individual account plans have access to the same investment-related information.

In addition, the Department has consulted the Securities and Exchange Commission to avoid duplicative,

overlapping, or conflicting requirements.

The Department is unaware of any additional relevant federal rules for small plans that duplicate, overlap, or conflict with these proposed regulations.

(e) Comments

The Department invites interested persons to submit comments regarding the impact on small plans of the proposed regulation and on the Department's assessment thereof. The Department also requests comments on the alternatives considered and its conclusions regarding those alternatives; on any additional alternatives it should have considered; on what, if any, special problems small plans might encounter if the proposal were to be adopted; and what changes, if any, could be made to minimize those problems.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the proposed regulation. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov*.

The Department has submitted a copy of the proposed regulation to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate 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;
- Evaluate the accuracy of the agency's estimate of the burden of the 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.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration. Please note that comments submitted to OMB are a matter of public record.

PRA Addressee: Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers.

In connection with publication of this proposed rule, the Department has submitted an ICR to OMB for its request of a revised information collection under OMB Control number 1210–0090. This is the control number for the Department's existing regulation under ERISA section 404(c), which would be amended by the proposal.[40] The public is advised that 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 Department will include a notice announcing OMB's action at the final rule stage.

The proposed regulation on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans would require the disclosure of plan and investment-related fee and expense information to participants and beneficiaries in participant-directed individual account plans. This ICR pertains to two categories of information that is required to be disclosed: "plan-related" and "investment-related" information. The information collection provisions of the proposal are intended to ensure that fiduciaries provide participants and beneficiaries with sufficient information regarding plan fees and expenses and designated investment alternatives to make informed decisions regarding the management of their individual accounts.

The estimates of respondents and responses are derived primarily from the Form 5500 Series filings for the 2005 plan year, which is the most recent reliable data available to the Department. The burden for the preparation and distribution of the disclosures is treated as an hour burden. Additional cost burden derives from materials and postage and costs to track and report required information. It is assumed that electronic means of communication will be used in 38 percent of the responses pertaining to annual notices and that such communications will make use of existing systems that comply with the Department's electronic media disclosure guidance (29 CFR 2520.104b–1(c)). Accordingly, no cost has been attributed to the electronic distribution of the information.

The Department estimates that approximately 437,000 participant directed individual account plans[41] covering 65,269,000 participants would be affected by the proposed regulation. Of these plans, 275,000 plans, covering 49,212,000 participants and beneficiaries are reported to comply with ERISA section 404(c), and the remaining 162,000 plans covering 16,057,000 participants and beneficiaries are not. The Department's estimates of the number of plans and participants are summarized in Table 22 below.

[40] See 29 CFR 2550.404c–1. The information collection provisions of the NPRM impose new hour and cost burdens on all participant directed individual account plans, and the Department intends to include the burden imposed by the proposal on 404(c) and not-404(c) compliant participant directed individual account plans under one control number.

[41] All numbers stated in this document have been rounded to the nearest 1,000. Any apparent discrepancy in the calculations described here is due to this rounding.

TABLE 22.—NUMBER OF PLANS AND PARTICIPANTS

Type of plan	Plans	Participants
404(c)	275,000	49,212,000
Non-404(c)	162,000	16,057,000
Total	437,000	65,269,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Plan-related Information—29 CFR 2550.404a–5(c). The proposal requires three subcategories of Plan-related information to be provided to participants and beneficiaries. The first sub-category is General Plan Information, which provides: how participants and beneficiaries may give investment instructions; any specified limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative; the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights; the specific designated investment alternatives offered under the plan; and any designated investment managers to whom participants and beneficiaries may give investment directions. (§ 2550.404a–5(c)(1)(i)). This information must be provided on or before the date a participant becomes eligible to participate in the plan, and afterwards at least annually. Material changes to this information must be disclosed not more than 30 days after adoption. Plans may make these disclosures in the summary plan description.

The second subcategory of Plan-related Information is Administrative Expense Information, which refers to an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not included in investment-related fees and expenses, may be charged against the individual accounts of participants or beneficiaries and the basis on which such charges will be allocated to, or affect the balance of, each individual account (e.g., pro rata, per capita). (§ 2550.404a–5(c)(2)). This information must be provided on or before the date a participant becomes eligible to participate in the plan, and afterwards at least annually. At least quarterly, plans must furnish statements of the aggregate dollar amount charged to each participant's account for these services. Plans may make the initial and annual disclosures in the summary plan description or the quarterly benefit statement, and the quarterly information may be included in the plan's quarterly benefit statements.

The third subcategory of Plan-related Information is Individual Expense Information, which describes expenses charged to individual accounts based on the actions taken by individual participants or beneficiaries. This would include charges for processing participant loans and qualified domestic relations orders. (§ 2550.404a–5(c)(3)). Information describing these charges must be furnished on or before the date a participant's eligibility and annually thereafter. Plans must provide quarterly statements identifying and showing the dollar amounts of each expense actually charged to an account. Plans may make the initial and annual disclosures in the summary plan description or the quarterly benefit statement, and the quarterly information may be included in the plan's quarterly benefit statements.

First Year

Annual Disclosure: The Department assumes that in the year of implementation, all 437,000 affected plans will conduct a legal review to verify their compliance with the proposed regulation and prepare the required disclosures. The Department estimates that the review would, on average, take one-half hour of a legal professional's time at an (in-house) hourly rate[42] of $113 resulting in a total aggregate estimate of approximately 218,000 legal hours at an equivalent cost of approximately $24,628,000. In addition, the Department estimates that each plan will spend one-half hour of clerical time at an (in-house) hourly rate of $26 preparing the disclosures. This would result in an hour burden of about 218,000 clerical burden hours with an equivalent cost of approximately $5,694,000. These estimates are summarized in Table 23 below.

TABLE 23.—PLAN-RELATED INFORMATION, GENERAL INFORMATION, FIRST YEAR

Type of plan	Number of affected plans	Professional hours	Clerical hours	Total professional hours	Total clerical hours	Equivalent cost—professional	Equivalent cost—clerical
404(c)	275,000	0.5	0.5	137,000	137,000	$15,491,000	$3,582,000
Non-404(c)	162,000	0.5	0.5	81,000	81,000	91,370,200	2,112,000
Total	437,000			218,000	218,000	24,628,000	5,694,000

Note: The displayed numbers are rounded to the nearest-thousand and therefore may not add up to the totals.

The Department assumes that plans will send 65,269,000 copies of the required plan information[43] to plan participants and beneficiaries, which will contain an average of 10 pages. Paper and printing costs are expected to be 5 cents per page and mailing costs are expected to be 76 cents per mailed disclosure. It is assumed that 38 percent of the disclosures will be delivered electronically. This results in a cost burden of $50,988,000, as shown in Table 24.

[42] The hourly wage estimates used in this analysis are estimates for 2009 and are based on data from the Bureau of Labor Statistics National Occupational Employment Survey (May 2005) and the Bureau of Labor Statistics Employment Cost Index (Sept. 2006).

[43] While plans are allowed to provide the disclosure in the SPD or quarterly benefit statement, the paperwork analysis assumes that plans would provide the required disclosures in a separate mailing to reduce costs as they otherwise are not required to send the SPD every year.

TABLE 24.—PLAN-RELATED INFORMATION, ANNUAL, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
404(c)	49,212,000	62%	10	$0.05	$0.76	$38,444,000
Non-404(c)	16,057,000	62%	10	0.05	0.76	12,544,000
Total	65,269,000					50,988,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Quarterly Disclosure: Plans will also have to determine the administrative and individual fees that will be charged directly against participants' accounts on a quarterly basis.[44] The Department estimates a cost burden of approximately $26,543,000 in the first year to establish new information systems or accounting practices that will collect, track and report the actual dollar amounts charged to the individual accounts. This cost is shown in Table 25.[45]

TABLE 25.—PLAN-RELATED INFORMATION, COST BURDEN, FIRST YEAR

Type of plan	Number of disclosures	Per participant cost from GAO report	Fraction of cost for calculating administrative fees	Cost burden
404(c)	49,212,000	$1.22	⅓	$20,013,000
Non-404(c)	16,057,000	1.22	⅓	6,530,000
Total	65,269,000			26,543,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Subsequent Years

Annual Disclosure: Based on the 2005 Form 5500 data the Department estimates that approximately 74,000 new participant-directed individual account plans would be required to disclose general plan information each year.[46] The Department assumes that on average writing a new disclosure notice for these plans would require one-half hour of legal professional time and one-half hour of clerical time per plan.

