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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

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Presidential Documents

Title 3—

The President

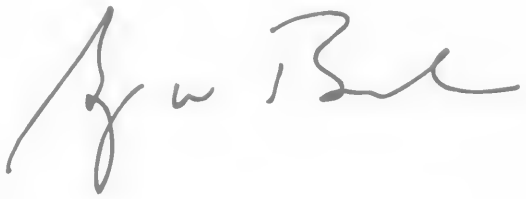
Presidential Determination No. 2004–29 of April 21, 2004

Presidential Determination on the Sudan Peace Act

Memorandum for the Secretary of State

Consistent with section 6(b)(1)(A) of the Sudan Peace Act (Public Law 107–245), I hereby determine and certify that the Government of Sudan and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue.

You are authorized and directed to notify the Congress of this determination and to arrange for its publication in the **Federal Register**.



THE WHITE HOUSE,
Washington, April 21, 2004.

[FR Doc. 04–10336
Filed 5–4–04; 8:45 am]
Billing code 4710–10–P

Presidential Documents

Presidential Determination No. 2004–30 of April 23, 2004

Determination and Certification under Section 8(b) of the Iran and Libya Sanctions Act

Memorandum for the Secretary of State

Pursuant to section 8(b) of the Iran and Libya Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note), as amended (Public Law 107–24), I hereby determine and certify that Libya has fulfilled the requirements of United Nations Security Council Resolution 731, adopted January 21, 1992, United Nations Security Council Resolution 748, adopted March 31, 1992, and United Nations Security Council Resolution 883, adopted November 11, 1993.

You are authorized and directed to transmit this determination and certification to the appropriate congressional committees and to arrange for its publication in the **Federal Register**.

THE WHITE HOUSE,
Washington, April 23, 2004.

[FR Doc. 04–10337
Filed 5–4–04; 8:45 am]
Billing code 4710–10–P

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 03–052–1]

Karnal Bunt; Compensation for Custom Harvesters in Northern Texas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the Karnal bunt regulations to provide for the payment of compensation to custom harvesters for losses they incurred due to the requirement that their equipment be cleaned and disinfected after four counties in northern Texas were declared regulated areas for Karnal bunt during the 2000–2001 crop season. We are also amending the regulations to provide for the payment of compensation to owners or lessees of other equipment that came into contact with Karnal bunt-positive host crops in those counties and was required to be cleaned and disinfected during the 2000–2001 crop season. The payment of compensation is necessary to reduce the economic burden imposed by the regulations and to encourage the participation of, and obtain cooperation from, affected individuals in our efforts to contain and reduce the presence of Karnal bunt in the United States.

DATES: This interim rule is effective May 5, 2004. We will consider all comments that we receive on or before July 6, 2004.

ADDRESSES: You may submit comments by any of the following methods:

- *Postal Mail/Commercial Delivery:* Please send four copies of your comment (an original and three copies) to Docket No. 03–052–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–052–1.
- *E-mail:* Address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 03–052–1" on the subject line.
- *Agency Web site:* Go to *http://www.aphis.usda.gov/ppd/rad/cominst.html* for a form you can use to submit an e-mail comment through the APHIS Web site.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Spaide, Senior Program Advisor, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 98, Riverdale, MD 20737; (301) 734–3769.

SUPPLEMENTARY INFORMATION:

Background

Karnal bunt is a fungal disease of wheat (*Triticum aestivum*), durum wheat (*Triticum durum*), and triticale (*Triticum aestivum* X *Secale cereale*), a hybrid of wheat and rye. Karnal bunt is caused by the smut fungus *Tilletia indica* (Mitra) Mundkur and is spread primarily through the movement of infected seed. In the absence of measures taken by the U.S. Department of Agriculture (USDA) to prevent its spread, the establishment of Karnal bunt in the United States could have significant consequences with regard to the export of wheat to international markets.

The regulations regarding Karnal bunt are set forth in 7 CFR 301.89–1 through 301.89–16 (referred to below as the regulations). Among other things, the regulations define areas regulated for Karnal bunt and restrict the movement of certain regulated articles, including wheat seed and grain, from the regulated areas. The regulations also provide for the payment of compensation for certain growers, handlers, seed companies, owners of grain storage facilities, flour millers, and participants in the National Karnal Bunt Survey who incurred losses and expenses because of Karnal bunt during certain years. These provisions are in § 301.89–15, "Compensation for growers, handlers, and seed companies in the 1999–2000 and subsequent crop seasons," and § 301.89–16, "Compensation for grain storage facilities, flour millers, and National Survey participants for the 1999–2000 and subsequent crop seasons."

On August 6, 2001, the Animal and Plant Health Inspection Service (APHIS) published in the **Federal Register** a final rule (66 FR 40839–40843, Docket No. 96–016–37) that established the compensation levels for the 1999–2000 crop season and subsequent years and made several other changes to the compensation regulations. One of these changes was that, after the 2000–2001 crop season, compensation would no longer be made available to persons growing or handling host crops that were knowingly planted in previously regulated areas.

On May 1, 2002, APHIS published in the **Federal Register** an interim rule (67 FR 21561–21566, Docket No. 01–112–1) that amended the regulations governing compensation to address five particular situations in four counties in northern Texas that arose during the 2000–2001 crop season. In Archer, Baylor, Throckmorton, and Young Counties, certain wheat growers, handlers, and other parties covered by the compensation regulations appeared to be ineligible to receive compensation for grain or seed affected by Karnal bunt due to restrictive language in the regulations that did not anticipate certain complications in the harvest and storage of grain that arose following

discovery of Karnal bunt in those counties. Due to the need to quickly declare these counties as regulated areas, we were unable to modify the compensation regulations at that time to address certain relevant aspects of the way seed and grain were moved, stored, and used in the newly regulated areas. The May 2002 interim rule amended the compensation provisions of the regulations to allow persons included in these five situations to apply for compensation.

We solicited comments concerning the interim rule for 60 days ending July 1, 2002. We received 86 comments by that date. They were from producers, representatives of industry groups, and representatives of State and foreign governments. In this document, we address the comments we received regarding the payment of compensation to custom harvesters and owners or lessees of other equipment in the four Texas counties during the 2000–2001 crop season. The other comments we received in response to the interim rule will be addressed in a subsequent document.

Seventy-eight commenters urged APHIS to provide for the payment of compensation to custom harvesters who operate in areas regulated for Karnal bunt, in addition to the compensation for growers, handlers, and other affected individuals provided by the interim rule. Some commenters stated that the cost of cleaning and disinfecting mechanized harvesting equipment after it has been used to harvest Karnal bunt-positive host crops prior to movement from a regulated area, as required by § 301.89–12(a), would either be absorbed by custom harvesters, causing them significant economic losses, or passed on to growers, already suffering losses from restrictions on the movement of their crops, in the form of higher rates.

Some custom harvesters, other commenters argued, might choose to avoid harvesting in regulated areas altogether; this would increase the economic losses suffered by growers in regulated areas, since the demand for custom harvesting services in regulated areas would exceed the supply, and growers would likely have to pay higher fees to have their crop harvested. If custom harvesters that normally operate in regulated areas chose to avoid harvesting in such areas, this would also drive down the incomes of custom harvesters that normally harvest outside regulated areas, due to increased competition.

Finally, many commenters noted that encouraging growers to participate in the Karnal bunt eradication program is a stated goal of the compensation program currently in place; without similar incentives for custom harvesters, they might not clean their mechanized harvesting equipment in accordance with the regulations when moving from a regulated area to an area not affected by Karnal bunt, possibly leading to further spread of Karnal bunt.

Most commenters favored compensating custom harvesters for the cost of cleaning their equipment if it is used to harvest Karnal bunt-positive host crops in a regulated area. The commenters also noted that custom harvesters typically set their schedules months in advance, meaning that custom harvesters could lose harvesting contracts due to the downtime (typically 8 hours) necessitated by cleaning and disinfecting mechanized harvesting equipment after it had been used to harvest Karnal bunt-positive host crops in a regulated area; compensation for contracts lost for this reason was also requested.

We agree that custom harvesters who operated in the four affected Texas counties suffered economic losses due to the designation of these counties as areas quarantined for Karnal bunt during the 2000–2001 crop season. Furthermore, because these counties became regulated areas late in the crop season, custom harvesters operating in those counties could not have been aware that they were harvesting crops that may have tested positive for Karnal bunt. Therefore, in this interim rule, we are providing for the payment of compensation to custom harvesters who harvested Karnal bunt-positive host crops in Archer, Baylor, Throckmorton, and Young Counties, TX, during the 2000–2001 crop season. This compensation is intended to reimburse custom harvesters for the cost of cleaning and disinfecting their mechanized harvesting equipment. We are also providing for the payment of compensation equivalent to the value of one contract that an eligible custom harvester lost due to the downtime necessitated by cleaning and disinfection. If an eligible custom harvester did not lose a contract due to this downtime, we are providing compensation for the fixed costs he or she incurred during the time the machine was being cleaned and disinfected. We are also providing for the payment of compensation for the expenses associated with the cleaning and disinfection of other types of equipment used in the four affected counties. The specific provisions of these compensation provisions are discussed below.

Note: Although the regulations in § 301.89–12 at the time specifically required that mechanized harvesting equipment be cleaned and disinfected after it has been used to harvest Karnal bunt-positive host crops prior to movement from a regulated area, during the 2000–2001 crop season equipment was allowed to move out of the regulated counties without disinfection if the inspector who issued the PPQ–540 certificate allowing such movement determined that cleaning alone was sufficient to remove all Karnal bunt spores. We have since amended the regulations in § 301.89–12 to require disinfection only if it is determined to be necessary by an inspector [see 69 FR 8091–8097, Docket No. 02–056–2, published February 23, 2004]. Therefore, custom harvesters seeking compensation under the regulations established by this interim rule will be required to present a copy of the PPQ–540 certificate allowing the movement of equipment from an area regulated for Karnal bunt, but they will not be required to present proof that their equipment was both cleaned and disinfected.

In all cases, claims for the compensation provided for by this interim rule must be received by APHIS on or before September 2, 2004. The Administrator may extend this deadline upon written request in specific cases, when unusual and unforeseen circumstances occur that prevent or hinder a claimant from requesting compensation on or before this date. If comments we receive in response to this interim rule cause us to change the rule, we will provide an additional 120-day period after the effective date of the final rule during which affected persons may submit claims for compensation.

Cleaning and Disinfection of Mechanized Harvesting Equipment

During the 2000–2001 crop season, the regulations in § 301.89–12(a) required that mechanized harvesting equipment that has been used to harvest host crops that test positive for Karnal bunt must be cleaned and disinfected in accordance with § 301.89–13(a) prior to movement from a regulated area. (As noted previously, § 301.89–12 has since been amended.) In § 301.89–13, paragraph (a) described four acceptable methods for cleaning and disinfection.

APHIS has estimated that cleaning and disinfection costs for mechanized custom harvesting equipment are typically $750 per harvesting machine. Therefore, under this interim rule, custom harvesters who harvested Karnal bunt-positive host crops in Archer, Baylor, Throckmorton, or Young Counties during the 2000–2001 crop season and whose mechanized harvesting equipment was then required to be cleaned and disinfected will be eligible to receive either compensation for the actual cost of the cleaning and

disinfection or $750 per harvesting machine cleaned, whichever amount is lower.

To receive compensation for the cost of cleaning and disinfecting mechanized harvesting equipment, custom harvesters must provide copies of a contract or other signed agreement for harvesting in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season, signed on a date prior to the designation of the county as a regulated area for Karnal bunt, or an affidavit stating that the custom harvester entered into an agreement to harvest in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season prior to the designation of the county as a regulated area for Karnal bunt; a copy of the PPQ–540 certificate issued to allow the movement of mechanized harvesting equipment from a regulated area after it had been used to harvest Karnal bunt-positive host crops and had been subsequently cleaned and disinfected; and a receipt showing the cost of the cleaning and disinfection. (Throckmorton and Young Counties, TX, were declared regulated areas in an interim rule effective on June 8, 2001 and published in the **Federal Register** on June 14, 2001 [66 FR 32209–32210, Docket No. 01–058–1]; Archer and Baylor Counties, TX, were declared regulated areas in an interim rule effective on July 13, 2001 and published in the **Federal Register** on July 19, 2001 [66 FR 37575–37576, Docket No. 01–063–1].)

Contracts Lost Due to Downtime Necessitated by Cleaning and Disinfection

The process of cleaning and disinfecting mechanized harvesting equipment takes approximately 8 hours, meaning that the custom harvesting equipment is unusable for one workday while it is being cleaned and disinfected. Custom harvesters typically schedule their harvesting contracts months in advance. Therefore, the downtime necessitated by cleaning and disinfecting mechanized harvesting equipment after it was used to harvest Karnal bunt-positive host crops in Archer, Baylor, Throckmorton, and Young Counties during the 2000–2001 crop season caused some custom harvesters to be unable to fulfill previously scheduled harvesting contracts.

In this interim rule, we are providing for the payment of compensation to custom harvesters who operated in Archer, Baylor, Throckmorton, or Young Counties during the 2000–2001 crop season and whose mechanized harvesting equipment was required to be cleaned and disinfected for the full value of one contract that was lost due to downtime necessitated by cleaning and disinfection. Compensation will only be provided for one contract lost due to cleaning and disinfection. The maximum value of compensation for this contract is $23.48 per acre that was to be harvested. This figure is APHIS' calculation of the average cost per acre of harvesting wheat; it was derived from data provided by U.S. Custom Harvesters, an industry trade group. APHIS will pay $23.48 per acre that was to be harvested or the full value of the contract, whichever is less.

To receive compensation for the value of a contract lost due to downtime necessitated by cleaning and disinfection, custom harvesters must provide copies of a contract or other signed agreement for harvesting in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season, signed on a date prior to the designation of the county as a regulated area for Karnal bunt, or an affidavit stating that the custom harvester entered into an agreement to harvest in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season prior to the designation of the county as a regulated area for Karnal bunt; a copy of the PPQ–540 certificate issued to allow the movement of mechanized harvesting equipment from a regulated area after it had been used to harvest Karnal bunt-positive host crops and had been subsequently cleaned and disinfected; and the contract for harvesting in an area not regulated for Karnal bunt that was lost due to downtime necessitated by cleaning and disinfection of mechanized harvesting equipment, signed on a date prior to the designation of the relevant county as a regulated area for Karnal bunt, for which the custom harvester will receive compensation.

Compensation for Fixed Costs Incurred During Cleaning and Disinfection

Custom harvesters who did not lose contracts due to downtime necessitated by cleaning and disinfection nevertheless had to pay fixed costs associated with custom harvesting while their equipment was being cleaned and disinfected; they could not recoup these costs by using their equipment during this time. Fixed costs associated with custom harvesting include labor costs, travel costs, insurance, telephone and utility costs, and interest. According to U.S. Custom Harvesters, such fixed costs typically total $250 per hour. Custom harvesters whose mechanized harvesting equipment was required to be cleaned and disinfected thus typically incurred $2,000 in unavoidable fixed costs because their equipment was idle for 8 hours. Therefore, we are providing for the payment of $2,000 in compensation to each custom harvester who harvested Karnal bunt-positive host crops in Archer, Baylor, Throckmorton, and Young Counties during the 2000–2001 crop season and who does not apply for compensation for a contract lost due to time lost to cleaning and disinfection. This compensation will ensure that all custom harvesters are compensated for economic losses associated with the cleaning and disinfection of their equipment.

To receive compensation for fixed costs incurred during cleaning and disinfection, custom harvesters must provide copies of a contract or other signed agreement for harvesting in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season, signed on a date prior to the designation of the county as a regulated area for Karnal bunt, or an affidavit stating that the custom harvester entered into an agreement to harvest in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season prior to the designation of the county as a regulated area for Karnal bunt; and a copy of the PPQ–540 certificate issued to allow the movement of mechanized harvesting equipment from a regulated area after it had been used to harvest Karnal bunt-positive host crops and had been subsequently cleaned and disinfected.

In the event that a custom harvester who harvested Karnal bunt-positive host crops in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season had to cancel a contract due to time lost to cleaning and disinfection that was valued at less than $2,000, that custom harvester may request the compensation for fixed costs incurred during cleaning and disinfection and receive $2,000 under this interim rule. Because the compensation for fixed costs does not address the variable costs that must be accounted for in the total cost of a contract, we believe that this situation is extremely unlikely to have occurred; in fact, APHIS currently estimates the average value of contracts lost due to downtime necessitated by cleaning and disinfection at $25,000. However, we believe it would not encourage participation in the Karnal bunt eradication program if we required that a custom harvester with documented losses of under $2,000 due to cleaning and disinfection receive less compensation than a custom harvester without documented losses receives as

a generic valuation of his or her fixed costs.

Cleaning and Disinfection of Other Equipment

During the 2000–2001 crop season, § 301.89–12 of the regulations required that mechanized harvesting equipment that had been used to harvest host crops that test positive for Karnal bunt and seed conditioning equipment that had been used in the production of any host crops in a regulated area be cleaned and disinfected in accordance with § 301.89–13(a) prior to movement from a regulated area. Mechanized harvesting equipment that has been used to harvest Karnal bunt-positive host crops and seed conditioning equipment that has been used in the production of host crops are the only types of equipment required to be treated prior to movement from a regulated area. However, § 301.89–6 allows an inspector or a person operating under a compliance agreement to issue a certificate or limited permit for the movement within or outside a regulated area of a regulated article if the inspector determines that the regulated article, among other possibilities, is to be moved in compliance with any additional conditions the Administrator may impose to prevent the artificial spread of Karnal bunt. These additional conditions may include cleaning and disinfection.

In Archer, Baylor, Throckmorton, and Young Counties during the 2000–2001 crop season, several pieces of equipment other than mechanized harvesting equipment and seed conditioning equipment that had come into contact with Karnal bunt-positive wheat were found by inspectors to require cleaning and disinfection so that they could be moved from the quarantined area without spreading Karnal bunt. The owners or lessees of these pieces of equipment had scheduled the movement of the equipment from the quarantined area prior to the declaration of these counties as regulated areas and needed to move the equipment out of the regulated areas to continue their harvesting. APHIS estimates that these pieces of equipment cost $100 each to clean and disinfect.

Therefore, we are providing for the payment of compensation in the amount of $100 for each piece of equipment to owners or lessees of equipment that was required by an inspector to be cleaned and disinfected during the 2000–2001 crop season after the equipment came into contact with Karnal bunt-positive wheat in Archer, Baylor, Throckmorton, and Young Counties. To receive this compensation, owners or lessees must submit a copy of the PPQ–540 certificate issued to allow the movement of the equipment from a regulated area after it had been in contact with Karnal bunt-positive host crops and had been subsequently cleaned and disinfected.

We are adding the provisions described above as a new paragraph § 301.89–16(d), "Special allowances for custom harvesters and equipment owners or lessees for costs related to cleaning and disinfection of mechanized harvesting and other equipment in Archer, Baylor, Throckmorton, and Young Counties, TX, in the 2000–2001 crop season." This new paragraph describes the circumstances under which custom harvesters and owners or lessees of equipment that were required to be cleaned and disinfected may receive compensation and the process by which they may apply for compensation.

Related Regulatory Action

We plan to initiate rulemaking to amend the regulations to provide for the payment of similar compensation to custom harvesters who harvest host crops that test positive for Karnal bunt and owners or lessees of other equipment that is exposed to host crops that test positive for Karnal bunt in any areas not previously regulated for Karnal bunt. That proposed rule, which would apply to the 2002–2003 through 2005–2006 crop seasons, is being prepared, in part, in response to other comments we received on our May 2002 interim rule.

Immediate Action

Immediate action is necessary to relieve the economic burden placed on small entities by the domestic quarantine regulations for Karnal bunt. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this action effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

Karnal bunt is a fungal disease of wheat, durum wheat, and triticale (a hybrid of wheat and rye). Upon detection of Karnal bunt in Arizona in March 1996, Federal quarantine and emergency actions were imposed to prevent the interstate spread of the disease to other wheat producing areas in the United States. The spread of the disease in the United States would have significant adverse economic consequences, since many U.S. wheat export markets require that wheat from the United States be from areas where Karnal bunt is not known to occur. By certifying that U.S. wheat is from such areas, APHIS facilitates exports to some markets that otherwise would likely be closed. It has been estimated that termination of the certification program would result in a cumulative reduction of national net farm income of $5.3 billion from 2003 to 2007.

The unexpected discovery of Karnal bunt and subsequent Federal emergency actions have disrupted the production and marketing flows of wheat in the quarantined areas, causing economic hardship for a number of persons.[1] In order to mitigate that hardship, and to help ensure full and effective compliance with the quarantine program, the USDA has offered compensation to certain growers, handlers and others. Compensation has been offered to mitigate losses incurred in the 1995–1996, 1996–1997, 1997–1998, and 1999–2000 and subsequent crop seasons.

This interim rule provides for custom harvesters and other equipment owners or lessees in Archer, Baylor, Throckmorton, and Young counties in northern Texas to receive compensation for certain disease-related losses and expenses that they had not been eligible for under the previous regulations. Specifically, custom harvesters are offered compensation for: (1) The cost of required cleaning and disinfection of mechanized harvesting equipment; and (2) lost harvesting contracts due to downtime necessitated by cleaning and disinfection of mechanized harvesting equipment or fixed costs incurred when mechanized harvesting equipment is idled for required cleaning and disinfection. Compensation is also offered, in specific cases, for the cost of required cleaning and disinfection of equipment other than mechanized

[1] As an example, it was estimated that the impact of Karnal bunt and subsequent Federal actions on the wheat industry totaled $44 million in the 1995–1996 crop season, comprised primarily of losses in the value of wheat and seed.

harvesting equipment. Compensation would be offered only in connection with APHIS-required cleaning and disinfection stemming from the use of equipment in those four counties in northern Texas during the 2000–2001 crop season.

The four counties named above became regulated for Karnal bunt late in the 2000–2001 crop season, after much of the wheat in those counties had already been harvested. Because they had no prior knowledge that their equipment would be used in a Karnal bunt-infested area, custom harvesters operating in the four counties during the 2000–2001 crop season did not have an opportunity to avoid the area.

The compensation provided by this interim rule is designed to reduce the economic impact of the Karnal bunt regulations on custom harvesters and other equipment owners and to help obtain cooperation from affected individuals in efforts to contain and reduce the prevalence of Karnal bunt. As an alternative, APHIS could elect to make no changes to the regulations, but that alternative would not encourage cooperation by custom harvesters and others subject to the cleaning and disinfection requirements of the regulations and other efforts designed to prevent the spread of the disease.

Cleaning and Disinfection of Mechanized Harvesting Equipment

The regulations for Karnal bunt in place during the 2000–2001 crop season required that mechanized harvesting equipment be cleaned and disinfected prior to being moved from a regulated area if it was used to harvest Karnal bunt-positive host crops.

This interim rule offers harvesters compensation for the actual cost of cleaning and disinfection, up to a maximum of $750 per cleaning and disinfection.[2]

USDA's compensation liability under this aspect of the interim rule is estimated at $37,500. This estimate assumes 50 machine cleanings (50 combines and associated equipment) at $750 per cleaning.[3] Although the estimate is based on 50 combines, fewer than 40 harvesters are expected to be affected by the interim rule, as some harvesters own more than one combine.

[2] The $750 figure is based on data provided by U.S. Custom Harvesters, a trade group. Harvesters would be eligible to receive compensation more than once, assuming they otherwise qualify.

[3] It is estimated that 130 pieces of harvesting equipment required cleaning—50 combines and 80 pieces of harvesting equipment other than combines. The 80 pieces of equipment other than combines were cleaned along with, and at the same time as, the 50 combines.

Contracts Lost Due to Downtime Necessitated by Cleaning and Disinfection

Custom harvesters typically negotiate their combining contracts well in advance of the harvest season. In addition, they set rigorous schedules for harvesting, so as to get maximum utilization from their equipment. Contracts are specific for reporting dates at a given location.

Because cleaning and disinfection delays the movement of their equipment to a subsequent location under contract, cleaning and disinfection may cause custom harvesters to default on contracts or to subcontract with other harvesters to fulfill the contracts. This interim rule offers custom harvesters compensation for the full value of one contract lost due to downtime necessitated by cleaning and disinfection, up to a maximum of $23.48 per acre of land to be harvested under the contract.[4] (Custom harvesters would be able to apply for this compensation or the compensation for downtime costs discussed above, but not both.)

USDA's compensation liability under this aspect of the interim rule is estimated at $250,000, assuming 10 lost contracts at an average of $25,000 per contract. No more than 10 harvesters are likely to be affected.

Compensation for Fixed Costs Incurred During Cleaning and Disinfection

In addition to the cost of cleaning and disinfection itself, harvesters incur other costs during the time their machines are cleaned and disinfected. These fixed costs (*e.g.*, for labor, travel, insurance, telephone, utilities, and interest) are distinct from variable costs (*e.g.*, for fuel and lubrication). This rule will provide custom harvesters compensation for fixed costs incurred during cleaning and disinfection at a rate of $2,000 per machine cleaning. The rate of $2,000 assumes fixed costs of $250 per hour for 8 hours, the typical time required for cleaning and disinfection of a combine.[5]

USDA's compensation liability under this aspect of the interim rule is estimated at $80,000. This estimate assumes 40 combine cleanings for which the combines' owners are compensated at $2,000 per cleaning. Fewer than 30 harvesters are expected to be affected by this aspect of the interim rule, since some harvesters own more than one combine.

[4] The $23.48 per acre figure represents average harvesting costs; it is based on data provided by U.S. Custom Harvesters, a trade group.

[5] Harvesters would be eligible to receive compensation more than once, assuming they otherwise qualify.

Harvesters would be able to apply for this compensation or the compensation for lost harvesting contracts discussed above, but not both. This is why the compensation estimate of $80,000 is based on only 40 combines, 10 fewer than the 50 combines assumed to require cleaning earlier in this analysis under the heading "Cleaning and Disinfection of Mechanized Harvesting Equipment."

Cleaning and Disinfection of Other Equipment

Under the regulations, owners or lessees of equipment other than mechanized harvesting equipment may be required to clean and disinfect their equipment (*e.g.*, hay wagons, balers, grain carts, and trailers) prior to moving it from a regulated area. This rule offers equipment owners or lessees compensation for the cost of cleaning and disinfection, at a rate of $100 per cleaning.[6]

USDA's compensation liability under this aspect of the interim rule is estimated at $1,000. This estimate assumes compensation for 10 pieces of equipment (10 × $100). No more than 10 owners or lessees are likely to be affected.

Impact on Small Entities

The Regulatory Flexibility Act requires that agencies consider the economic effects of their rules on small businesses, organizations, and governmental jurisdictions. This interim rule affects certain wheat harvesters and other equipment owners or lessees in northern Texas. Affected entities will benefit, because the interim rule will allow them to receive compensation for certain disease-related losses and expenses that they are not now eligible for under the current regulations.

Most entities that are affected are likely to be small in size, when judged by the U.S. Small Business Administration's (SBA) standards.[7] Composite data for wheat growers offers an example. In 1997, there were a total of 50,176 U.S. farms in North American Industry Classification System (NAICS) category 11114, a classification category comprised of establishments primarily engaged in growing wheat and/or producing wheat seeds. The per-farm average sales for those farms that year was $78,260, well below the SBA's small entity threshold of $750,000 in annual sales for farms in that NAICS

[6] Equipment owners or lessees would be eligible to receive compensation more than once, assuming they otherwise qualify.

[7] The overwhelming majority of business entities, in general, are small under the SBA's standards.

category.[8] Affected harvesters are also likely to be small in size. In 2000, there were 338 firms in NAICS category 115113, classification comprised of establishments primarily engaged in mechanical harvesting, picking, and combining of crops. Of the 338 firms, 306, or 91 percent, had fewer than 20 employees, thus falling below the SBA's small entity threshold.[9]

The interim rule is not expected to have a significant economic impact on a substantial number of entities, large or small. This is because no more than about 40 harvesters and equipment owners or lessees are likely to be affected by the rule. For some harvesters, especially those whose profit margins are small, the receipt of $25,000 in compensation for a contract lost due to downtime necessitated by cleaning and disinfection could be considered significant. It is possible that a small number of harvesters, no more than about 10, could experience substantial economic benefits from compensation for lost harvesting contracts, assuming average per-contract compensation of $25,000.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection and recordkeeping requirements included in this interim rule have been submitted for emergency approval to the Office of Management and Budget (OMB). OMB has assigned control number 0579–0248 to the information collection and recordkeeping requirements.