This results in an hour burden of nearly 37,000 hours for legal professional work and 37,000 hours of clerical work. The hour burden has an equivalent cost of approximately $4,168,000 for legal professional time at $113 per hour and $964,000 for clerical time at $26 per hour. These estimates are summarized in Table 26 below.

TABLE 26.—PLAN-RELATED INFORMATION, GENERAL INFORMATION, NEW PLANS, ANNUAL, SUBSEQUENT YEARS

Type of new plans	Number of new plans	Professional hours	Clerical hours	Total professional hours	Total clerical hours	Equivalent cost—professional	Equivalent cost—clerical
404(c)	46,000	0.5	0.5	23,000	23,000	$2,621,000	$606,000
Non-404(c)	27,000	0.5	0.5	14,000	14,000	1,546,000	3,578,000
Total	74,000			37,000	37,000	4,168,000	964,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

The Department also estimates that 363,000 existing plans will require one-quarter hour of legal professional time and one-quarter hour of clerical staff time to update plan documents to take into account plan changes, such as new investment alternatives, in subsequent years. This results in an hour burden of approximately 91,000 hours for professional time and 91,000 hours for clerical time with an equivalent cost of approximately $10,230,000 for professional time and $2,365,000 for clerical time as summarized in Table 27 below.

[44] It is assumed that the inclusion of the actual dollar disclosure will add a minimal burden that has not been quantified.

[45] The increase in administrative costs resulting from disclosing actual dollar fee and expense disclosure is derived from a GAO report (GAO–03–551T, "Mutual Funds: Information on Trends in Fees and Their Related Disclosure," March 12, 2003, p. 14), which measures the cost of the disclosures of the actual dollar amount of mutual fund investment expenses on a participant level. The GAO report estimates the initial cost to generate these disclosures in 2001 at $1 per account, and the annual cost of continued compliance at $0.35 per account. The cost to plans to calculate administrative fees for purposes of the NPRM is expected to be less, because most of the expense information to be disclosed under the regulation is already tracked. The Department assumes it may cost plans one-third less to provide these administrative disclosures than it does for mutual funds to disclose investment costs, leading to cost estimates in 2009 dollars of about 41 cents per plan participant in the first year and 14 cents thereafter.

[46] The 74,000 new plans include newly created participant directed account plans as well as some existing participant directed account plans that newly elect to be 404(c) compliant in subsequent years. Plans that newly elect to be 404(c) compliant in subsequent years had to previously comply with the new requirements and therefore might need to spend slightly less time on the review of the 404(c) requirements than the time indicated in Table 19.

TABLE 27.—PLAN-RELATED INFORMATION, GENERAL INFORMATION, EXISTING PLANS, ANNUAL, SUBSEQUENT YEARS

Existing plans	Number of revised disclosures	Professional hours	Clerical hours	Total professional hours	Total clerical hours	Equivalent cost—professional	Equivalent cost—clerical
404(c)	228,000	0.25	0.25	57,000	57,000	$6,435,000	$1,488,000
Non-404(c)	135,000	0.25	0.25	34,000	34,000	3,795,000	878,000
Total	363,000			91,000	91,000	10,230,000	2,365,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

As with the first year, the Department assumes that plans will send 65,269,000 copies of the required plan information to plan participants and beneficiaries in all subsequent years, resulting in a cost burden of $50,988,000.

Quarterly Disclosures: In subsequent years, plans will also have to determine the administrative and individual fees that will be charged directly against participants' accounts on a quarterly basis. The Department estimates a cost burden of approximately $9,355,000 in the subsequent years to maintain the information systems or accounting practices that will collect, track and report the actual dollar amounts charged to the individual accounts. This cost is shown in Table 28.

TABLE 28.—PLAN-RELATED INFORMATION, COST BURDEN, ANNUAL, SUBSEQUENT YEARS

Type of plan	Number of disclosures	Per participant cost from GAO report	Fraction of cost for calculating administrative fees	Cost burden
404(c)	49,212,000	$0.43	⅓	$7,054,000
Non-404(c)	16,057,000	0.43	⅓	2,302,000
Total	65,269,000			9,355,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Investment-related Information—29 CFR 2550.404a–5(d). The proposal requires three sub-categories of Investment-related Information to be disclosed, which relates to the plans designated investment alternatives.

Sub-Category 1: Information to be Provided Automatically

The first subcategory is information to be provided automatically. (§ 2550.404a–5(d)(1)). For each designated investment alternative, the plan, based on the latest information available, must disclose specified identifying information, past performance data, comparable benchmark returns, and fee and expense information. This information must be furnished on or before the date of a participant's eligibility and annually thereafter. This information must be furnished in a chart or similar format designed to help participants compare the plan's investment alternatives. (§ 2550.404a–5(d)(2)). To facilitate compliance, the proposal includes a model disclosure form that may be used by plan fiduciaries.

Preparation: The Department assumes that the preparation of a comparative chart containing specified identifying information, past performance data, comparable benchmark returns, and fee and expense information will require one hour of accountant or financial professional time at an hourly rate of $60, which would result in an hour burden of approximately 437,000 hours at an equivalent cost of about $26,290,000. These estimates are summarized in Table 29 below.

TABLE 29.—INVESTMENT-RELATED INFORMATION, INFORMATION PROVIDED AUTOMATICALLY, PREPARATION

Type of plan	Number of plans	Professional hours	Total professional hours	Equivalent cost—professional
Non-404(c)	275,000	1	275,000	$16,537,000
Non-404(c)	162,000	1	162,000	9,754,000
Total	437,000		437,000	26,290,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Distribution: The comparative chart needs to be sent to all participants (65.3 million). Given that 38 percent (24.8 million) of all disclosures are made electronically, only 62 percent will be sent by mail (40.5 million). The Department assumes that clerical staff could spend, on average, two minutes per disclosure to copy and mail this information. This burden is shown in Table 30.

TABLE 30.—INVESTMENT-RELATED INFORMATION, INFORMATION PROVIDED AUTOMATICALLY, ANNUAL, DISTRIBUTION

Type of plan	Total number of participants	Disclosures by mail (percent)	Number of disclosures	Clerical hours per disclosure	Total clerical hours	Equivalent cost—clerical
404(c)	49,212,000	62	30,511,000	0.033	1,017,000	$26,514,000
Non-404(c)	16,057,000	62	9,955,000	0.033	332,000	8,651,000
Total	65,269,000		40,467,000		1,349,000	35,166,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

It is assumed this disclosure will be three pages. As this information is required to be sent on an annual basis, the Department assumes it will be sent with the plan-related information required pursuant to § 2550.404a–5(c). Mailing costs are already accounted for in the calculation of the cost burden for delivery of the plan-related information. Table 31 shows the resulting annual cost burden of $6,070,000.

TABLE 31.—INVESTMENT-RELATED INFORMATION, INFORMATION PROVIDED AUTOMATICALLY, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Cost burden
404(c)	49,212,000	62	3	$0.05	$4,577,000
Non-404(c)	16,057,000	62	3	0.05	1,493,000
Total	65,269,000				6,070,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Sub-Category 2: Post-Investment Information

The second sub-category is post-investment information. The proposal requires that when a plan provides for the pass-through of voting, tender and similar rights, the fiduciary must furnish participants and beneficiaries who have invested in a designated investment alternative with these features any materials about such rights that have been provided to the plan. See § 2550.404a–5(d)(3). This requirement is similar to the requirement currently applicable to section 404(c) plans ("pass-through materials").