We plan to request continuation of that approval for 3 years. Please send written comments on the 3-year approval request to the following addresses: (1) Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503; and (2) Docket No. 03–052–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 03–052–1 and send your comments within 60 days of publication of this rule.

This interim rule provides for the payment of compensation to custom harvesters for losses they incurred due to the requirement that their equipment be cleaned and disinfected after four counties in northern Texas were declared regulated areas for Karnal bunt during the 2000–2001 crop season and for the payment of compensation to owners of other equipment that came into contact with Karnal bunt-positive host crops in those counties and was required to be cleaned and disinfected during the 2000–2001 crop season. In order to receive compensation for the cost of cleaning and disinfection of mechanized harvesting equipment and for fixed costs incurred during cleaning and disinfection, custom harvesters must provide copies of a contract or other signed agreement for harvesting in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season, signed on a date prior to the designation of the county as a regulated area for Karnal bunt, or an affidavit stating that the custom harvester entered into an agreement to harvest in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season prior to the designation of the county as a regulated area for Karnal bunt; a copy of the PPQ–540 certificate issued to allow the movement of mechanized harvesting equipment from a regulated area after it had been used to harvest Karnal bunt-positive host crops and had been subsequently cleaned and disinfected; and a receipt showing the cost of the cleaning and disinfection. Custom harvesters seeking compensation for a lost contract must additionally provide a copy of the contract for which they are seeking compensation. Owners of other equipment seeking compensation must provide a copy of the PPQ–540 certificate allowing the movement of the equipment. We are soliciting comments from the public (as well as affected agencies) concerning our information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, 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 information collection on those who are to respond (such as 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).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.2 hours per response.

Respondents: Custom harvesters, owners of other equipment, lessees of other equipment.

Estimated annual number of respondents: 40.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 40.

Estimated total annual burden on respondents: 8 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

Government Paperwork Elimination Act Compliance

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

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine,

[8] Source: SBA and 1997 Census of Agriculture (NASS).

[9] Source: SBA. The SBA's size standard for firms in NAICS 115113 is based on annual sales, not the number of employees. However, composite sales data for firms in that NAICS category are not available.

Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 also issued under Sec. 204, Title II, Pub. L. 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

■ 2. Section 301.89–16 is amended by revising the section title and adding a new paragraph (d) and an OMB control number citation to read as follows:

§ 301.89–16 Compensation for grain storage facilities, flour millers, National Survey participants, and certain custom harvesters and equipment owners or lessees for the 1999–2000 and subsequent crop seasons.

* * * * *

(d) *Special allowances for custom harvesters and equipment owners or lessees for costs related to cleaning and disinfection of mechanized harvesting and other equipment in Archer, Baylor, Throckmorton, and Young Counties, TX, in the 2000–2001 crop season.* All claims for compensation under this paragraph § 301.89–16(d) must be received by APHIS on or before September 2, 2004. The Administrator may extend this deadline upon written request in specific cases, when unusual and unforeseen circumstances occur that prevent or hinder a claimant from requesting compensation on or before this date. All compensation payments made under this paragraph § 301.89–16(d) will be issued by APHIS. Claims for compensation should be sent to Plant Protection and Quarantine, APHIS, USDA, 304 West Main Street, Olney, TX 76374.

(1) *Custom harvesters.* (i) *Cleaning and disinfection of mechanized harvesting equipment.* Custom harvesters who harvested host crops that tested positive for Karnal bunt and that were grown in Archer, Baylor, Throckmorton, or Young Counties, TX, during the 2000–2001 crop season are eligible to receive compensation for the cost of cleaning and disinfecting their mechanized harvesting equipment as required by § 301.89–12(a). Compensation for the cost of cleaning and disinfection mechanized harvesting equipment used to harvest Karnal bunt-positive host crops will be either the actual cost or $750 per cleaned machine, whichever is less. To claim compensation, a custom harvester must provide copies of a contract or other signed agreement for harvesting in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season, signed on a date prior to the designation of the county as a regulated area for Karnal bunt, or an affidavit stating that the custom harvester entered into an agreement to harvest in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season prior to the designation of the county as a regulated area for Karnal bunt; a copy of the PPQ–540 certificate issued to allow the movement of mechanized harvesting equipment from a regulated area after it had been used to harvest Karnal bunt-positive host crops and had been subsequently cleaned and disinfected; and a receipt showing the cost of the cleaning and disinfection.

(ii) *Contracts lost due to cleaning and disinfection.* Custom harvesters who harvested host crops that tested positive for Karnal bunt and that were grown in Archer, Baylor, Throckmorton, or Young Counties, TX, during the 2000–2001 crop season are also eligible to be compensated for the revenue lost if they lost one contract due to downtime necessitated by cleaning and disinfection, if the contract to harvest Karnal bunt-positive host crops in a previously nonregulated area was signed before the area was declared a regulated area for Karnal bunt. Compensation will only be provided for one contract lost due to cleaning and disinfection. Compensation for any contract that was lost due to cleaning and disinfection will be either the full value of the contract or $23.48 for each acre that was to have been harvested under the contract, whichever is less. To claim compensation, a custom harvester must provide copies of a contract or other signed agreement for harvesting in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season, signed on a date prior to the designation of the county as a regulated area for Karnal bunt, or an affidavit stating that the custom harvester entered into an agreement to harvest in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season prior to the designation of the county as a regulated area for Karnal bunt; a copy of the PPQ–540 certificate issued to allow the movement of mechanized harvesting equipment from a regulated area after it had been used to harvest Karnal bunt-positive host crops and had been subsequently cleaned and disinfected; and the contract for harvesting in an area not regulated for Karnal bunt that had been lost due to time lost to cleaning and disinfecting harvesting equipment, signed on a date prior to the designation of the relevant county as a regulated area for Karnal bunt, for which the custom harvester will receive compensation.

(iii) *Fixed costs incurred during cleaning and disinfection.* Custom harvesters who harvested host crops that tested positive for Karnal bunt and that were grown in Archer, Baylor, Throckmorton, or Young Counties, TX, during the 2000–2001 crop season who do not apply for compensation for a contract lost due to cleaning and disinfection as described in paragraph (d)(1)(ii) of this section are eligible for compensation for fixed costs incurred during cleaning and disinfection. Compensation for fixed costs incurred during cleaning and disinfection will be $2,000. To claim compensation, a custom harvester must provide copies of a contract or other signed agreement for harvesting in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season, signed on a date prior to the designation of the county as a regulated area for Karnal bunt, or an affidavit stating that the custom harvester entered into an agreement to harvest in Archer, Baylor, Throckmorton, or Young County during the 2000–2001 crop season prior to the designation of the county as a regulated area for Karnal bunt; and a copy of the PPQ–540 certificate issued to allow the movement of mechanized harvesting equipment from a regulated area after it has been used to harvest Karnal bunt-positive host crops and has been subsequently cleaned and disinfected.

(2) *Other equipment; cleaning and disinfection.* Owners or lessees of equipment other than mechanized harvesting equipment and seed conditioning equipment that came into contact with host crops that tested positive for Karnal bunt in Archer, Baylor, Throckmorton, or Young Counties, TX, during the 2000–2001 crop season and that was required by an inspector to be cleaned and disinfected are eligible for compensation for the cost of cleaning and disinfection. Compensation for the cleaning and disinfection of such equipment will be $100. To receive this compensation, owners or lessees must submit a copy of the PPQ–540 certificate issued to allow the movement of the equipment from a regulated area after it had been in contact with Karnal bunt-positive host crops and had been subsequently cleaned and disinfected.

(Approved by the Office of Management and Budget under control number 0579–0248.)

Done in Washington, DC, this 29th day of April 2004.

Peter Fernandez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–10195 Filed 5–4–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 98–035–5]

RIN 0579–AB75

Importation of Orchids of the Genus *Phalaenopsis* From Taiwan in Growing Media

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations governing the importation of plants and plant products to add orchids of the genus *Phalaenopsis* from Taiwan to the list of plants that may be imported in an approved growing medium subject to specified growing, inspection, and certification requirements. We are taking this action in response to a request by Taiwan and after determining that *Phalaenopsis* spp. plants established in growing media can be imported without resulting in the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

EFFECTIVE DATE: June 4, 2004.

FOR FURTHER INFORMATION CONTACT: Mr. William Thomas, Import Specialist, Phytosanitary Issues Management, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–6799.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR part 319 prohibit or restrict the importation into the United States of certain plants and plant products to prevent the introduction of plant pests and noxious weeds. The regulations in "Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products," §§ 319.37 through 319.37–14 (referred to below as the regulations or Quarantine 37) contain, among other things, prohibitions and restrictions on the importation of plants, plant parts, and seeds for propagation.

The regulations in Quarantine 37 currently allow the importation of orchids from all countries of the world, provided that the plants are (1) free of sand, soil, earth, and other growing media, (2) accompanied by phytosanitary certificate of inspection, (3) imported under a permit issued by the Animal and Plant Health Inspection Service (APHIS), and (4) imported into a Federal plant inspection station listed in § 319.37–14(b), where they are subject to inspection by APHIS. Such plants are imported bare-rooted into the United States, and are rooted and potted for sale by U.S. nurseries.

On September 1, 1998, we published in the **Federal Register** (63 FR 46403–46406, Docket No. 98–035–1) a proposal to amend the regulations by allowing the importation of orchids of the genus *Phalaenopsis* established in an approved growing medium, subject to specified growing, inspection, and certification requirements. We proposed this action in response to a request from Taiwan and after determining that the degree of pest risk posed by these plants is no greater than the pest risk associated with the importation of bare-rooted *Phalaenopsis* spp. orchids, which may already be imported under the regulations. We accepted comments on our proposal for a total of 90 days, ending December 1, 1998.[1]

In response to comments received on the proposed rule (discussed in detail later in this document), APHIS narrowed the application of the rule to *Phalaenopsis* spp. orchids from Taiwan and entered into consultation with the U.S. Fish and Wildlife Service (FWS) to assess the potential effects of the proposed action on endangered or threatened species, as required under section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). On April 7, 2003, FWS concluded the section 7 consultation process by concurring with APHIS's determination that the importation of *Phalaenopsis* spp. orchids from Taiwan in growing media will not adversely affect federally listed or proposed endangered or threatened species or their habitats. The section 7 consultation for this rule is described later in this document.

Upon receiving concurrence from FWS, APHIS completed an environmental assessment in accordance with: (1) The National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS's NEPA Implementing Procedures (7 CFR part 372). On May 9, 2003, we published in the **Federal Register** (68 FR 24915, Docket No. 98–035–3) a notice announcing the availability of the environmental assessment, and solicited comments on the environmental assessment for 30 days ending June 9, 2003. On June 11, 2003, we published in the **Federal Register** (68 FR 34898–37899, Docket No. 98–035–4) another notice that extended the comment period on the environmental assessment for an additional 30 days ending July 9, 2003.

2003 Risk Analysis

Also in response to public comments, APHIS updated the risk assessment that was prepared in support of this rulemaking action. The original risk assessment, referred to elsewhere in this document as the 1997 risk assessment, identified pests that are known to be associated with *Phalaenopsis* spp. plants in Taiwan and assessed the risk posed by those pests in the absence of the mitigative effects of the requirements of § 319.37–8(e), which are designed to establish and maintain a pest-free production environment and ensure the use of pest-free seeds or parent plants. However, as noted by commenters, the 1997 risk assessment did not contain a thorough description of how the mitigation measures required under the regulations in § 319.37–8(e) reduce the risk posed by the specific quarantine pests of *Phalaenopsis* spp. orchids that were identified in the risk assessment. Because the original risk assessment was prepared in April 1997, APHIS believes it was appropriate to update the risk document that supported this rule in several ways in order to address commenters' concerns regarding its adequacy. These changes were necessary to provide the most transparent communication of risk possible at this time.

First, we revised the 1997 risk assessment to bring it up to date with current APHIS guidelines for pathway-initiated risk assessments. As a result of this update, some of the risk ratings that were identified in the 1997 risk assessment have changed.[2] These changes are a result of the fact that the new risk assessment guidelines employ the use of a different risk rating system

[1] The comment period on the proposed rule was extended from 60 to 90 days in a notice published in the **Federal Register** on October 29, 1998 (63 FR 57932, Docket 98–035–02).

[2] In the 2003 risk analysis, the baseline pest risk potential for 5 of the identified pests has been reassessed as "medium" rather than "high."

that was not used by APHIS at the time the 1997 risk assessment was drafted. Using the current guidelines, the individual risk elements that compose the overall estimated consequences and likelihood of introduction associated with the importation of the commodity are assigned a rating of low (1 point), medium (2 points), or high (3 points) for each known quarantine pest. Cumulative risk values for consequences and likelihood of introduction are then calculated by a summation of their component risk estimates, and the overall pest risk potential posed by the identified pests is calculated by adding together the ratings for consequences and likelihood of introduction for each pest. The interpretation scale was modified based on agency experience with other importations, and a "risk score" is no longer used. Instead, descriptions of pest biology augment the presentation of the risk ratings. For a detailed description of the current process, please refer to APHIS's Guidelines for Pathway-Initiated Risk Assessments.[3]

Next, we searched for any additional research and data published since the 1997 risk assessment was prepared that could have a bearing on the findings of the risk assessment and updated the document accordingly. Specifically, the fungus *Colletotrichum phalaenopsidis*, which was listed in the 1997 assessment as a quarantine significant pest that could follow the *Phalaenopsis* spp. orchid import pathway, was removed from further consideration because it has been synonymized with (considered to be the same species as) *C. gloeosporioides* (Penz.), which is widely distributed in the United States.

Finally, we added a substantial discussion of how the risk mitigation measures contained in § 319.37–8(e) mitigate the risks posed by the six quarantine pests that were identified as likely to follow the commodity import pathway. This part of the analysis is referred to as "risk management," and is contained in part III of the revised risk document. Note that, due to the addition of risk management to the risk document, we now refer to the document as a "risk analysis." Risk analysis is the combined product of risk assessment (an analysis of pests associated with the commodity) and risk management (an analysis of the effectiveness of the measures chosen in mitigating the risk posed by the pests identified in the risk assessment). The revised risk analysis, "Risk Analysis of the Importation of Moth Orchid, *Phalaenopsis* spp. Plants in Approved Growing Media From Taiwan into the United States," was completed May 6, 2003. The revised risk analysis is referred to throughout this document as the 2003 risk analysis, and is available on the Internet at *http://www.aphis.usda.gov/ppq/pim/*.

[3] Version 5.02, available on the Internet at: *http://www.aphis.usda.gov/ppq/pra/commodity/cpraguide.pdf*.

Determination by the Secretary

In this document, APHIS is adopting its proposal to allow the importation of orchids of the genus *Phalaenopsis* established in an approved growing medium as a final rule, with the changes discussed in this document. Specifically, we are allowing the importation of *Phalaenopsis* spp. plants in growing media from Taiwan only.

Under § 412(a) of the Plant Protection Act, the Secretary of Agriculture may prohibit or restrict the importation and entry of any plant or plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

The Secretary has determined that it is not necessary to prohibit the importation of orchids of the genus *Phalaenopsis* from Taiwan that are established in an approved growing medium in order to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed. This determination is based on the findings of the risk documents referred to earlier in this document, and the Secretary's judgment that the application of the measures required under § 319.37–8(e) will prevent the introduction or dissemination of plant pests into the United States.

Regulatory Requirements

Under this final rule, *Phalaenopsis* spp. plants imported in growing media are subject to the requirements of § 319.37–8(e), which:

- Specifies the types of growing media that may be used;
- Requires plants to be grown in accordance with written agreements between APHIS and the plant protection service of the country where the plants are grown and between the foreign plant protection service and the grower;
- Requires the plants to be rooted and grown in a greenhouse that meets certain requirements for pest exclusion and that is used only for plants being grown in compliance with § 319.37–8(e);
- Restricts the source of the seeds or parent plants used to produce the plants, and requires grow-out or treatment of parent plants imported into the exporting country from another country;
- Specifies the sources of water that may be used on the plants, the height of the benches on which the plants must be grown, and the conditions under which the plants must be stored and packaged; and
- Requires that the plants be inspected in the greenhouse and found free of evidence of plant pests no more than 30 days prior to the exportation of the plants.

A phytosanitary certificate issued by the plant protection service of the country in which the plants were grown that declares that the above conditions have been met must accompany the plants at the time of importation. These conditions have been used successfully to mitigate the risk of pest introduction associated with the importation into the United States of approved plants established in growing media.

Discussion of Public Comments on the Proposed Rule

We received 40 comments on the proposed rule by the close of the comment period. The comments were from orchid growers and sellers, Members of Congress, farm bureaus, Federal and State government agency representatives, university researchers, agricultural research scientists, and orchid, nursery, landscape, and floriculture associations and societies. Thirty-five of the commenters opposed some aspect of the rule, and the remaining five requested that APHIS extend the comment period on the proposal, which we did, for 30 days (*see* 63 FR 57932). The comments are discussed below, by topic.

We also received a letter from the Small Business Administration (SBA) regarding our proposal, which we considered along with public comments received by the close of the comment period. Several issues raised by SBA were also raised by other commenters; therefore, we discuss all comments, including the SBA letter, below.

We also received 19 comments in response to our May 2003 notice of the availability of the environmental assessment. Many of those comments pertain to the 2003 risk analysis or to the proposed rule for this action. Comments that pertained to the environmental assessment are addressed in the final environmental assessment, and the accompanying finding of no significant impact, which may be viewed on the Internet at *http://www.aphis.usda.gov/ppd/es/ppqdocs.html*. Comments that pertained

to the 2003 risk analysis or the proposed rule are addressed below, along with comments submitted during the comment period for the proposed rule.

Availability of Resources and Verification of Compliance

One commenter stated that due to budget cuts and downsizing in Federal agencies, it is unclear whether APHIS can continue to conduct adequate inspections, especially in the face of an increase in the amount of plant material entering the United States.

While some Federal agencies have been subject to budget cuts and downsizing, APHIS's appropriated funding for Agricultural Quarantine Inspection (AQI) Programs has doubled since 1998, from approximately $27.2 million to $55 million in 2002. Funds collected via AQI user fees have increased from $140.5 million in 1998 to $260 million in 2002. The inspections required under this rule will not be affected by the transfer of APHIS personnel to the Department of Homeland Security (DHS). All plants imported under this rule are required to be imported into Federal plant inspection stations,[4] which continue to be staffed by APHIS, not DHS, inspectors. APHIS has reviewed its resources and believes it has adequate resources available to ensure compliance with the conditions of the final rule.

One commenter stated that the conditions imposed by § 319.37–8 cannot be verified by APHIS because the cost of attempting to verify compliance is a significant expense and would require an unprecedented level of cooperation from other governments and their agencies, many of whom are ill-equipped to do their jobs or may be influenced by corrupt elements. The commenters stated that if APHIS does not physically conduct the reviews required by the regulations, the Agency must demand, receive, and review documentation from the exporting country and its growers that is sufficient to satisfy the Agency that the conditions of § 319.37–8 have been complied with.

Under the regulations in § 319.37–8, there must be an agreement between APHIS and a foreign entity for enforcement of the regulations in that section. In this case, the agreement will technically be between the American Institute in Taiwan and the Taiwanese Economic and Cultural Representative's Office, and will involve the plant protection organization of Taiwan and APHIS (this agreement is referred to elsewhere in this document as "U.S.-Taiwan agreement"). Each grower who wishes to export to the United States under the regulations must enter into an agreement with the plant protection organization of Taiwan whereby he or she must agree to comply with the provisions of the regulations in § 319.37–8 and to allow APHIS inspectors, and representatives of Taiwan's plant protection organization, access to the growing facility as necessary to monitor compliance with the provisions of that section. Taiwan's plant protection organization is responsible for ongoing oversight of the program. APHIS inspectors will monitor for compliance with the regulations by making periodic visits to production sites, as is the case with current and past plants in growing media programs, such as the following:

- In the Netherlands, two to four greenhouses (companies) have participated in the plants in growing media program each year since 1990. Both ferns and *Anthurium* have been grown and exported to the United States. Currently, three greenhouses are in the program. APHIS plant health specialists inspect the greenhouses 4 to 12 times a year for noncompliance with program requirements, including the absence of plant pests. No greenhouses have been found to be noncompliant and no plant pests have been found on any of these visits.
- In Israel, one greenhouse growing ferns and African violets participated in the plants in growing media program between 1990 and 1994. This facility was inspected by APHIS plant health specialists three to five times a year. Again, no greenhouses were found to be noncompliant and no plant pests were found.

Based on our experience with these programs, we are confident that the safeguards work, and that we can verify compliance regularly.

One commenter stated that, under § 319.37–8(g)(4)(ii), sufficient APHIS resources must be available to implement or ensure implementation of appropriate mitigation measures. The commenter cited a report by the U.S. General Accounting Office (GAO) that APHIS is unable to determine the extent to which its inspection programs actually work. The commenter posited that, given the GAO report, APHIS is unable to determine the extent to which its inspection programs actually work, and therefore, cannot determine that sufficient APHIS resources are available to implement or ensure implementation of the appropriate mitigation measures.

The portion of the GAO report cited by the commenter (GAO report RCED–97–102) deals primarily with issues surrounding the allocation of APHIS inspectors at ports in the United States according to risk-based criteria. The report acknowledges that "APHIS faces a difficult mission" in ensuring that tons of cargo and millions of passengers entering the United States do not bring in harmful pests or diseases, and found that APHIS should "allocate its limited inspection resources to the ports of entry with the highest risks of pest and disease introduction." These findings should not be construed to mean that APHIS "is unable to determine the extent to which its inspection programs actually work." As stated earlier in this document, APHIS has reviewed its resources and believes it has adequate resources available to ensure compliance with the conditions of the final rule.

One commenter expressed concern that Taiwan will receive plants moved from China, relabel them, and ship them directly to the United States.

The regulations require that the plant protection organization of Taiwan ensure that the plants exported to the United States meet the requirements contained in § 319.37–8(e). It is in an exporting country's interest to ensure that the requirements of importing countries are strictly followed. If falsified documentation is discovered, it could impact severely on the exporter, and possibly the exporting country's plant protection service, and could result in the loss of export markets.

One commenter questioned what will happen if parties are caught out of compliance, including in the event of pest-or disease-infested shipments.

If APHIS determines that *Phalaenopsis* spp. orchids imported from Taiwan in growing media contain quarantine or actionable pests, APHIS may hold all imports until an investigation can be completed and appropriate measures initiated, including stopping imports from a specific producer or shutting down the entire program, if the circumstances show that such an action is warranted.

Trade and Equivalence

One commenter expressed concern that APHIS's pest prevention mission is being compromised in favor of trade facilitation, and stated that the proposed action appears to be linked in trade negotiations that resulted in agreements for U.S. exports of other commodities.

APHIS makes decisions as to whether to allow the importation of agricultural products and commodities based on an evaluation of facts, data, and available scientific evidence. While the order of processing particular requests may be

[4] A list of Federal plant inspection stations is contained in 7 CFR 319.37–14(b).

influenced by trade considerations, and the components of a risk management program may be a product of negotiations between APHIS and its foreign counterparts, the ultimate determination as to whether a commodity can be safely imported is based on a determination that the product can be imported without introducing a plant pest or noxious weed into the United States.

One commenter stated that U.S. producers should have equivalent access to the export market, and claimed that producers have considerable difficulty exporting, even within the NAFTA region. The commenter claimed that adoption of the proposed rule would make the "playing field" even less level. Another commenter stated that there is no indication whatsoever that reciprocal arrangements with Taiwan or any other country are anticipated, and that no nation should be allowed to export to the United States without U.S. growers being able to export plants back under the same conditions.

Other countries make decisions as to whether to allow the importation of U.S. products only when formally requested. If U.S. producers of orchids wish to export to other countries, those persons may submit a request to APHIS, and APHIS will take that request to the appropriate country's plant protection organization for their consideration. Upon receipt of a request, APHIS may contact the requestor and ask for additional information prior to making a proposal to the designated export country.

In any case, measures applied to mitigate the risk posed by a particular plant or plant part exported from one country to another are determined by the particular risks posed in each case. Because of climatic conditions and other factors, the risks posed to Taiwan by *Phalaenopsis* spp. orchid imports from the United States are not likely the same risks posed by imports of Taiwan-grown *Phalaenopsis* spp. orchids into the United States. The risk posed by imported plants is dependent on the pests associated with the commodity in the country of origin and the pests' potential impact on the importing country. As such, reciprocal trade could occur under the same phytosanitary conditions if the pest dynamics in each country are the same.

One commenter questioned whether other countries could make a similar request to import other potted orchids that are now grown in the United States, provided the countries meet APHIS's sanitary and certification standards.

Any country may request that APHIS consider allowing the importation of a new commodity. Whether APHIS grants that request is tied to the findings of a risk analysis and a determination by the Secretary of Agriculture as to whether the commodity can be imported without resulting in the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

One commenter questioned whether APHIS is obliged to grant every request to import an agricultural commodity into the United States as long as it is pest-free and will benefit the American consumer, without regard to the effects on small, minority- or family-operated businesses in the United States.

APHIS is bound by Federal statutes and executive orders that require us to consider the economic effects of our actions, as well as to identify and assess the costs and benefits of regulatory alternatives, including alternatives that reduce economic effects on small entities. However, pursuant to § 7701(3) of the PPA, APHIS regulates exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds. The determination to allow an import under the PPA is based on the Secretary's determination that the importation of a commodity will not result in the introduction into or dissemination within the United States of a plant pest or noxious weed.

One commenter stated that APHIS is not acting in accordance with its mission by "enhancing the competitive positions of the countries currently exporting orchids to the United States." The commenter stated that, instead of being concerned for the well-being of foreign interests, APHIS should work to enhance the competitiveness of U.S. businesses.

The quote cited by the commenter is taken from APHIS's initial regulatory flexibility analysis (IRFA), which is contained in the proposed rule. The IRFA identifies the economic effects that could be associated with adoption of the proposed rule, but the text cited is not part of APHIS's rationale for making the proposal; rather, it was considered as a possible consequence of adopting this rule. As stated earlier in this document, the Secretary considers many factors in making a determination to allow the import of a previously prohibited article, such as potential environmental effects and the economic effects associated with the introduction of a plant pest or noxious weed. The determination to allow an import under the PPA, however, is ultimately based on the Secretary's determination that the importation of a commodity will not result in the introduction into or dissemination within the United States of a plant pest or noxious weed. This approach is consistent with APHIS's obligations under the PPA and international trade agreements.

Part of APHIS's mission is to facilitate exports, and we strive to do so. Success in this area is somewhat tied to factors out of our control, but we make every effort to assist domestic industry in securing access to export markets.

One commenter stated that imports should have to meet the same standards as U.S. products, including growing conditions, pest freedom, pesticides applied, *etc.* The commenter stated that the proposed rule would allow the importation of orchid plants subject to fewer restrictions than apply to interstate shipments.

We are unclear as to what standards the commenter refers. There are no Federal restrictions on the interstate movement of orchids, and as such, there are no specific "standards" that apply to how they are grown or shipped. *Phalaenopsis* spp. plants imported from Taiwan in growing media would have to meet the strict phytosanitary conditions contained in § 319.37–8(e), while domestically produced orchids are not subject to any Federal regulation whatsoever. While individual producers may adopt specific standards for how their plants are produced, and individual States may impose requirements that apply to the intrastate movement of plants, those standards are not Federal standards, are not applicable in every State, and cannot be applied to plants being imported into the United States.

Risk Assessment

General

Several commenters stated that because the 1997 risk assessment only considered the importation of orchids from Taiwan, it cannot be used to evaluate the risks associated with importation of orchids from any other area, as APHIS proposed. The commenters noted that pests and pathogens are not the same from country to country, and that a pest risk assessment and management strategy for *Phalaenopsis* spp. orchids is needed for each exporting country.

We agree with the commenter's statement. In this final rule, we are only authorizing the importation of

Phalaenopsis spp. orchids in approved growing media from Taiwan—the region considered in the 1997 risk assessment and the 2003 risk analysis.

One commenter stated that APHIS should reexamine its 1997 pest risk assessment, analysis procedures, and policies to ensure that they are consistent with current levels of scientific knowledge and standards. The commenter stated that the 1997 risk assessment should form "a link between scientific data and decision makers," but also that decisionmakers must have accurate and adequate scientific data upon which to base their decisions—which, the commenter argued, is not the case in this rulemaking. The commenter further claimed that the risk assessors' conclusion is simply an opinion—one not supported by any scientific rigor—and does not even appear to have been used by the decisionmakers.