Distribution: The Department assumes that clerical staff will prepare and send the required materials. It may take the clerical staff on average one and one-half minutes to prepare and mail the post-investment materials. It is further assumed that this disclosure will be sent to about 15,153,000 plan participants in plans that have assets invested in employer securities. This number was reduced to reflect that some participants already receive this information pursuant to the Department's Qualified Default Investment Alternative regulation (QDIA)[47] and the burden is counted under OMB Control Number 1210–0132. The Department expects 38 percent of the disclosures will be sent electronically resulting in no burden. This results in an hour burden of approximately 235,000 hours of clerical staff time, with an equivalent cost of $6,123,000. Table 32 reports the estimates of the burden.

TABLE 32.—INVESTMENT-RELATED INFORMATION, POST-INVESTMENT INFORMATION, DISTRIBUTION

Type of plan	Number of disclosures	Clerical hours	Total clerical hours	Equivalent cost—clerical
404(c)	11,656,000	0.025	181,000	$4,710,000
Non-404(c)	3,497,000	0.025	54,000	1,413,000
Total	15,153,000		235,000	6,123,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

The required post-investment information is assumed to be, on average, ten pages long, with mailing costs of $0.59 per disclosure. As Table 33 shows, this results in an annual cost burden of $10,240,000.

TABLE 33.—INVESTMENT-RELATED INFORMATION, POST-INVESTMENT INFORMATION, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
404(c)	11,656,000	62	10	$0.05	$0.59	$7,877,000
Non-404(c)	3,497,000	62	10	0.05	0.59	2,363,000

[47] 29 CFR 2550.404c–5 (Oct. 24, 2007).

TABLE 33.—INVESTMENT-RELATED INFORMATION, POST-INVESTMENT INFORMATION, COST BURDEN—Continued

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
Total	15,153,000					10,240,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Sub-Category 3: Information To Be Provided Upon Request

The third subcategory is information to be provided upon request. (§ 2550.404a–5(d)(4)). Participants may request the plan to provide prospectuses, financial reports, as well as statements of valuation and of assets held by an investment alternative.

Preparation: Plans must be prepared to provide the required information on request. The Department expects all plans to receive, on average, one request per year for the information. The Department estimates that plans will need to devote, on average, one clerical staff hour to comply with this requirement. Paperwork burden for this requirement is divided between § 2550.404c–5 (Fiduciary relief for investments in qualified default investment alternatives), which was accounted for previously under OMB Control Number 1210–0132 (QDIA regulation), and § 2550.404c–1 (ERISA section 404(c) plans), which is reflected in Table 34 below.

TABLE 34.—INVESTMENT-RELATED INFORMATION, INFORMATION ON REQUEST, ANNUAL, PREPARATION

Type of plan	Number of disclosures	Clerical hours	Total clerical hours	Equivalent cost—clerical
404(c)	275,000	1	275,000	$7,164,000
Non-404(c)	0	1	0	0
Total	275,000		275,000	7,164,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Distribution: The Department estimates that in total, plans will respond to approximately 275,000 requests for information annually. It is assumed that 38 percent of the disclosures will be delivered electronically. For the remaining 62 percent of disclosures (170,000 requests annually), the Department has assumed that these disclosures will be sent by mail and estimates that reproduction and distribution of these disclosures will take 2 minutes of clerical time per request. Plans will therefore have an additional annual hour burden of 5,700 hours (170,000 requests notices × 0.033 hours). The equivalent cost of these hours is $148,000. Table 35 contains the estimates of the burden.

TABLE 35.—INVESTMENT-RELATED INFORMATION, INFORMATION ON REQUEST, ANNUAL, DISTRIBUTION

Type of plan	Number of disclosures by mail	Clerical hours	Total clerical hours	Equivalent cost—clerical
404(c)	170,000	0.033	6,000	$148,000
Non-404(c)				
Total	170,000		6,000	148,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

As some of these disclosures are accounted for under the QDIA regulation, the cost burden for the remainder is estimated at approximately $271,000 based on an average page length of 20 pages and mailing costs of $0.59 as shown in Table 36, below.

TABLE 36.—INVESTMENT-RELATED INFORMATION, INFORMATION ON REQUEST, ANNUAL, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
404(c)	275,000	62	20	$0.05	$0.59	$271,000
Non-404(c)	0	62	20	0.05	0.59	0
Total	275,000					271,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Summary

The Department has estimated the hour burden in the first year to be 2,732,000 hours with an equivalent cost of $105,065,000, as shown in Table 37. The hour burden in the subsequent years is estimated to be 2,551,000 hours with an equivalent cost of $92,470,000, as shown in Table 38.

TABLE 37.—HOUR BURDEN FOR FIRST YEAR

Type of plan	Professional hour burden	Clerical hour burden	Total hours	Equivalent cost—professional	Equivalent cost—clerical	Total equivalent cost
404(c)	412,000	1,610,000	2,022,000	$32,028,000	$41,970,000	$73,998,000
Non-404(c)	243,000	467,000	710,000	18,891,000	12,177,000	31,068,000
Total	655,000	2,077,000	2,732,000	50,918,000	54,147,000	105,065,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

TABLE 38.—HOUR BURDEN FOR YEARS TWO AND THREE

Type of plan	Professional hour burden	Clerical hour burden	Total hours	Equivalent cost—professional	Equivalent cost—clerical	Total equivalent cost
404(c)	355,000	1,553,000	1,908,000	$25,593,000	$40,482,000	$66,075,000
Non-404(c)	209,000	433,000	643,000	15,095,000	11,299,000	26,395,000
Total	565,000	1,986,000	2,551,000	40,688,000	51,781,000	92,470,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

The Department has estimated the cost burden in the first year to be $94,112,000; and $76,925,000 in the subsequent years. These estimates are shown in Table 39.

TABLE 39.—TOTAL COST BURDEN

Type of plan	First year—total cost burden	Subsequent years—total cost burden
404(c)	$71,182,000	$58,223,000
Non-404(c)	22,930,000	18,702,000
Total	94,112,000	76,925,000

Note: The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Type of Review: Revised collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

OMB Number: 1210–0090.

Affected Public: Business or other for-profit; not-for-profit institutions.

Respondents: 437,000

Responses: 407,042,000

Frequency of Response: Annually; quarterly.

Estimated Annual Burden Hours: 2,732,000 hours in the first year; 2,551,000 hours in each subsequent year.

Estimated Annual Burden Cost: $94,112,000 in the first year; $76,925,000 in each subsequent year.

Congressional Review Act Statement

This notice of proposed rulemaking is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act Statement

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, the notice of proposed rulemaking does not include any federal mandate that will result in expenditures by state, local, or tribal governments in the aggregate of more than $100 million, adjusted for inflation, or increase expenditures by the private sector of more than $100 million, adjusted for inflation.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations would not have federalism implications because they have no 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. Section 514 of ERISA provides, with certain exceptions specifically enumerated that are not pertinent here, that the provisions of Titles I and IV of ERISA supersede State laws that relate to any employee benefit plan covered by ERISA. The requirements implemented in the

proposed regulations do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Fiduciaries, Investments, Pensions, Disclosure, Reporting and recordkeeping requirements, and Securities.

For the reasons set forth in the preamble, the Department proposes to amend Subchapter F, Part 2550 of Title 29 of the Code of Federal Regulations as follows:

Subchapter F—Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135; sec. 657, Pub. L. 107–16, 115 Stat.38; and Secretary of Labor's Order No. 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401b–1 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), 3 CFR, 1978 Comp. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), 3 CFR, 1978 Comp. 332. Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.407c–3 also issued under 29 U.S.C. 1107. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp. p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp. 332. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

2. Add § 2550.404a–5 to read as follows:

§ 2550.404a–5 Fiduciary requirements for disclosure in participant-directed individual account plans.