As noted elsewhere in this document, we have updated the 1997 risk assessment to bring it up to current standards. This update included (1) inserting the data from the 1997 risk assessment into the risk assessment document format currently used by APHIS, (2) searching for additional research and data published since the 1997 risk assessment was prepared that could have a bearing on the findings of the risk analysis, and (3) adding a substantial discussion of how the risk mitigation measures selected reduce the risk posed by quarantine pests of *Phalaenopsis* spp. orchids that can be expected to follow the import pathway. We believe that by making the link between the identified quarantine pests and the mitigation measures more apparent, we have addressed the commenter's concern about the need for a link between scientific data and decisionmakers. The 2003 risk analysis is based on the best data available to us at the time the analysis was drafted, and it provides a clear and rational basis as to why *Phalaenopsis* spp. orchids imported from Taiwan in growing media will not result in the introduction of plant pests or noxious weeds into the United States.

Several commenters stated that the 1997 risk assessment should incorporate a rigorous study of conditions and practices at foreign nurseries and all existing inspection reports of imported bare-root orchid plants. The commenters expressed concern that imports of *Phalaenopsis* spp. orchids in growing media could result in the introduction of new insects and diseases into the United States, and stated that such pests would pose a grave threat to both indigenous species and commercially cultivated plants.

The 1997 risk assessment and the risk assessment portion of the 2003 risk analysis are based on (1) a search of all available scientific literature and (2) APHIS's pest interception records for imported plants of the genus *Phalaenopsis* and the plant family Orchidaceae. As such, we examined data on prior bare-root orchid imports and visited some of the production sites that would export as a result of the final rule. Furthermore, any exports of *Phalaenopsis* spp. orchids by Taiwan would be contingent on an inspection of the production sites by APHIS and the execution of the U.S-Taiwan agreement described earlier in this document. We believe our 2003 risk analysis provides an adequate analysis of the risks posed by quarantine pests, and documents how the measures in § 319.37–8(e) remove those pests from the import pathway.

Several commenters stated that basing a risk assessment on a literature search has some inherent weaknesses. One of the commenters stated that literature searches do not catch all pests due to the fact that pests have different common names, and because only the title words of literature are searched. Several commenters also stated that insufficient scientific literature and biological information regarding orchid pests exists to justify reliance upon a literature search, as orchids are not a major agricultural commodity and research has not been conducted to the necessary depth for every pest on every orchid species. Several commenters noted that orchids are a niche crop, and that as such, have not had the extensive research that more widely produced crops typically endure. One commenter stated that APHIS should conduct field tests and preclearance surveys on the imported plants in addition to a literature search. Another commenter claimed that the risk potential for all the pest species identified may be high, yet due to a lack of information, the potential effects of orchid importation cannot be adequately addressed at this time. Another commenter stated that the 1997 risk assessment may not consider all potential pests, and therefore, the mitigation measures would also have to mitigate any risk posed by unknown organisms. The commenter stated that the risk mitigations are not designed to protect against all potential unidentified pests.

The purpose of conducting an analysis of the risk posed by imported agricultural commodities is to evaluate available scientific evidence and to provide an evaluation of the risk associated with the importation of those commodities. As such, APHIS can only make the determination to allow the importation of the commodity based on the current state of scientific knowledge. In developing the list of pests that are analyzed in the 1997 risk assessment and 2003 risk analysis, we began with a list of pests provided to us by Taiwan. We then consulted applicable scientific literature (including field surveys done to date) and reviewed APHIS's records to determine what pests were intercepted on imported plants of the genus *Phalaenopsis*. Literature searches are unique to each risk analysis, and typically begin with broad searches of both abstracts of publications and the entire text of publications, depending on the database being searched. These initial searches typically use scientific species, genus, and family names, as well as known common names of plants. As analysts learn more about the pests involved and their nomenclature, additional pest-specific searches are conducted.

We believe these sources provide an adequate means to identify and assess pests of concern. Further, we disagree with commenters' contentions that orchids are niche crops. While orchids may not be one of the top-selling products in the entire floriculture industry, they rate highly among other potted flowering plants, according to data collected by the National Agricultural Statistics Service. (*See http://www.usda.gov/nass/* for more information.)

While we do not believe there is a shortage of appropriate scientific information in this specific case, if APHIS were to regulate the trade of agricultural commodities based on the risk posed by unknown factors, such an action could be viewed as highly arbitrary, which could potentially affect the export markets for our own domestically produced commodities. Under the PPA, APHIS protects American agriculture while facilitating the trade of agricultural commodities. There is always some uncertainty associated with the risk posed by imported agricultural products, and if zero risk were the standard applied, there would be no international trade in agricultural products. While we can never be certain that our methods, regulations, and policies will exclude pests 100 percent of the time, our goal is to do just that, to the extent practicable. We are confident that the measures required under this rule will reduce the risk posed by *Phalaenopsis* spp. plants imported from Taiwan in approved growing media. Our judgment is supported by the fact that bare-rooted *Phalaenopsis* spp. plants and the growing media in which they will be

imported have separately been imported from throughout the world for many years with no known associated pest problems. Given that the plants in growing media will be subject to a number of additional requirements (the effects of which are considered and evaluated in the risk management section of the 2003 risk analysis) that do not apply to bare-rooted plants, we believe that the risk posed by known and unknown pests is appropriately reduced, to the extent practicable, by the measures in § 319.37–8(e).

One commenter claimed that a pest should have been included in the pest list, but was not because it has multiple common names, including "spiraling whitefly," "keys whitefly," and "spiral whitefly."

While the commenter did not specify the scientific name of the pest, we assume he is referring to *Aleurodicus dispersus*. There is no available evidence to show that this pest attacks orchids in Taiwan. Our process for searching for pests associated with a given commodity is described earlier in this document.

One commenter stated that APHIS should reassess the role that the propagative material pathway is playing in new pest introductions, claiming that the U.S. nursery and greenhouse industry has suffered from continuing pest incursions associated with plant material imports. The commenter claimed that the current system associated with imported propagative material is failing and that expanding the list of plant material allowed entry established in growing media using as a baseline the risk associated with bare-root materials—regardless of the acceptability of that current risk—is reckless.

APHIS recognizes that the underlying structure of the regulations for nursery stock and other propagative material are different from the corresponding regulations for fruits and vegetables. Fruits and vegetables are prohibited entry into the United States unless the regulations specifically provide otherwise. In contrast, nursery stock and other propagative plant material (except plants imported in growing media) are allowed importation subject to inspection at a plant inspection station unless the regulations specifically provide otherwise. While APHIS conducts risk analyses in each case where the importation of a new fruit or vegetable is proposed, risk analyses are only conducted for nursery stock and propagative material in response to a demonstrated pest problem or in response to a new request to import plants in growing media. The regulations in § 319.37–8(g) currently provide that APHIS will allow the importation of plants in growing media if it determines, using risk analysis, that the plants pose the same or less risk than bare-rooted plants which are already allowed importation under the current regulations in Quarantine 37. In this case, restricting the entry of *Phalaenopsis* spp. orchids in growing media is not necessary because the measures in § 319.37–8(e) reduce the risk posed by those plants to a level at or below that of bare-root plants.

APHIS recognizes that there is a need to reconsider the underlying structure of the nursery stock regulations in order to better address the risk posed by propagative material and has been considering ways to approach the issue for several years. We are in the process of drafting an advanced notice of proposed rulemaking on the subject of revising Quarantine 37; however, we are not able to provide a projected publication date at this point.

One commenter expressed confusion as to why the title of the 1997 risk assessment indicates that seedlings are under consideration, yet neither the body of the 1997 risk assessment nor proposed rule address the distinction between seedlings and adult plants.

The reference to seedlings in the title of the 1997 risk assessment was made in error. While Taiwan requested that we allow the importation of *Phalaenopsis* spp. seedlings in growing media, the 1997 risk assessment and 2003 risk analysis actually consider the risk posed by all plants regardless of whether they were grown from seed or whether they are a specific size or age.

One commenter stated that some of the pests identified in the 1997 risk assessment could affect other plants besides orchids and that APHIS should have discussed potential effects on those species in the proposed rule.

Risk analyses conducted by APHIS are designed to assess the risk of introducing quarantine pests into the United States, regardless of the domestic plants that can serve as hosts for those pests. The 1997 risk assessment considered potential effects on other plants in its estimates of consequences of introduction, as does the 2003 risk analysis. We acknowledge that some pests attack other hosts besides orchids; however, the Secretary's determination to allow the importation of *Phalaenopsis* spp. orchids from Taiwan in growing media was derived from the conclusions of the 2003 risk analysis, which shows that importations of those plants will not result in the introduction of pests into the United States.

One commenter stated that the importation of propagative material presents different levels of risk than does trade in major food commodity crops, which are well-studied. The commenter stated that more is known about the pests associated with fruits and vegetables, including those that are incidental, but that little is known about crops such as orchids, and therefore, informed decisionmaking is not possible. The commenter claimed that if a pest is allowed to enter and become established, there may not be enough knowledge about its background, enemies, physiology, hosts, and so on, to enable us to control it quickly.

We agree with the commenter's statement that propagative material presents different risks than do food commodities, primarily because of the nature of the commodity. Pests associated with fruits and vegetables can be the same species as those associated with propagative plants. Nevertheless, as stated elsewhere in this document, we believe there are sufficient data available to conclude that the importation of *Phalaenopsis* spp. orchids in growing media from Taiwan will not result in the introduction of plant pests into the United States.

One commenter stated that the 1997 risk assessment should consider the risk posed by microbial species that may inhabit the growing media. The commenter also claimed that all risk assessments must include experiments on the genetic consequences on "founder populations" of these alien species, as genetic changes and the evolution of new recombinants as a result of small population size can be extremely important in the ability of alien species to adapt to new habitats.

The 1997 risk assessment and 2003 risk analysis for this action take into account all pests that are known to be associated with *Phalaenopsis* spp. orchids, and consider the unique risk posed by the plant imported in growing media. As stated elsewhere in this document, determinations as to whether a new agricultural commodity can be safely imported are based on the current state of knowledge and based on the information available, there is no reason to believe that the importation of *Phalaenopsis* spp. orchids in growing media from Taiwan will result in the introduction of plant pests such as the commenter has suggested (including microbial species). As such, we do not believe the experiments suggested by the commenter are necessary.

One commenter stated that if pests are excluded from risk mitigation because they are not expected to remain with the commodity during harvest and

shipping, according to APHIS guidelines, references must be cited to support the pest's inability to follow the pathway.

The risk assessments (1997 and 2003) for this action assume that all known pests are expected to follow the pathway if risk mitigation measures are not applied. However, most of the pests listed in table 2 of the 2003 risk analysis (table 1 of the 1997 risk assessment) are excluded from further consideration because of two factors: (1) The pests do not meet the Food and Agriculture Organization of United Nations (FAO) definition of a "quarantine pest" for the United States, or (2) the pests have not been specifically linked in scientific literature or APHIS interception records with orchids of the genus *Phalaenopsis*. This winnowing of the list of pests is documented in detail in section E, "Analysis of Quarantine Pests" in the 2003 risk analysis.

One commenter stated that none of the conditions required by § 319.37–8(e) address the risks presented by *Phalaenopsis* spp. orchids that have flower spikes. The commenter noted that flower spikes increase pest risk because they provide a habitat for thrips, blossom mites, blossom midges, and other blossom-infesting organisms.

There are no quarantine pests of the types cited by the commenter that have been specifically linked in scientific literature or APHIS pest interception records with orchids of the genus *Phalaenopsis*. Further, the operators of greenhouses in which plants imported under the regulations in § 319.37–8(e) are required to apply measures necessary to eliminate pest infestation of plants being grown in an approved greenhouse, including infestations by pests such as those cited by the commenter. In the event that any such quarantine pests are confirmed to be associated with *Phalaenopsis* spp. plants in the future either in program greenhouses, in scientific literature, or via inspections by APHIS, we would adopt revised conditions that address the risk posed by those pests.

One commenter stated that the World Trade Organization's Sanitary and Phytosanitary Agreement provides that members shall take into account relevant ecological and environmental conditions and quarantine or other treatment, and claimed that APHIS's 1997 risk assessment does not consider relevant ecological and environmental conditions. Specifically, the commenter noted that (1) pesticide use in other countries is less restrictive, (2) there are more chemical pesticides available, and (3) due to the long U.S. pesticide registration process, new pesticides in other countries are years ahead of sales in the United States. The commenter claimed that because of these factors, the presence of serious pathogens is masked and pests rapidly become resistant to pesticides. The commenter claimed that the risk assessment should provide for consideration as to whether introduced plant pests will arrive as resistant strains, since control of such strains is difficult, if not impossible.

There is no specific scientific evidence that any of the quarantine pests affecting *Phalaenopsis* spp. are resistant to pesticides. Furthermore, APHIS has taken into account relevant ecological and environmental conditions in its risk analysis. We are confident that the measures required under the regulations in § 319.37–8(e) will reduce the risk posed by *Phalaenopsis* spp. plants imported from Taiwan in growing media, regardless of whether or not the pests are resistant to pesticides. Our judgment is supported by the fact that these plants have been imported bare-rooted for many years, with no known associated pest problems. Given that the plants in growing media will be subject to a number of additional requirements that do not apply to bare-rooted plants, we believe that the risk posed by all plant pests is appropriately reduced by the measures in § 319.37–8(e).

One commenter claimed that the establishment of introduced pest species is far more likely in Hawaii than in other States, as Hawaii's climate and ecology are very similar to the proposed point of origin for this plant material, Taiwan. The commenter stated that, for this reason, Hawaii's State quarantine measures have historically focused on plants coming from within the 30° parallels, yet the 1997 risk assessment for the proposed rule does not account for this. The commenter claimed that failure to address this point results in APHIS treating Hawaii's verdant ecosystems the same as those of urban environments without suitable hosts.