(a) *General.* The investment of plan assets is a fiduciary act governed by the fiduciary standards of section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1001 *et seq.* (all section references herein are references to ERISA unless otherwise indicated). Pursuant to section 404(a)(1)(A) and (B), fiduciaries must discharge their duties with respect to the plan prudently and solely in the interest of participants and beneficiaries. Where the documents and instruments governing an individual account plan, as defined in section (3)(34), provide for the allocation of investment responsibilities to participants or beneficiaries, fiduciaries, consistent with section 404(a)(1)(A) and (B), must take steps to ensure that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including fees and expenses, and regarding designated investment alternatives, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts.

(b) *Satisfaction of duty to disclose.* For plan years beginning on or after January 1, 2009, the fiduciary (or fiduciaries) of an individual account plan must comply with the disclosure requirements set forth in paragraphs (c) and (d) of this section with respect to each participant or beneficiary that, pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to, his or her individual account. Compliance with paragraphs (c) and (d) of this section will satisfy the duty to make the regular and periodic disclosures described in paragraph (a) of this section.

(c) *Disclosure of plan-related information.* A fiduciary (or a person or persons designated by the fiduciary to act on its behalf) shall provide to each participant or beneficiary the plan-related information described in paragraphs (c)(1) through (3) of this section, based on the latest information available to the plan.

(1) *General.*

(i) On or before the date of plan eligibility and at least annually thereafter:

(A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions;

(B) An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;

(C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights;

(D) An identification of any designated investment alternatives offered under the plan; and

(E) An identification of any designated investment managers; and

(ii) Not later than 30 days after the date of adoption of any material change to the information described in paragraph (c)(1)(i) of this section, each participant and beneficiary shall be furnished a description of such change.

(2) *Administrative expenses.*

(i) On or before the date of plan eligibility and at least annually thereafter, an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not otherwise included in investment-related fees and expenses, may be charged to the plan and the basis on which such charges will be allocated (e.g., pro rata, per capita) to, or affect the balance of, each individual account, and

(ii) At least quarterly, a statement that includes:

(A) The dollar amount actually charged during the preceding quarter to the participant's or beneficiary's account for administrative services, and

(B) A description of the services provided to the participant or beneficiary for such amount (e.g., recordkeeping).

(3) *Individual expenses.*

(i) On or before the date of plan eligibility and at least annually thereafter, an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary for services provided on an individual, rather than plan, basis (e.g., fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice or similar services charged on an individual basis), and

(ii) At least quarterly, a statement that includes:

(A) The dollar amount actually charged during the preceding quarter to the participant's or beneficiary's account for individual services, and

(B) A description of the services provided to the participant or beneficiary for such amount (e.g., fees attendant to processing plan loans).

(d) *Disclosure of investment-related information.* A fiduciary (or a person or persons designated by the fiduciary to act on its behalf), based on the latest information available to the plan, shall:

(1) *Information to be provided automatically.* Provide to each participant or beneficiary, on or before the date of plan eligibility and at least annually thereafter, the following information with respect to each designated investment alternative offered under the plan—

(i) *Identifying information.* Such information shall include:

(A) The name of the designated investment alternative;

(B) An Internet Web site address that is sufficiently specific to lead

participants and beneficiaries to supplemental information regarding the designated investment alternative, including the name of the investment's issuer or provider, the investment's principal strategies and attendant risks, the assets comprising the investment's portfolio, the investment's portfolio turnover, the investment's performance and related fees and expenses;

(C) The type or category of the investment (e.g., money market fund, balanced (stocks and bonds) fund, large-cap fund); and,

(D) The type of management utilized by the investment (e.g., actively managed, passively managed);

(ii) *Performance data.* For designated investment alternatives with respect to which the return is not fixed, the average annual total return (percentage) of the investment for the following periods, if available: 1-year, 5-year, and 10-year, measured as of the end of the applicable calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future. In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, both the fixed rate of return and the term of the investment;

(iii) *Benchmarks.* For designated investment alternatives with respect to which the return is not fixed, the name and returns of an appropriate broad-based securities market index over the 1-year, 5-year, and 10-year periods comparable to the performance data periods provided under paragraph (d)(1)(ii) of this section, and which is not administered by an affiliate of the investment provider, its investment adviser, or a principal underwriter, unless the index is widely recognized and used;

(iv) *Fee and expense information.* For designated investment alternatives with respect to which the return is not fixed:

(A) The amount and a description of each shareholder-type fee (i.e., fees charged directly against a participant's or beneficiary's investment), such as sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees;

(B) The total annual operating expenses of the investment expressed as a percentage (e.g., expense ratio); and

(C) A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, the amount and a description of any shareholder-type fees that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part;

(v) *Disclosure on or before date of plan eligibility.* The requirement in paragraph (d)(1) of this section to provide information to a participant on or before the date of plan eligibility may be satisfied by furnishing to the participant the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1) of this section and any material changes to the information furnished to participants and beneficiaries pursuant to paragraph (c)(1)(ii) of this section.

(2) *Comparative format.* Furnish the information described in paragraph (d)(1) of this section in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan; as well as:

(i) a statement indicating the name, address, and telephone number of the fiduciary (or a person or persons designated by the fiduciary to act on its behalf) to contact for the provision of the information required by paragraph (d)(4) of this section, and

(ii) A statement that more current investment-related information (e.g., fee and expense and performance information) may be available at the listed Internet Web site addresses (see paragraph (d)(1)(i)(B) of this section). Nothing herein, however, shall preclude a fiduciary from including additional information that the fiduciary determines appropriate for such comparisons, provided such information is not inaccurate or misleading;

(3) *Information to be provided subsequent to investment.* Provide to each investing participant or beneficiary, subsequent to an investment in a designated investment alternative, any materials provided to the plan relating to the exercise of voting, tender and similar rights appurtenant to the investment, to the extent that such rights are passed through to such participant or beneficiary under the terms of the plan;

(4) *Information to be provided upon request.* Provide to each participant or beneficiary, either at the times specified in paragraph (d)(1), or upon request, the following information relating to designated investment alternatives—

(i) Copies of prospectuses (or any short-form or summary prospectus, the form of which has been approved by the Securities and Exchange Commission) for the disclosure of information to investors by entities registered under either the Securities Act of 1933 or the Investment Company Act of 1940, or similar documents relating to designated investment alternatives that are provided by entities that are not registered under either of these Acts.

(ii) Copies of any financial statements or reports, such as statements of additional information and shareholder reports, and of any other similar materials relating to the plan's designated investment alternatives, to the extent such materials are provided to the plan;

(iii) A statement of the value of a share or unit of each designated investment alternative as well as the date of the valuation; and

(iv) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3–101 and the value of each such asset (or the proportion of the investment which it comprises);

(e) *Form of disclosure.* (1) The information required to be disclosed pursuant to paragraphs (c)(1), (c)(2)(i), and (c)(3)(i) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with paragraph (c)(1) of this section.

(2) The information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) of this section may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

(3) A fiduciary that uses and accurately completes the model format set forth in the Appendix will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

(4) Except with respect to the dollar amounts required to be included under paragraphs (c)(2)(ii)(A) and (c)(3)(ii)(A) of this section, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge.

(5) The information required to be prepared by the fiduciary for disclosure under this section shall be written in a manner calculated to be understood by the average plan participant.

(f) *Selection and monitoring.* Nothing herein is intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan

or designated investment alternatives offered under the plan.

(g) *Manner of furnishing.* Disclosures under this section shall be furnished in any manner consistent with the requirements of 29 CFR 2520.104b–1 of this chapter, including paragraph (c) of that section relating to the use of electronic media.

(h) *Definitions.* For purposes of this section, the term—

(1) *Designated investment alternative* means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term "designated investment alternative" shall not include "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(2) *Average annual total return* means the average annual profit or loss realized by a designated investment alternative at the end of a specified period, calculated in the same manner as average annual total return is calculated under Item 21 of Securities and Exchange Commission Form N–1A with respect to an open-end management investment company registered under the Investment Company Act of 1940.

(3) *Total annual operating expenses* means annual operating expenses of the designated investment alternative (*e.g.*, investment management fees, distribution, service, and administrative expenses) that reduce the rate of return to participants and beneficiaries, expressed as a percentage, calculated in the same manner as total annual operating expenses is calculated under Instruction 3 to Item 3 of Securities and Exchange Commission Form N–1A with respect to an open-end management investment company registered under the Investment Company Act of 1940.