APHIS's 2003 risk analysis is designed to assess the risk posed by all known pests that could be introduced into the United States via *Phalaenopsis* spp. plants imported from Taiwan in growing media. The intent of the regulatory approach chosen is to ensure that pests are not introduced into the United States, regardless of the destination of the plants. Specifically, in this case, the risk assessment identifies the climatological conditions in which identified pests could survive and the estimates of consequences of introduction of those pests reflect what is known about climate-host interaction and host range for the pests. While the consequences of the introduction of the identified pests into Hawaii differ from the consequences associated with introductions into urban environments, the risk assessment also considers introductions into a suitable habitat and introductions near suitable hosts. Nonetheless, given the application of mitigation measures that will be required under this final rule, there is a very low likelihood that an identified pest would be introduced into Hawaii via *Phalaenopsis* spp. plants imported in growing media from Taiwan.

Risk Ratings

Two commenters argued that the risk rating for climate-host interaction should be assessed as high for all pest species because plant hardiness zone 11 includes more than just the southern part of Florida, which is the only area cited in the risk assessment. The commenters noted that plant hardiness zone 11 also includes Hawaii, Guam, American Samoa, Northern Mariana Islands, U.S. Virgin Islands, Federated States of Micronesia, and Puerto Rico, and stated that given this error the 2003 risk analysis does not adequately address the potential risks posed to these States and territories.

We have corrected the 2003 risk analysis to show that plant hardiness zone 11 includes other States and territories besides Florida. However, this does not affect the risk ratings for climate-host interaction [5] in the 2003 risk analysis. As described in APHIS's "Guidelines for Pathway-Initiated Pest Risk Assessments" (available on the Internet at *http://www.aphis.usda.gov/ppq/pra/commodity/cpraguide.pdf*), risk ratings for climate-host interaction are based on the number of plant hardiness zones where a pest can establish, not the number of States that are contained within a specific plant hardiness zone. If a pest can establish in a specific U.S. plant hardiness zone, the risk assessment takes that into consideration, regardless of the number of States and territories that fall within the particular plant hardiness zone.

For the purposes of commodity risk assessments, if a pest can establish in a single plant hardiness zone (*e.g.*, zone 11, which occurs in parts of more than one State), the risk rating for climate host-interaction is "low." If a pest can establish in two or three plant hardiness zones (*e.g.*, zones 9, 10, and 11), the risk rating for climate-host interaction is medium. If a pest can establish in four

[5] "Climate-host interaction" is one of several risk elements that factor into the overall "consequences of introduction" risk rating in commodity risk assessments.

or more plant hardiness zones, the risk rating for climate-host interaction is high. Given these facts, the risk ratings for climate-host interaction for each identified pest in the 2003 risk analysis are appropriate.

One commenter stated that the information given in the 2003 risk analysis does not accurately reflect the potential host range of the quarantine mealybug pest *Planococcus minor*. The commenter pointed out that the 2003 risk analysis characterizes the host range of *P. minor* (according to Cox, 1989) as including more than 30 species in over 10 families, but that according to ScaleNet (*http://www.sel.barc.usda.gov /scalenet/scalenet.htm*), the host range of *P. minor* includes more than 100 species in over 60 families, with many hosts being genera grown in the ornamental industry.

APHIS agrees that the host range of *Planococcus minor* includes many hosts, but the mitigation measures are designed to reduce or eliminate this pest from production facilities and remove it from the pathway of the importation. Given that the risk rating for host range of *Planococcus minor* is already high, we do not see any need to revise our risk analysis based on this comment, since making such a change would not affect the estimates of risk or the overall conclusions of the risk analysis.

One commenter noted that the host range for pathogens *Cylindrosporium phalaenopsis* and *Sphaerulina phalaenopsis* was assumed to be only *Phalaenopsis*. The commenter claimed that host range, if not known, should not be assumed to be restricted to orchids. The commenter stated that if only one host is known it may be because plant pathologists do not have the time or funds to undertake costly cross-inoculation studies.

As stated elsewhere in this document, APHIS makes determinations as to whether a new agricultural commodity can be safely imported based on data and research available to us. There is no evidence to suggest that the host range of the pests cited by the commenter is incorrectly rated in the risk assessment. Furthermore, "cross-inoculation" is not sufficient in this case. A complete demonstration of Koch's Postulates to establish pathogenicity is the standard for host range testing that plant pathologists have relied on since the start of modern plant pathology.

One commenter stated that the host range of *Phomopsis orchidolphila* is nothing more than the extent of scientific observations and not a biological limit. The commenter noted that not all species of orchids have been tested and not found to be a host of this pathogen, and claimed that, contrary to the 2003 risk analysis, it is very likely that other orchid genera will be hosts of *P. orchidophila* but have not been observed yet.

While APHIS agrees that many orchid genera are closely related, hybrids are common, and members of the Orchidaceae may be susceptible to a variety of pests, APHIS makes determinations as to whether a new agricultural commodity can be safely imported based on data and research available to us. There is no evidence to suggest that the host range of the pest cited by the commenter is incorrectly rated in the risk assessment. We are aware of no evidence that the importation of bare-rooted plants has led to the introduction of *Phomopsis orchidolphila*, so there is no reason to suspect that the lower-risk plants produced under this system are likely to be infected.

One commenter stated that the dispersal potential of mollusks should be rated high in the 2003 risk analysis because of difficulty of finding them on the roots of orchid plants.

APHIS acknowledges that mollusks may be difficult to detect on orchid plants, which is why the overall risk rating for the mollusks *Acusta* (= *Bradybaena*) *tourranensis* and *Bradybaena* spp. is "medium." The overall rating would not change if the rating for dispersal potential was changed to medium or high, and, in any event, the risk management measures contained in § 319.37–8(e) would appropriately reduce the risk posed by mollusks including *Acusta* (= *Bradybaena*) *tourranensis* and *Bradybaena* spp. regardless of whether the overall risk rating is "medium" or "high." The ability of the measures to reduce the risk posed by mollusks, including *A. tourranensis*, is discussed in detail in the risk management section of the 2003 pest risk analysis.

One commenter stated that the dispersal potential of *Planococcus minor* should be rated as high because finished, flowering orchids have not previously moved in international commerce, and that a lack of interceptions on bare-root plants is proof of nothing. The commenter claimed that the presence of mealybugs is a major cause of rejections of potted flowering orchid plants.

Determinations as to whether a new agricultural commodity can be safely imported are based on data and research available to us. There is no evidence to suggest that the dispersal potential of the pest cited by the commenter is incorrectly rated in the risk assessment, and the commenter provided no data to suggest otherwise. Further, potted orchids plants have not been previously allowed importation into the United States from any location. The commenter's claim that "mealybugs are a major cause of rejections of potted flowering orchid plants," pertains to interstate movements of potted plants that are not subject to the same measures as *Phalaenopsis* spp. imported from Taiwan. There are no Federal regulations governing the interstate movement of *Phalaenopsis* spp. plants.

One commenter stated that it is incorrect to assume that the spores of *S. phalaenopsis, P. orchidophila*, and *C. phalaenopsis* are not dispersed over long distances since spores are carried by rain splashes. The commenter stated that observation of the roadsides in Hawaii shows that spores are likely to be widely dispersed, either by rain splashes, or in the air, and claimed that the dispersal rating for these pathogens should be rated as high.

Our risk rating for the dispersal potential of *S. phalaenopsis, P. orchidophila*, and *C. phalaenopsis* is based on the need for both adequate rain and wind to disseminate these spores. While the anecdotal observation cited by the commenter suggests that these combined conditions occur in native U.S. habitats, the dispersal potential rating in the risk analysis also considers the dispersal potential derived from plants within greenhouses, production facilities, and interiorscapes where proper watering practices and reduced airflow are expected to limit the conditions that favor spore dispersal.

One commenter claimed the 2003 risk analysis' prediction that no more than 10 shipping containers per year are expected to be imported from Taiwan is an understatement. as permission to import this commodity into the United States is likely to be linked with an increase in production and subsequent increases in volume of imports. The commenter claimed that the pest risk concerning the quantity of product should be properly assessed as high, not low.

Our estimate that no more than 10 shipping containers per year are expected to be imported from Taiwan is based on information provided to us by Taiwan. We believe this estimate and the risk rating for "quantity imported annually" contained in 2003 risk analysis are appropriate.

Pest List

Two commenters stated that, in the 1997 risk assessment, 18 of the 26 mollusk and arthropod quarantine pests do not have species identification and

are identified to family or genus level only. The commenters claimed that the risk assessment, therefore, does not comply with APHIS's own regulatory requirement that all quarantine pests be catalogued. One of the commenters also claimed that APHIS regulations require that an evaluation be made of the history of past plant pest interceptions or introductions, but that the 1997 risk assessment does not contain such an evaluation.

The 2003 risk analysis catalogues all known pests that have been documented as being associated with *Phalaenopsis* spp. plants, and identifies all pests that are of quarantine significance. Contrary to one of the commenters' statements, the pests that were identified to family or genus level were selected because they appear in APHIS interception records for orchids; however, for the purposes of this action, APHIS did not select pests for further consideration in the risk assessment unless those specific pests were directly linked by scientific literature or pest interception records with the particular host species being imported. In this case, there is no evidence available to clearly establish that the pests identified to family or genus level are pests of *Phalaenopsis* spp. orchids.

Several commenters stated that the 1997 risk assessment is based on an incomplete catalog of quarantine pests, and a few commenters identified specific pests that they claimed APHIS should consider in its risk assessment. Another commenter submitted a list of pests of orchids that were found during Hawaiian State plant inspections.

As stated elsewhere in this document, APHIS is confident that the 2003 risk analysis considers all pests known to be associated with *Phalaenopsis* spp. orchids. We reviewed lists of pests provided by commenters and found that our list of pests is complete. The lists provided did not contribute any new quarantine pests of *Phalaenopsis* spp. orchids from Taiwan.

Several commenters claimed that only two mollusk taxa are discussed in the 2003 risk analysis, but many other species have potential to be imported with growing media, including Achatinidae (*e.g., Achatina fulica,* the giant African snail), species of *Succinea* (family Succineidae), *Meghimatium* species (slugs in the family Philomycidae), as well as various species of Subulinidae (especially species in the genus *Opeas*), Veronicellidae, Camaenidae, Helicarionidae, and Ariophantidae. The commenter claimed that many of these species are actionable by APHIS.

There is no scientific evidence that any mollusks of quarantine significance are associated with *Phalaenopsis* spp. orchids in Taiwan besides those considered in the 2003 risk analysis. Further, even if one of the mollusks cited by the commenter was associated with *Phaelanopsis* spp. orchids in Taiwan, the mitigation measures required under this final rule would be sufficient to mitigate the risk posed by the pest.

One commenter stated the 1997 pest risk assessment omits pathogenic roundworms, nematodes, phytopathogenic bacteria, and plant viruses vectored by insects, and stated that the pest risk assessment is focused only on "the organisms for which biological information is available." The commenter claimed that the 1997 risk assessment does not comply with the requirement in § 319.37–8(g)(2)(v) that any nonindigenous or native plant pest that may be able to vector another plant pest be identified and assessed. The commenter stated that undetected bacteria contained within orchids established in growing media or orchids serving as symptomless carriers of viruses are possibilities that must be addressed in the risk assessment.

As stated earlier in this document, APHIS is confident that our 1997 risk assessment and our 2003 risk analysis consider all pests known to be associated with *Phalaenopsis* spp. orchids. The commenter did not identify any specific pests for APHIS to evaluate. Further, based on the findings of our risk analysis, we believe that the measures contained in § 319.37–8(e) will effectively remove all known quarantine pests from the import pathway. APHIS does not currently have any evidence to support the conclusion that any of the pests identified in the risk analysis are vectors of animal or plant diseases, therefore, we would not be justified in regulating the importation of *Phalaenopsis* spp. plants in growing media as if they posed a risk of introducing pests that serve as vectors of animal or plant diseases.

One commenter stated that the species identifications for four fungal pathogens (*Colletotrichum phalaenopsis, Cylindrosporium phalaenopsis, Phomopsis orchidophila,* and *Sphaerulina phalaenopsis*) are incorrect, and therefore, the risk ratings for those pests are incorrect. The commenter stated that none of the species were found in the Permuterm Subject Index for 1985 to 1998 (January and February for 1998), published by the Institute for Scientific Information, and questioned how the four fungal pathogens were identified to the species level in the 1997 risk assessment when there has been no species identification of these four fungal pathogens in the last 13 years. The commenter claimed that the four fungal pathogens should properly have been identified only to genus, the host range of these four genera should have been appraised as high, and, as a consequence, the risk rating for these four fungal pathogens should be assessed as high.

To produce the pest list for the risk assessments on *Phalaenopsis* spp. orchids from Taiwan, the risk assessors relied on published scientific literature on pests of quarantine significance from that area. The references that supported the inclusion on the list of the four fungi [6] were from periodicals listing fungal taxa (genus, species, and author), hosts (scientific names), and their geographical distributions. One of the references was a book which was a list of plant pests reported in Taiwan (published by Taiwan's plant protection organization). Another reference was the scientific journal *Mycologia.* Fungus names and host names were provided to the species level. Fungus names and authors of names were verified by using USDA–ARS National Fungus Collection's Database on Fungi operated from Beltsville, MD. Even if the pests were not reported or intercepted recently (*i.e.,* in the last 13 years) APHIS would still consider that they occur in that area unless official notification by Taiwan was made declaring "eradication."

One commenter stated that the mealybugs *Pseudococcus importatus* McKenzie and *Pseudococcus microcirculus* McKenzie are host specific to orchids and that *Pseudococcus orchidicola* Takahashi has a wide host range and could become a pest on many other plant species if established.

The mealybugs cited by the commenter have not been linked specifically with *Phalaenopsis* spp. orchids in any scientific literature or by interception records. For this reason, they were not specifically considered in the 1997 risk assessment or 2003 risk analysis.

One commenter stated that it is critical that risk analysis be conducted at the species level, and claimed that the extrapolation of data regarding one species across an entire genus is not acceptable. The commenter noted that, for an expert to accurately predict the potential impact of an exotic pest in the

[6] *Colletotrichum phalaenopsidis,* which was listed in the 1997 risk assessment, was removed from futher consideration because it has been synonymized with *C. gloeosporioides* (Penz.), which is widely distributed in the United States.

United States, we must know what factors are responsible for its impact (or lack of impact) in the country of origin. The commenter stated that adding species of plants within the requested genus further complicates and reduces the probability of successful prediction of risk.

In conducting the risk analysis for this action, we searched for information that linked specific pests with any plant in the genus *Phalaenopsis* in Taiwan, and we assumed that those pests found could affect any plants in the genus. We disagree that analysis needs to be conducted at the species level, since an analysis at the species level would have likely yielded far fewer pests, and a less-accurate prediction of the risk. In fact, our risk analysis would yield similar results if it were composed of a series of species-specific risk analyses; the same pests we have identified would have been cited in a series of documents, rather than in one document. If anything, the approach we have chosen may overestimate the risk posed by imports of certain species of *Phalaenopsis* spp. orchids in growing media, as identified pests may not actually be associated with the specific species and varieties of *Phalaenopsis* that may be imported under this final rule.

One commenter stated that imported orchids pose a risk of introducing an unknown virus, which has no symptoms of infection until potted *Phalaenopsis* spp. orchids are mature and stressed. The commenter claimed that a major outbreak of this virus has occurred in Japan from potted *Phalaenopsis* spp. orchids imported from Taiwan, and that the virus is well established in Taiwan. The commenter also claimed that it is likely that the virus has arrived on the mainland and in Hawaii on bare-rooted *Phalaenopsis* spp. orchids shipped from Taiwan.

As stated elsewhere in this document, we can only make determinations as to whether a new agricultural commodity can be safely imported based on available scientific evidence, and we are not aware of any evidence that supports the commenter's suggestion that a previously unknown disease or virus has been documented to affect *Phalaenopsis* spp. orchids. Given that the commenter did not identify the disease in question, we have no basis to revise our risk analysis in response to this comment.

Risk Management

General

One commenter expressed concern as to why APHIS proposed this action given the fact that the 1997 risk assessment found that seven quarantine pests could be expected to follow the import pathway, and that the risk posed by each pest was rated "high." The commenter stated that it would take an unwise "leap of faith" to assume that the mitigation measures will reduce identified high risks to acceptable levels.

First, as explained earlier in this document, through the process of updating the risk assessment to bring it up to current standards, the baseline pest risk potential for five of the identified pests has been reassessed as "medium." Only one (*Spodoptera litura*) of the original seven identified quarantine pests remains rated as "high;" the other pest (*Colletotrichum phalaenopsidis*) listed in the 1997 risk assessment was removed from further consideration because it was synonymized with *C. gloeosporioides* (Penz.), which is widely distributed in the United States. Second, as stated elsewhere in this document, in response to commenters' concerns that the measures chosen may not mitigate the risk posed by the pests identified, we have updated the 1997 risk assessment to include a thorough discussion of how the risks posed by the pests of concern, including the risk posed by *Spodoptera litura,* are mitigated by the measures in § 319.37–8(e).

Several commenters stated that no manner of risk mitigation can be completely effective, nor can there be any guarantees that a surreptitious pest in an imported *Phalaenopsis* plant or its growing medium will not spread to other plants, including food crops and indigenous flora. One commenter questioned whether APHIS will be held accountable for any introduction of new pests that occur if the proposed rule is adopted.

As stated elsewhere in this document, while we can never be certain that our methods, regulations, and policies will exclude pests 100 percent of the time, our goal is to do just that, to the extent practicable. We are confident that the measures required under this rule will effectively remove all identified quarantine pests from the import pathway. Again, if zero tolerance for pest risk were the standard applied to international trade in agricultural products, it is likely that no country would ever be able to export an agricultural commodity to any other country. There will always be some degree of pest risk associated with the movement of agricultural products; however, as stated in the PPA, APHIS will "facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds."

In the highly unlikely event that a new pest is introduced into the United States as a result of the importation of *Phalaenopsis* spp. orchids from Taiwan in growing media, responsibility for managing that situation would reside with APHIS, in cooperation with States and industry.

One commenter stated that mitigation measures to control the growing environment can only be effective if enough is known about the specific diseases and pest species associated with the import in the country of origin. The commenter claimed that, in this case, the lack of available biological information raises doubts as to how effective any mitigation efforts will be.

As stated elsewhere in this document, we identified all known quarantine pests of *Phalaenopsis* spp. orchids and evaluated the ability of the mitigation measures to mitigate the risk posed by those particular pests. We believe sufficient biological information is available to determine that these plants can be safely imported into the United States.

One commenter stated that monitoring reduces pest risk by lowering the level of pest infestation, which does not negate the presence of pests. The commenter claimed that lowered pest levels are more difficult to detect upon inspection at the nursery and at the port of entry, yet the pest still has the capability to be introduced and established in a new environment.

While it is true that the mitigation measures required under this rule are intended to reduce pest introduction into the United States, the level of pest infestation of all imported plants is generally very low to begin with. While very low levels of pest infestation are harder to detect than high levels of pest infestation, we believe that the reductions in pest levels resulting from the application of the measures specified in § 319.37–8(e) will not affect our ability to prevent the introduction of plant pests into the United States. As with other systems approaches, the measures in § 319.37–8(e) provide an overlapping series of safeguards which, even if one of the measures fails, still ensures that the risk of pest introduction is reduced to the extent practicable.

One commenter stated that the mitigative effects of the requirements in § 319.37–8(e) are not sufficient to reduce the risk posed by plants imported in

growing media to the same level as that posed by bare-rooted plants or plants imported on other approved epiphytic growing media.

As stated in our proposed rule, and based on the findings of the 2003 risk analysis, we believe the mitigation measures required under this rule are sufficient to reduce the risk posed by *Phalaenopsis* spp. orchids imported in growing media to the same level, or a lower level, than that posed by bare-rooted plants. Plants that are currently allowed to be imported with bare roots are subject only to inspection at the port of entry, while plants imported in media under the conditions of § 319.37–8(e) are subject to additional conditions that reduce the risk that those plants could become infested with pests prior to export to the United States or introduce pests into the United States.

One commenter claimed that the success of the proposed rule depends upon the cooperation and enforcement of the exporting country, which in many cases simply are inadequate or underfunded. The commenter claimed that compliance with the conditions spelled out in § 319.37–8(e) could only be assured if an inspector were on-site every hour of every day in every "certified" greenhouse—and perhaps not even then—and stated that signing an agreement does not guarantee that it will be followed. The commenter stated that APHIS should take extra precautions to enter only into agreements that have a high likelihood of compliance and claimed that there is no such assurance in this case.

The regulations in § 319.37–8 require that for orchid producers of Taiwan to export *Phalaenopsis* spp. orchids to the United States, there must be an agreement in place that stipulates provisions for how the regulations will be enforced. Furthermore, each grower who wishes to export to the United States under the regulations must enter into an agreement with the plant protection organization of Taiwan whereby he or she must agree to comply with the provisions of the regulations in § 319.37–8 and to allow APHIS inspectors, and representatives of Taiwan's plant protection service, access to the growing facility as necessary to monitor compliance with the provisions of this section.

We disagree with the commenter that these agreements do not provide for verification that the conditions specified in the regulations will be followed. As noted elsewhere in this document, APHIS monitors production sites to ensure compliance with the regulations. If the regulations are not followed, inspections of the production sites and inspections of the imported plants at the ports of entry in the United States will reveal as much, and APHIS may hold all imports until an investigation can be completed and appropriate measures initiated, including stopping imports from a specific producer or shutting down the entire program, if the circumstances show that such an action is warranted. For this reason, the plant protection organization of Taiwan and growers have an economic incentive to follow the regulations.

Two commenters stated that none of the conditions required by § 319.37–8(e) mitigates the risk of contamination of plants in growing media by fungal spores. The commenters stated that while the 1997 risk assessment identifies 12 fungal pests of *Phalaenopsis* spp. orchids, 3 of these fungi have teleomorphic or sexual stages, which produce spores that will contaminate growing media, be discharged into air currents, and quickly travel throughout a greenhouse. The commenter stated that since fungal spores are microscopic in size, they cannot be detected via inspection.

The fact that plants will be required to be grown in greenhouses for a minimum of 4 months, propagated from clean mother stock, and watered with clean water sources reduces the risk that undetected infections will occur. Many fungal spores are able to travel by air and water, but it is unlikely that the spores will gain entry into a greenhouse, spread to plants intended for export, and infect the plants, and that the subsequent symptoms of infection will escape detection during both the 4-month pre-export quarantine period and port of entry inspection. APHIS agrees that unlike leaf-spot symptoms, microscopic fungal spores are not likely to be detected via inspection, but the risk analysis accounts for this within its risk element rating for the ability of the pest to evade detection. If greenhouses are contaminated by fungal spores, plants are likely to show symptoms or signs of infection prior to export to the United States, or at an inspection station in the United States. If fungal infection is detected in the greenhouse, surrounding plants would be removed from the greenhouse and remedial measures would be applied to ensure that the fungal spores do not reinfest clean plants. If fungal infection is detected at the port of entry into the United States, the plants would be refused entry, and APHIS may hold all imports until an investigation can be completed and appropriate measures initiated, including stopping imports from a specific producer or shutting down the entire program, if the circumstances show that such an action is warranted.

Furthermore, *Phalaenopsis* spp. plants have been imported bare-rooted for years, subject simply to inspection at a port of entry. Bare-rooted plants are more likely to be infected with a fungal pest than plants grown under the stringent conditions of § 319.37–8(e), yet there have been no major problems with *Phalaenopsis* spp. plants imported with bare roots.

One commenter stated that APHIS should employ postentry risk management to reduce the risk posed by *Phalaenopsis* imported in growing media. The commenter claimed that in this case, an effective post-harvest disinfestation treatment is needed for *Thrips palmi*.

As stated elsewhere in this document, we are confident that the measures contained in § 319 37–8(e) will mitigate the risk posed by orchids of the genus *Phalaenopsis* imported in growing media from Taiwan. The effectiveness of these measures renders postentry risk management other than inspection unnecessary. *Thrips palmi* has not been documented as being specifically associated with *Phalaenopsis* spp. plants. Should *Thrips palmi* or any other quarantine-significant pest be detected in shipments of *Phalaenopsis* spp. plants in the future, or in the event that such a pest is linked to *Phalaenopsis* in scientific literature, we may reevaluate whether the measures we have chosen mitigate the risk posed by the particular pests discovered.

One commenter claimed that there is a lack of plant virus control by growers in Taiwan because they do not sterilize tools between plants.

Our 2003 risk analysis did not identify any quarantine-significant viruses that are associated with *Phalaenopsis* spp. orchids in Taiwan. Nonetheless, growers will be required to perform specific sanitary measures under the requirements of the rule and the bilateral workplan that APHIS enters into with the plant protection organization of Taiwan.[7] Greenhouse

[7] A bilateral workplan is a written agreement between APHIS and a foreign plant protection organization that clarifies the responsibilities of each organization in enforcing APHIS regulations that pertain to preclearance export programs. The workplan also clarifies how specific aspects of the program operate, and may include directives as to how certain pest problems must be remedied. The workplan goes into more detail regarding the day to day operation of the programs than do the regulations in the CFR, and, because of their separation from the CFR, workplans are flexible and can be revised as needed based on changing circumstances in the exporting country. The workplan is enforceable, and failure of the exporting country to abide by the conditions of the

operating procedures will specify that sterilization of tools between plants must occur.

One commenter stated that laboratory testing is necessary to confirm the absence of pests such as latent viruses and nematodes, and that it is necessary to keep a log of pesticide applications that indicates pesticides used, dosage, and date of application.

Based on the findings of the 2003 risk analysis, we believe there is no basis to require laboratory testing of plants intended for export to the United States. We are confident that the measures required under the regulations are sufficient to address the risk posed by *Phalaenopsis* spp. orchids from Taiwan. Further, the bilateral workplan for the export program will require growers to keep a log of pesticide applications as suggested by the commenter. This type of requirement is standard in APHIS's plants in growing media import programs.

Two commenters claimed that pest control during the growing period and an efficacious disinfestation treatment prior to shipment are necessary to ensure pest-free orchid plants. The commenters claimed that the systems approach should include an effective postproduction treatment.

Based on the findings of the 2003 risk analysis, we believe there is no basis to require plants intended for export to the United States to be subjected to a specific post-harvest treatment regimen. Further, it is the responsibility of the growers of these plants in the exporting country to apply pesticides and fungicides as necessary to ensure that plants are pest-free.

One commenter claimed that the program requirements will not address the dispersal potential of identified mollusk pests, and claimed that 46 cm benches are not high enough. The commenter claimed that, in Hawaii, slugs and snails easily travel 90 cm to infest plants on benches of that height.

If the height of benches were the only risk-mitigating factor to protect against the infestation of *Phalaenopsis* spp. orchids by mollusks (*i.e.*, if plants were not grown in greenhouses subject to the requirements of § 319.37–8(e)), then we would agree with the commenter that the risk posed by those pests may have been too great. However, plants are subject to a series of mitigation measures intended to keep mollusks out of the greenhouse, and, in the unlikely event that they enter the greenhouse, they are subject to additional control measures. Should we find evidence that mollusks are present in program greenhouses, we may require additional risk mitigation for those pests, such as attaching copper flashing to vertical structural components.

One commenter claimed that the regulations should include explicit requirements for greenhouse sanitation such as those imposed on imported geraniums.

The regulations do require that plants be grown in a greenhouse in which sanitary procedures sufficient to exclude plant pests and diseases are always applied. The bilateral workplan for the program will specify measures that are believed by APHIS to be necessary to meet this requirement.

One commenter stated that the regulations should include a requirement that prohibits packing at night under lights and packing outside of the pest exclusionary greenhouse.

The bilateral workplan will require plants to be packed inside the greenhouse. We see no need to require that plants not be packed at night since plants will be packed in greenhouses that exclude quarantine pests.

Inspection at the Port of Entry

One commenter stated that inspection should be considered the first line of defense, and not considered to be a "catch all" for pests that are able to exist on the plant in potting media despite proposed safeguards. The commenter stated that Hawaii's pest interceptions on orchid plants from 1988 to 1998 indicate that it is difficult to intercept pests on orchid plants, as evidenced by the fact that, only later, while under Hawaii's mandatory 60-day quarantine in secure quarantine facilities, did pests develop into larger populations that became observable, or develop to a detectable state, or produce signs (*i.e.*, exit holes) that could be detected. The commenter stated that the Hawaii Department of Agriculture has intercepted a large number of pests on bare-rooted orchids, and expressed concern as to whether those pests could be found on potted materials when inspectors from two separate agencies (foreign and APHIS) could not find these pests on bare-rooted materials.