(4) *At least annually thereafter* means at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(5) *At least quarterly* means at least once in any 3-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

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APPENDIX to §2550.404a-5 – Model Comparative Chart

ABC Corporation 401k Savings Plan
Investment Options – January 1, 200X

Whether you will have adequate savings at retirement will depend in large part on how much you choose to save and how you invest your savings. The following information will assist you in comparing the designated investment options available to you under the **ABC Corporation 401k Savings Plan**.

While the information furnished below is important to making informed investment decisions, you should carefully review all available information about an investment option prior to directing your retirement savings into an investment option. Internet Web site addresses are provided to help you access additional information (such as investment strategies and risks, portfolio holdings and turnover) about each of the plan's investment options. You may also contact your plan representative, [insert name of fiduciary or designee] at [insert telephone number and address] for additional information or visit the Department of Labor's Web site for general information on investing for retirement. See www.dol.gov/ebsa/investing.html

Part I. Performance Information
This chart shows each option's performance over several time periods and compares the performance with a recognized benchmark. For options with returns that vary over time, past performance does not guarantee how your investment in the option will perform in the future; your investment in these options could lose money.

Name/ Type of Option	Mgmt.	Fixed Return/ Term	Average Annual Total Return as of 12/31/0X 1yr.	5yr.	10yr.	Benchmark/Index as of 12/31/0X 1yr.	5yr.	10yr.
Stock Funds								
A Fund/S&P 500 Index www.Web site.com	Passive	NA	15.6%	6.1%	8.3%	15.8%	6.2%	8.4% S&P 500
B Fund/Large Cap www.Web site.com	Active	NA	8.9%	.22%	NA	-8.9%	5.9%	12.2% Russell 1000
C Fund/Int'l Stock www.Web site.com	Active	NA	4.3%	5.2%	11.2%	26.9%	15.4%	8.1% MSCI EAFE
D Fund/Mid Cap ETF www.Web site.com	Passive	NA	15%	12.7%	11.4%	15%	13%	12% Russell Midcap
Bond Funds								
E Fund/Bond Index www.Web site.com	Passive	NA	4.3%	5.2%	6.2%	4.3%	5.1%	6.2% LBA U.S. Aggr. Bd.
Other								
F Fund/ GICs www.Web site.com	Active	NA	4.7%	4.4%	5%	5%	3%	3.8% US 91 Day T Bill
G Fund/Stable Value www.Web site.com	Active	NA	4.3%	4.0%	4.9%	4.7%	3.4%	4.3% Treasury CM
H 200X GIC www.Web site.com	NA	4% 2 yr.	NA	NA	NA	NA		

Part II. Fees and Expense Information

This chart shows only investment-related fees and expenses for investment options offered in your plan. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Name/ Type of Option	Total Annual Operating Expenses *	Shareholder/Shareholder-type Fees **
Stock Funds		
A Fund / S&P 500 Index	0.18%	$20 annual service fee assessed for accounts holding less than $10,000. May be waived in certain circumstances.
B Fund / Large Cap	2.45%	4.25% deferred sales charge against amounts redeemed within 12 months of purchase.
C Fund/International Stock	0.79%	5.75% sales charge against amounts invested.
D Fund/ Mid Cap ETF	0.20%	4.25% sales charge against amounts invested or redeemed.
Bond Funds		
E Fund/ Bond Index	0.50%	N/A·
Other		
F Fund/ GICs	0.46%	10% charge against amounts withdrawn within 18 mos. of initial investment.
G Fund/ Stable Value	0.65%	Dollars withdrawn may not be transferred to a competing fund for 90 days after withdrawal.
H 200X GIC	NA	12% charge against amounts withdrawn before maturity.

For an explanation of non investment-related fees and expenses, such as recordkeeping or loan processing fees that may be charged against your account, you may consult your [SPD], [insert name of annual disclosure used to satisfy § 2550.404a-5(c)], [and] [quarterly benefit statement]. The dollar amount actually charged to your account during the preceding quarter for such administrative or individual expenses will be reported to you on a quarterly basis.

NOTE: More current information about your plan's investment options, including fees and expenses and performance updates, may be available at the listed Internet Web site addresses.

*Total Annual Operating Expenses are ongoing expenses paid indirectly from your investment in this option each year, expressed as a percentage of the value of your investment in the option (*e.g.*, expense ratio).

**Shareholder/Shareholder-type Fees are fees paid directly from your investment in this option (*e.g.*, sales loads, sales charges, deferred sales charges, redemption fees, exchange fees, account fees, purchase fees, transfer or withdrawal fees, surrender charges, contract maintenance fees, and mortality and expense charges).

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3. In § 2550.404c–1 revise (b)(2)(i)(B), (c)(1)(ii), and (f)(1), and add (d)(2)(iv) to read as follows:

§ 2550.404c–1 ERISA section 404(c) plans.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed investment decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this subparagraph, a participant or beneficiary will be considered to have sufficient information if the participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

(*1*) An explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Income Security Act, and 29

CFR 2550.404c–1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary;

(*2*) Identification of any designated investment managers;

(*3*) The information required pursuant to 29 CFR 2550.404a–5; and

(*4*) In the case of plans which offer an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative), a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights, by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures (see paragraphs (d)(2)(ii)(E)(4)(vii), (viii) and (ix) of this section).

* * * * *

(c) * * *

(1) * * *

(ii) For purposes of sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section, a participant or beneficiary will be deemed to have exercised control with respect to voting, tender or similar rights appurtenant to the participant's or beneficiary's ownership interest in an investment alternative, provided that the participant's or beneficiary's investment in the investment alternative was itself the result of an exercise of control; the participant or beneficiary was provided a reasonable opportunity to give instruction with respect to such incidents of ownership, including the provision of the information described in 29 CFR 2550.404a–5(d)(3); and the participant or beneficiary has not failed to exercise control by reason of the circumstances described in paragraph (c)(2) of this section with respect to such incidents of ownership.

* * * * *

(d) * * *

(2) * * *

(iv) Paragraph (d)(2)(i) of this section does not serve to relieve a fiduciary from its duty to prudently select and monitor any designated investment manager or designated investment alternative offered under the plan.

* * * * *

(f) * * *

(1) A plan is an individual account plan described in section 3(34) of the Act. The plan states that a plan participant or beneficiary may direct the plan administrator to invest any portion of his individual account in a particular diversified equity fund managed by an entity which is not affiliated with the plan sponsor, or any other asset administratively feasible for the plan to hold. However, the plan provides that the plan administrator will not implement certain listed instructions for which plan fiduciaries would not be relieved of liability under section 404(c) (see paragraph (d)(2)(ii) of this section). Plan participants and beneficiaries are permitted to give investment instructions during the first week of each month with respect to the equity fund and at any time with respect to other investments. The plan provides for the pass-through of voting, tender and similar rights incidental to the holding in the account of a participant or beneficiary of an ownership interest in the equity fund or any other investment alternative available under the plan. The plan administrator of Plan A provides each participant and beneficiary with the information described in paragraph (b)(2)(i)(B) of this section upon their entry into the plan (including the information that must be provided on or before plan eligibility pursuant to 29 CFR 2550.404a–5), and provides updated information in the event of any material change in the information provided. Subsequent to any investment by a participant or beneficiary, the plan administrator forwards to the investing participant or beneficiary any materials provided to the plan relating to the exercise of voting, tender or similar rights attendant to ownership of an interest in such investment (see paragraph (b)(2)(i)(B)(*3*) of this section and 29 CFR 2550.404a–5(d)(3)). Upon request, the plan administrator provides each participant or beneficiary with copies of any prospectuses (or similar documents relating to designated investment alternatives that are provided by entities that are not registered under the Securities Act of 1933 or the Investment Company Act of 1940), financial statements and reports, and any other materials relating to the designated investment alternatives available under the plan in accordance with 29 CFR 2550.404a–5(d)(4)(i) and (ii). Also upon request, the plan administrator provides each participant and beneficiary with other information required by 29 CFR 2550.404a–5(d)(4) with respect to the equity fund, which is a designated investment alternative, including information concerning the latest available value of the participant's or beneficiary's interest in the equity fund. Plan A meets the requirements of paragraph (b)(2)(i)(B) of this section regarding the provision of investment information.

Note: The regulation imposes no additional obligation on the administrator to furnish or make available materials relating to the companies in which the equity fund invests (e.g., prospectuses, proxies, etc.).

* * * * *

Signed at Washington, DC, this 15th day of July 2008.

Bradford P. Campbell,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. E8–16541 Filed 7–22–08; 8:45 am]

BILLING CODE 4510–29–P

Federal Register

Wednesday,
July 23, 2008

Part V

Postal Regulatory Commission

39 CFR Part 3020
Administrative Practices and Procedure; Postal Service; Final Rule

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. CP2008–8, CP2008–9, and CP2008–10; Order No. 85]

Administrative Practice and Procedure; Postal Service

AGENCY: Postal Regulatory Commission.
ACTION: Direct final rule.

SUMMARY: The Commission is adding the Postal Service's negotiated agreement with Global Plus to the competitive product list. This action is consistent with changes in a recent law governing postal operations. Re-publication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

DATES: Effective June 23, 2008.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION: *Regulatory History,* 73 FR 33465 (June 12, 2008).

I. Background

On June 2, 2008, the Postal Service filed three notices, which have been assigned to Docket Nos. CP2008–8, CP2008–9 and CP2008–10, announcing prices and classification changes for competitive products not of general applicability. The notice in Docket No. CP2008–8 indicates that "the Governors have established prices and classifications for competitive products not of general applicability for Global Plus Contracts." [1] The Postal Service attached a proposed revision of the draft Mail Classification Schedule (MCS) (section 2610.5) concerning Global Plus contracts to the Notice.[2] Docket No. CP2008–8 has been filed pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5 and 3020.90. In support of this docket, the Postal Service has also filed materials under seal, including the Governors' decision. The Postal Service claims that "[c]ontract prices are highly confidential in the business world * * * [and that its] ability * * * to negotiate individual contracts would be severely compromised if prices for these types of agreements were publicly disclosed." *Id.* at 1–2.

The notices in Docket Nos. CP2008–9 and CP2008–10 announce individual negotiated service agreements; namely, specific Global Plus contracts that the Postal Service has entered into with individual mailers.[3] In support of these dockets, the Postal Service has also filed materials, including the contracts and supporting materials, under seal. The Postal Service asserts that "[t]he names of customers who enter into respective contracts and the related contract prices are highly confidential business information." Docket No. CP2008–9 Pricing Notice at 1; Docket No. CP2008–10 Pricing Notice at 1.

In Order No. 81, the Commission gave notice of the three dockets, requested the Postal Service to address certain issues, appointed a Public Representative, and provided the public with an opportunity to comment.[4]

II. Postal Service Supplemental Filing

In response to Order No. 81, the Postal Service filed a pleading,[5] which (1) stated that the Postal Service intended that the Docket No. CP2008–8 shell classification would be the template product, and that the agreements submitted in Docket Nos. CP2008–9 and CP2008–10 would be functionally equivalent agreements within the Docket No. CP2008–8 product; (2) provided additional supporting materials under part 3020, subpart B of the Commission's rules in support of adding Global Plus as the shell classification to the competitive products list; *see id.*, Attachment A; (3) stated that there are no existing Global Plus contracts that fail to fit within the revised Global Plus proposed MCS language; (4) indicated that the Postal Service believes that the expiration dates of Global Plus contracts could be made publicly available; (5) filed a redacted version of the Governors' decision with respect to Docket No. CP2008–8;[6] and (6) discussed why the Postal Service believes that certain provisions in the Docket Nos. CP2008–9 and CP2008–10 agreements which provide for price incentives prior to regulatory approval for such rates are appropriate.

III. Comments

Comments were filed by United Parcel Service (UPS), the Public Representative, Parcel Shippers Association (PSA), and International Mailers' Advisory Group (IMAG).[7]

UPS urges the Commission to require public disclosure of the proposed contracts subject to adequate safeguards to allow meaningful public insight. It also suggests that the Commission resist any "presumption" that markets for international services are perfectly competitive markets since private carriers face more burdensome customs and brokerage requirements than postal administrations. UPS Comments at 1–2.

The Public Representative comments on several aspects of the Postal Service's filings in these cases: (1) Confidentiality; (2) compliance with part 3020, subpart B of the Commission's rules; (3) the Governors' decision with respect to the shell classification; (4) the specific agreements; and (5) the retroactivity provisions. With respect to confidentiality, the Public Representative argues that the Postal Service should justify the limits of all confidentiality requests to comport with the spirit of Federal Rules of Civil Procedure 26(c). Public Representative Comments at 3. With respect to the Postal Service's filings under part 3020, subpart B, the Public Representative believes that the Postal Service should provide as much information as possible to assist the Commission in performing its statutory functions. *Id.* at 3–4. The

[1] Notice of United States Postal Service of Governors' Decision Establishing Prices and Classifications for Global Plus Contracts, June 2, 2008, at 1 (Notice).

[2] The draft MCS remains under review. The Commission anticipates providing interested persons an opportunity to comment on the draft MCS in the near future. Modifications to the MCS, such as proposed in Docket No. CP2008–8, should, in the future, be filed in the dockets designated by the "MC" prefix. Contracts executed pursuant to those requested classifications are appropriately filed as "CP" dockets.

[3] Docket No. CP2008–9, Notice of United States Postal Service of Filing a Global Plus Contract, June 2, 2008 (Docket No. CP2008–9 Pricing Notice); Docket No. CP2008–10, Notice of United States Postal Service of Filing a Global Plus Contract, June 2, 2008 (Docket No. CP2008–10 Pricing Notice).

[4] PRC Order No. 81, Notice and Order Concerning Prices Under Global Plus Negotiated Service Agreements, June 6, 2008 (Order No. 81).

[5] United States Postal Service Response to Order No. 81 and Notice of Filing Information Responsive to Part 3020 of the Commission's Rules of Practice and Procedure, June 13, 2008; United States Postal Service Notice of Erratum to Response to Order No. 81 and Notice of Filing Information Responsive to Part 3020 of the Commission's Rules of Practice and Procedure, June 16, 2008 (collectively, Postal Service Response).

[6] United States Postal Service Notice of Filing Redacted Copy of Governors' Decision No. 08–8, June 16, 2008.

[7] Docket No. CP2008–8, Comments of United Parcel Service in Response to Order Concerning Prices Under Global Plus Negotiated Service Agreements; Docket No. CP2008–9, Comments of United Parcel Service in Response to Order Concerning Prices Under Global Plus Negotiated Service Agreements, Docket No. CP2008–10, Comments of United Parcel Service in Response to Order Concerning Prices Under Global Plus Negotiated Service Agreements (collectively UPS Comments); Public Representative Comments in Response to United States Postal Service Notice of Global Plus Services Contracts (Public Representative Comments); Comments of Parcel Shippers Association in Response to Order No. 81 Concerning Prices Under Global Plus Negotiated Service Agreements (PSA Comments); Comments of International Mailers' Advisory Group Pertaining to Competitive Product Prices—Global Plus Negotiated Service Agreements, PRC Docket No. CP2008–10 (IMAG Comments), all filed on June 19, 2008.

Public Representative submits that the formula proposed in the Governors' decision comports with the provisions of title 39. *Id.* at 5. With respect to the specific agreements, the Public Representative recognizes that the agreements in Dockets Nos. CP2008–9 and CP2008–10 are not identical, but does not take a position as to whether they should be classified as separate products. The Public Representative does contend, however, that the agreements satisfy the requirements of title 39. *Id.* at 6. With respect to retroactivity, the Public Representative believes that the Postal Service should be provided with the same authority as competitors in their customary business practices. *Id.* at 7.

PSA addresses three points. It endorses the Postal Service's suggestion that the Global Plus contracts under the shell classification be treated as one "product." PSA Comments at 2–3. It argues that confidentiality is extremely important and disclosure would keep the Postal Service from successfully competing in competitive markets. *Id.* at 3. Lastly, PSA contends that the level playing field envisioned by the Postal Accountability and Enhancement Act (PAEA) of 2006 requires the Commission, not Postal Service competitors, to review and examine the terms of the contracts to ensure there is no cross-subsidization. *Id.*

IMAG focuses on (1) the need to afford the Postal Service maximum flexibility for competitive contract rates not of general applicability through expedited and predictable Commission proceedings; (2) the importance of protecting the confidentiality of commercially sensitive information; and (3) the justification for the retroactive pricing provisions. IMAG Comments at 1–4.

IV. Commission Analysis

A. Part 3020, Subpart B Requirements

The Postal Service appears to argue that filing under 39 CFR part 3020, subpart B is unnecessary in this instance because the Commission has already listed all negotiated service agreements concerning outbound international mail as competitive products on the product list. Therefore, the Postal Service contends, a determination by the Commission under section 3642(b) is unnecessary. Postal Service Response at 4–5.

Under the PAEA, the term "product" is defined as "a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be applied." 39 U.S.C. 102(6). The Commission noted in Order No. 43 that "each negotiated service agreement (NSA) is a separate product," but may, "upon proper showing, be grouped as one product." Order No. 43, paras. 1003, 2177–78. Additionally, for the classification of each product, the Commission must consider the impact on the private sector, the views of those that use the product, and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3). The Commission must take these factors into consideration when evaluating new rate or classification proposals. Therefore, until the Postal Service makes an adequate showing under the statutory definition and section 3642, including subsection (b)(3), that separate negotiated service agreements should be grouped together as one product, each negotiated service agreement will be treated as a separate product and will be assigned to the product list in accordance with section 3642.

With respect to the Global Plus contracts, the Postal Service has filed the Governors' decision and a statement of Frank Cebello in support of its proposal to add the Docket No. CP2008–8 shell classification to the competitive product list. The Postal Service contends that adding the shell classification as a competitive product will improve the Postal Service's competitive posture, while allowing verification that each agreement covers attributable costs and satisfying applicable statutory requirements. Postal Service Response, Attachment A, at 2. The draft MCS includes a provision requiring each agreement to cover its own attributable costs. *See* Notice, proposed MCS language § 2610.5. Alternatively, adding the individual agreements as separate products will also improve the competitive posture of the Postal Service, but to a lesser degree. Postal Service Response, Attachment A, at 2. In the alternative, the Postal Service sought to add the contracts filed in Docket Nos. CP2008–9 and CP2008–10 to the competitive product list. *Id.* at 1–2. The Commission has reviewed this supplemental information as well as the materials filed by the Postal Service and commenters in Docket Nos. CP2008–9 and CP2008–10, including that submitted under seal. These contracts provide services that, under the criteria of section 3642(b), are properly classified as competitive.

B. Functionally Equivalent Agreements

Whether the shell or the actual agreements should be added to the competitive product list is a fundamental issue in these cases. The Commission seeks to strike an appropriate balance between the Postal Service's need for flexibility with the need for adequate regulatory oversight. Consideration of a shell classification as a product may work in instances where the shell narrowly defines the particular product.

With respect to these cases in particular, the Commission has concerns with the breadth of the proposed Global Plus MCS language (concerning a variety of different services), and that it does not identify principal contract provisions as prerequisites for functional equivalency. Thus, the Commission does not believe that the Docket No. CP2008–8 shell classification, on its own, provides enough specificity to be categorized as a product at this time.[8]

An examination of the contracts, however, reveals that they are functionally equivalent in all pertinent respects, notwithstanding different revenue thresholds. As a consequence, the Commission concludes that it is appropriate to group these contracts as one product, which for purposes of the Mail Classification Schedule, will be listed on the competitive product list and grouped under the Global Plus classification as "Global Plus 1". Revisions to the competitive product list are shown below the signature line of this order and shall become effective upon publication in the **Federal Register**. Any future Global Plus contracts having substantially the same terms and conditions as the Global Plus 1 contracts may be filed under section 3015.5 of the Commission's rules. Global Plus contracts not having substantially the same terms and conditions as the Global Plus 1 contracts must be filed under part 3020, subpart B of the Commission's rules.[9] The Commission will process such contracts as expeditiously as practicable consistent with the requirements of title 39.[10]

Under section 3015.5 of the Commission's rules, the explanation and justification for the rate or class not of general applicability must also

[8] The Governors' decision in Docket No. CP2008–8, however, may properly authorize more than one Global Plus contract type.

[9] Future Global Plus contracts having different terms and conditions from Global Plus 1 contracts but functionally equivalent with one another would be grouped similarly, *e.g.*, as "Global Plus 2". The Postal Service may request such treatment when it files such agreements with the Commission. It should support any such request with a statement justifying that approach.

[10] In the future, if and when the Postal Service files a Governors' decision under seal, it shall also file a redacted copy of that decision. In addition, the Postal Service shall notify the Commission no later than the termination date of each Global Plus contract if such contract is terminated pursuant to an early termination clause.

include the contract. When filing a new (or changed) Global Plus contract that it seeks to have classified as functionally equivalent with an existing product, *e.g.*, Global Plus 1, the Postal Service shall identify all significant differences between the new contract and the pre-existing product group. Such differences would include terms and conditions that impose new obligations or new requirements on any party to the agreement.

The Global Plus classification language submitted by the Postal Service includes the requirement that each agreement executed pursuant to that shell classification (and the accompanying Governors' decision) cover its attributable costs. This is a key provision and the classification language adopted for all competitive negotiated service agreements will include the same provision.[11]

The Commission reviews competitive product filings for compliance with section 3633 of title 39 and the Commission's implementing regulations which require each product to recover its attributable costs, bar cross-subsidization by market dominant products, and require competitive products collectively to recover an appropriate share of the Postal Service's total institutional costs.

The Commission has reviewed the materials filed by the Postal Service under seal, including the Governors' decision, the contracts submitted in Docket Nos. CP2008–9 and CP2008–10, and the financial analysis accompanying the contracts, and finds, based on the filed materials, that the Docket Nos. CP2008–9 and CP2008–10 agreements should cover their attributable costs, should not lead to the subsidization of competitive products by market dominant products, and should contribute to the recovery of an appropriate share of institutional costs by competitive products collectively.

C. Retroactive Contract Provisions

In Order No. 81, the Commission directed the Postal Service to provide statutory justification for allowing customers to receive certain price incentives prior to regulatory approval of such rates, subsequent to collection of the difference in the full price if regulatory approval is not obtained.[12] The Postal Service contends that "[t]he retroactivity provisions are not inconsistent with any statutory or regulatory authority." Postal Service Response at 8. In support of this, the Postal Service argues that (1) pragmatic factors justify the arrangement and that, in any event, weigh strongly against construing the statute to forestall the reimbursement provisions, and (2) the mailer remains responsible for payment of the published rates if the contracts are not approved.

Section 3642(e) of title 39 states that "no product that involves the physical delivery of letters, printed matter, or packages may be offered by the Postal Service unless it has been assigned to the market-dominant or competitive category of mail * * *". This provision means that new products, such as a new negotiated service agreement or product group not listed in the MCS, may not be offered by the Postal Service until such time as the Commission assigns the proposed product to the appropriate product list. Additionally, even if the rate or class involves a pre-existing product, Commission rule 3015.5, which implements section 3632(b)(3) of title 39, requires that notice be filed "at least 15 days before the effective date of the change." Effectively, this means that any new (or revised) contract must be filed prior to the date that the new (or revised) rates become effective.

The Commission understands the Postal Service's pragmatic concerns and the need to maintain the status quo. As experience is gained with the filing requirements under the PAEA, the parties should be better equipped to address such exigencies. If and when such situations arise, the Commission stands ready to act quickly on requests for temporary relief based on extenuating circumstances.

V. Ordering Paragraphs

It is Ordered:

1. The contracts submitted in Docket Nos. CP2008–9 and CP2008–10 will be added to the competitive product list as one product under Negotiated Service Agreements, Outbound International as Global Plus Contracts, Global Plus 1 (CP2008–9 and CP2008–10).

2. The Secretary shall arrange for publication of the amended product list in the **Federal Register**.

By the Commission.
Issued: June 27, 2008.

Steven W. Williams,

Secretary.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure; Postal Service.

■ For the reasons stated in the preamble, under the authority at 39 U.S.C. 503, the Postal Regulatory Commission amends 39 CFR part 3020 as follows:

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. In Appendix A to subpart A of part 3020—Mail Classification Schedule revise part B, Competitive Products, section 2000 to read as follows:

* * * * *

PART B—COMPETITIVE PRODUCTS

2000 Competitive Product List

Express Mail:
- Express Mail
- Outbound International Expedited Services
- Inbound International Expedited Services
  - International Expedited Services 1 (CP2008–7)

Priority Mail:
- Priority Mail
- Outbound Priority Mail International
- Inbound Air Parcel Post

Parcel Select:

Parcel Return Service:

International:
- International Priority Airlift (IPA)
- International Surface Airlift (ISAL)
- International Direct Sacks—M—Bags
- Global Customized Shipping Services
- Inbound Surface Parcel Post (at non-UPU rates)
- International Money Transfer Service
- International Ancillary Services

Negotiated Service Agreements:
- Domestic
- Outbound International
  - Global Plus Contracts
    - Global Plus 1 (CP2008–9 and CP2008–10)

* * * * *

[FR Doc. E8–16904 Filed 7–22–08; 8:45 am]
BILLING CODE 7710–FW–P

[11] The Postal Service filing included proposed classification language governing Global Plus contracts. The MCS remains in draft form. The language filed by the Postal Service will be deemed illustrative until such time as the MCS is finalized.

[12] PRC Order No. 81, Notice and Order Concerning Prices Under Global Plus Negotiated Service Agreements, June 6, 2008, at 4 (Order No. 81).

Federal Register

Wednesday,
July 23, 2008

Part VI

The President

Proclamation 8274—Captive Nations Week, 2008

Federal Register
Vol. 73, No. 142
Wednesday, July 23, 2008

Presidential Documents

Title 3—

The President

Proclamation 8274 of July 18, 2008

Captive Nations Week, 2008

By the President of the United States of America

A Proclamation

Freedom is the longing of every soul and the birthright of all mankind. During Captive Nations Week, we underscore our commitment to advancing democracy, defending liberty, and protecting human rights around the world.

It is in our Nation's interest to help those who are suffering under oppressive regimes defeat the ideologues of hate with an ideology of hope. Advancing the cause of liberty advances the cause of peace. A free society upholds justice and defends human dignity. Over the years, many have underestimated the power of freedom to overcome tyranny, but history has shown us that freedom will prevail.

In the 20th century, the evils of Soviet communism and Nazi fascism were defeated and freedom spread around the world as new democracies emerged. Today, our Nation faces new struggles with adversaries who murder the innocent and seek to subject millions to their violent, totalitarian rule. Still, we remain confident that the light of liberty will again overcome this darkness.

To bring that day about, we must support young democracies in places like Afghanistan and Iraq. In countries like Belarus, Burma, Cuba, Iran, North Korea, Sudan, Syria, and Zimbabwe, people continue to live under oppressive regimes, and we will work for the day when all these nations are free. By opposing these despots and helping young democracies grow, we will lay the foundation of peace and prosperity for generations to come. Throughout Captive Nations Week, we renew our pledge that as people across the world find their own paths to freedom, they will also find a friend in the United States of America.

The Congress, by Joint Resolution approved July 17, 1959 (73 Stat. 212), has authorized and requested the President to issue a proclamation designating the third week in July of each year as "Captive Nations Week."

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim July 20 through July 26, 2008, as Captive Nations Week. I call upon the people of the United States to reaffirm our commitment to all those seeking liberty, justice, and self-determination.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of July, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

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H.R. 802/P.L. 110–280

Maritime Pollution Prevention Act of 2008 (July 21, 2008; 122 Stat. 2611)

H.R. 3891/P.L. 110–281

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Last List July 18, 2008

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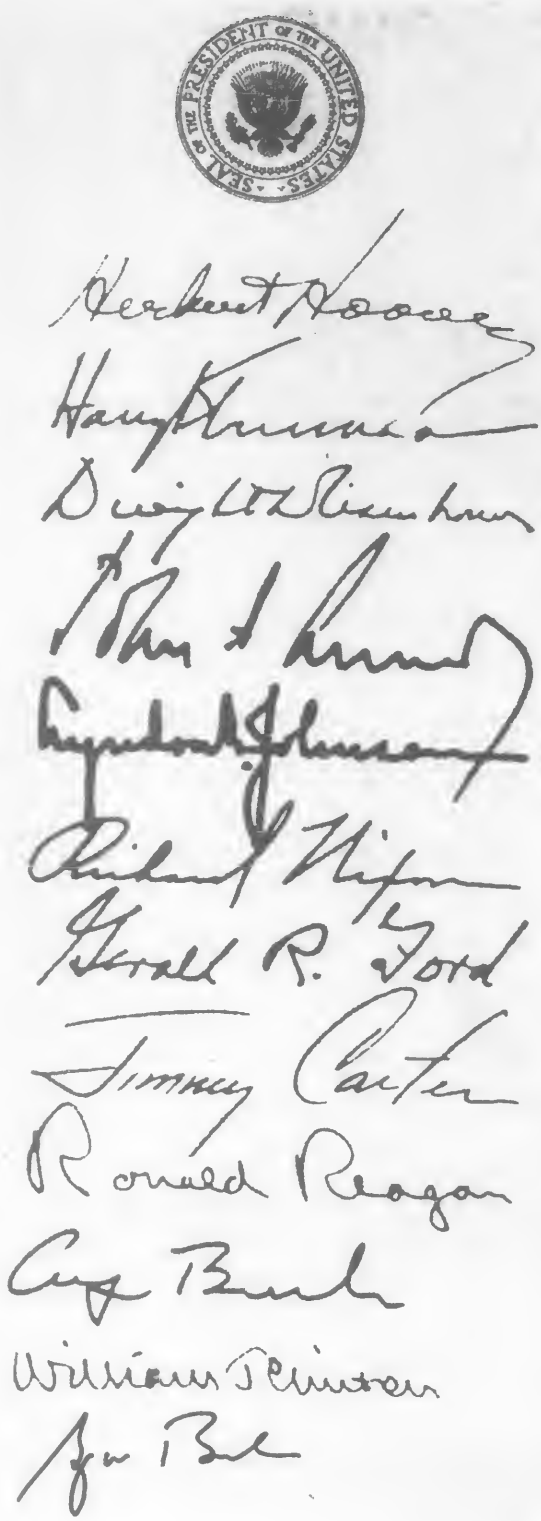

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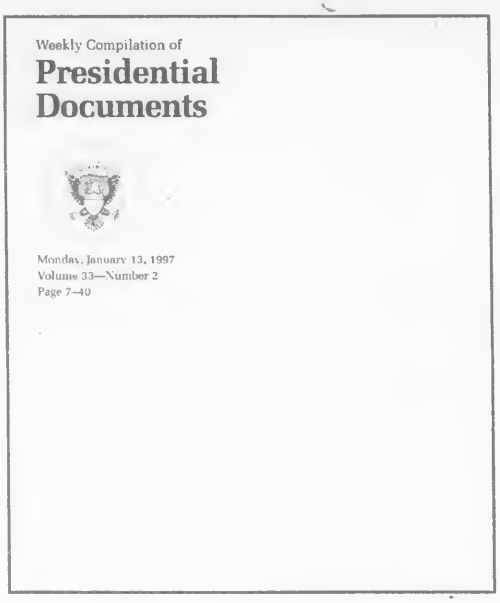

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