It is significant to note that inspection is the last in a series of safeguards required under this final rule to ensure that *Phalaenopsis* spp. orchids imported in growing media do not introduce plant pests into the United States, including Hawaii. It is also significant to note that the pests detected by Hawaii's inspectors were found on bare-rooted plants, which, in contrast to plants imported under this final rule, are allowed importation subject only to inspection. As a practical matter, under this rule, inspection at the port of entry is not the "first line of defense," since it is the last phytosanitary measure applied to *Phalaenopsis* spp. from Taiwan. As such, it is the last remaining means by which to ensure, to the extent possible, that plants are pest-free prior to release into domestic commerce. The various other measures required under § 319.37–8(e) are intended to ensure that the plants are free of pests prior to arrival at a port of entry into the United States.

One commenter stated that inspection at the port of entry is not an effective mitigation measure, especially given the list of pests that have become established in the United States in recent years, apparently associated with the living plant or cut flower/decorative plant material pathways.

APHIS believes that inspection, as a mitigation measure, is more effective in some cases than others. For instance, if a pest associated with a commodity is large and not mobile, we would likely consider inspection sufficient mitigation for the risk posed by the pest. In a case where a pest is difficult to detect via inspection, we would employ inspection in combination with other measures that reduce the likelihood that the plants being inspected are infested with the pest. In this case, the regulations in § 319.37–8(e) place several restrictions on plants imported under this final rule. Inspection is just one in a series of measures that, taken together, reduce the likelihood that plants released into U.S. commerce will contain pests that could harm U.S. agriculture or the natural environment.

One commenter questioned at what rate orchids would be inspected upon arrival at U.S. ports of entry.

For at least the first year of the program, APHIS would inspect a large percentage (greater than 50 percent) of each shipment of *Phalaenopsis* spp. orchids imported in growing media from Taiwan. In subsequent years, the rate of sampling may increase or decrease depending on the results of previous inspections (*i.e.*, based on how well the program appears to be working). In the event that pests are found, APHIS may hold all imports until an investigation can be completed and appropriate measures initiated, including stopping imports from a specific producer or shutting down the entire program, if the circumstances show that such an action is warranted.

Screening and Doors

Three commenters stated that screens of 0.6 mm mesh are inadequate to keep out certain important pests. One of the

workplan is grounds for suspension, and possibly cancellation, of the export program.

commenters claimed that the melon aphid and the silverleaf whitefly will pass through screens with mesh sizes of 0.281 mm, and that quarantine pests of *Phalaenopsis* spp. orchids, including *Dichromothrips* spp., *Frankliniella intonsa, Frankliniella schultezi,* and *Thrips palmi* will not be excluded with hole sizes as small as 0.073 mm. The commenter also stated that the required 0.6 mm opening will not exclude aphids, whiteflies, thrips, and crawlers of mealybug, including *Planococcus minor,* soft scales, and armored scales, including *Parlatoria* spp., as well as young nymphal stages of leafhoppers. The commenter noted that *Dichromothrips* spp., *Frankliniella intonsa, Frankliniella schultezi, Planococcus minor, Parlatoria* spp., and *Thrips palmi* are identified quarantine pests of *Phalaenopsis* spp. orchids, and that *Planococcus minor* is one of the identified quarantine pests of *Phalaenopsis* spp. orchids that is most likely to travel with the plant and has the greatest potential for economic damage.

The screen mesh size required under the regulations in § 319.37–8(e) is sufficient to exclude all life stages of all quarantine pests of *Phalaenopsis* spp. orchids identified in our risk analysis, except for the crawler stage of *Planococcus minor.* That said, the likelihood that *P. minor* could invade a greenhouse and infest *Phalaenopsis* grown in media is very low. The crawler, which is not highly mobile, would have to either crawl through a screen, up a bench, and onto plants'—or be blown in the air through a screen and fall directly on a plant below. Nonetheless, even if *P. minor* invaded a greenhouse, it would likely be detected during greenhouse or port of entry inspections, thus greatly reducing the chance that it could be introduced into the United States via imported *Phalaenopsis* spp. plants.

One commenter stated that equipping entryways with automatic closing doors is of little protection, unless double door systems are used and the production areas are under positive pressure. Another commenter stated that during the short period when a door is opened, flying insects, such as adults of the nocturnal, high-risk pest cluster caterpillar (*Spodoptera litura*) are capable of entering the greenhouse, especially if it is lighted. The commenter claimed that if a mated female moth entered the greenhouse, she would be capable of laying fertile eggs on potted orchids.

APHIS acknowledges that pests may be able to gain access to greenhouses, but it is the responsibility of the person growing the plants to ensure that does not happen. Regular inspections of growing premises are intended to ensure that plants are grown in a pest-free environment, and our past experience with this type of program provides evidence that this approach is successful.

Regarding *Spodoptera litura* specifically: If a mated adult female entered the greenhouse and laid eggs on plants, given that those eggs are relatively large and are typically laid in one location, the eggs would likely be detected by a simple visual inspection. If the eggs went undetected and hatched, the damage caused by the larvae would be detectable during the growing period or at the port of entry.

One commenter stated that ants and other pests that move underground will not be excluded by mesh screens and automatic doors. The commenter stated that ants intercepted on bare-root orchids in the past are generalist predators and, if established, some species would most certainly become pests in urban, agricultural, and natural environments. The commenter cited, as an example, the introduced ant *Linepithema humile* (Mayr), which has had a devastating effect on many native and endangered plant and animal species in Hawaii.

We are not aware of how the ant *Linepithema humile* (Mayr) was introduced into Hawaii, but we have no reason to believe that its introduction had anything to do with imports of plants in growing media, or imports of orchids specifically. Ants that are associated with vegetation are worker ants, which are not generally reproductive, and which therefore present little risk of establishment if imported into the United States. Ants generally only pose a risk of becoming established in the United States if a queen were imported in a plant in growing media. Given the fact that signs of ant infestation of *Phalaenopsis* spp. plants in growing media would be relatively obvious in the greenhouse in Taiwan and at the port of entry into the United States, and given the fact that media must be safeguarded against pest introduction prior to entry into the greenhouse, we do not believe the risks posed by ants require additional risk mitigation. Again, if pests, including ants, are detected in a program greenhouse, remedial measures must be applied, and the infestation must be eliminated.

One commenter stated that rusts, such as *Coleosporium merillii, Uromyces* spp., *Puccinia* spp., and *Uredo* spp. have spores able to penetrate through mesh screens.

The commenter is correct that rust fungi have spores that could penetrate mesh screens, however, according to our risk analysis, there are no known quarantine significant rusts that are associated with *Phalaenopsis* spp. orchids in Taiwan. In general, greenhouse mesh screens are not intended to prevent the entry of fungal spores, although the decrease in air flow associated with screening may provide some benefits. The exclusion of diseases begins with the use of only clean stock plants and media, and continues via the rapid detection and removal of symptomatic plant tissues. Other mitigation measures that are part of good plant production practices, such as sanitation and proper watering, are expected to be more effective in reducing or eliminating diseases than manipulation of the mesh screen size.

One commenter questioned whether 0.8 mm mesh size screens would be sufficient, rather than 0.6 mm screens.

Given the pests known to be associated with *Phalaenopsis* spp. plants in Taiwan, and the fact that other APHIS plants in growing media programs have been successful in keeping plants pest-free using 0.6 mm screens, we believe that size mesh is necessary.

Greenhouse Inspections and Pest Freedom

One commenter stated that the requirement that a greenhouse be "found free from evidence of plant pests and diseases * * * no more than 30 days prior to the date of export to the United States" is inadequate. The commenter stated that, during that period of time, any number of pests could become established and develop in the greenhouse, and then be imported into the United States.

The requirement that plants be inspected no more than 30 days prior to export grew out of the practical reality of inspecting the plants. Greenhouses ship plants periodically—sometimes several different shipments in one month—and it is often not feasible for inspectors to visit greenhouses and perform inspections for each shipment of plants during the day or week they are shipped. Rather, the inspectors inspect and approve plants for export within the next 30 days, which allows the owner of the plants to ship certified plants as needed during that time frame. If plants that are inspected and certified are not shipped within 30 days, they must be reinspected. While it is possible that plants could become infested with a pest during the short time between inspection and shipment from the greenhouse, it is highly unlikely, as

shown by our years of experience in allowing imports of plants in growing media under the regulations in § 319.37–8(e). Furthermore, as noted earlier in this document, it is in the interest of producers to ship only pest-free plants, or else risk that the plants be refused entry into the United States upon inspection at a plant inspection station.

Two commenters stated that even under near-optimal conditions of chemical pest control, it is unlikely that a greenhouse can be kept pest-free over extended periods of time.

In section D of the risk management portion of the 2003 risk analysis, we describe the historical performance of existing programs for the export to the United States of plants in growing media. Our review of those programs found that during the approximately 200 inspectional site visits made to greenhouses participating in plants in growing media programs, no pests were found. While it is possible that pests could infest program greenhouses, the regulations in § 319.37–8(e) and the bilateral workplans for such export programs are designed to ensure that plants are not infested with pests of quarantine significance.

One commenter questioned how often greenhouses would be inspected in Taiwan.

Approved greenhouses will be inspected at least monthly by officials of Taiwan's plant protection organization to monitor for compliance with the regulations, and APHIS personnel will make multiple inspections during the first year of the program, followed by at least one inspection per year in subsequent years.

Risk Associated With Growing Media

One commenter stated that fungal plant pathogens of *Phalaenopsis* orchids, including *Colletotrichum phalaenopsis, Cylindrosporium phalaenopsis, Phomopsis orchidophila,* and *Sphaerulina phalaenopsis,* could be introduced into the United States unless the media and pots were removed to expose roots.

We disagree that it will be necessary to remove growing media from plants to detect these fungal diseases,[8] which can cause leaf-spotting or canker symptoms on affected plant parts. These are not primarily root-affecting fungi. Orchids routinely produce roots that protrude from associated media, and these will be visible to inspectors. Furthermore, inspectors at APHIS's plant inspection stations (into which all plants in growing media must be imported) do remove growing media from plants to inspect their root systems for soil or other pests.

One commenter stated that the proposal, if adopted, will create another avenue for the illegal importation of wild-collected plants, because it will inhibit inspection of the root systems of imported plants. The commenter stated that one of the major factors in determining whether a plant is wild-collected instead of artificially propagated is the nature and condition of the root system.

As stated elsewhere in this document, it is in the interest of the exporting country to ensure that the conditions of the regulations are met. Failure to abide by the conditions could result in rejection of shipments of plants, as well as suspension of the program. As such, Taiwan's plant protection organization is responsible for verifying that plants are artificially propagated and in compliance with the program—otherwise Taiwan risks suspension of the program. If APHIS finds one quarantine pest in a shipment of imported plants, we may hold all imports until an investigation can be completed and appropriate measures initiated, including stopping imports from a specific producer or shutting down the entire program, if the circumstances show that such an action is warranted. We wish to make it clear that we will accept certifications made by the plant protection organization of Taiwan as true unless there is a reason to believe that certifications are being made improperly. Regardless, as stated in response to the previous comment, inspectors at APHIS's plant inspection stations (into which all plants in growing media must be imported) do remove growing media from plants to inspect their root systems.

Several commenters stated that increased risk of pest introduction comes not from *Phalaenopsis* spp. plants but from the medium in which they are shipped, which, they alleged, the 1997 risk assessment did not consider. The commenters stated that the likelihood of importing pests and diseases is greatly increased where plants are already established in sphagnum, or any other growing medium, as bare root plants allow a more thorough inspection of plant roots and easier detection of any pests or diseases which may be present. One commenter stated that the mounding of media around the bases of plants obscures not only the roots but also the lower leaf axils where additional pests occur. The commenter stated that the medium also provides harborage for dormant pest stages and may delay pest and disease symptoms. One commenter stated that insects and other pests that feed on roots are found in substrates during part of their life cycle may not be noticed by the APHIS inspector during inspection. The commenters also stated that there may be an unacceptable risk of pest introduction associated with even bare-root orchids.

The 1997 risk assessment and 2003 risk analysis take into account the fact that growing media has an effect on pests' ability to find suitable shelter and an effect on the ability of inspectors to detect certain pests that may be obscured by growing media. Specifically, the risk assessment took these factors into consideration in its estimates of the likelihood of introduction (*see* table 6 and preceding text in the 2003 risk analysis). The risk posed by growing media in and of itself was not considered in the risk assessment, because the specific types of growing media are already approved and listed in § 319.37–8(e)(1) of the regulations, and have been successfully imported into the United States for years.[9] Such media does not present a risk of pest introduction into the United States. In particular, sphagnum moss, which APHIS expects to be the growing medium of choice for growers in Taiwan, is exported in bulk and in association with plants imported under the regulations in § 319.37–8(e) from countries all over the world.

Based on many years of inspections of bare-rooted *Phalaenopsis* spp. orchids, we do not believe that it is necessary to impose any additional restrictions on their entry. Our interception records shows that, since 1988, there have been fewer than 50 interceptions of quarantine significant pests on orchids of the genus *Phalaenopsis* from Taiwan. This number compares favorably with numbers of interceptions for other imported plants. It suggests that the risk posed by these plants is low, and that pests are generally not associated with *Phalaenopsis* spp. orchids

Several commenters claimed that the importation of *Phyllosticta* or *Guignardia* species in vandaceous orchids imported from southeast Asia is already happening, and that potting media will only make it worse.

There is no interception evidence that either of the pests cited by the commenter is associated with *Phalaenopsis* spp. orchids in Taiwan or would be associated with imports of

[8] *Colletotrichum phalaenopsidis* was removed from further consideration in the 2003 risk analysis because it has been synonymized with *C. gloeosporioides* (Penz.), which is widely distributed in the United States.

[9] See section D of the risk management section of the 2003 risk analysis for additional detail.

those plants in growing media. Furthermore, there is no evidence that the unidentified *Phyllosticta* and *Guignardia* species are even of quarantine concern on vandaceous orchids.

Several commenters claimed that immature stages of biting midges (Ceratopoginidae = *Culicoides* spp., *Forcipomyia* spp.) that are present in Taiwan could be imported in sphagnum moss. The commenters claimed that given the size of the midges, the mitigation measures required by the rule cannot prevent them from entering greenhouses where plants intended for export to the United States are grown. The commenters claimed the midges can vector arboviruses, filarial worms, other parasites, and in addition, could be major pests to humans in areas such as Hawaii which have climatic conditions to support their survival.

APHIS believes that there is a very low likelihood that biting midges that can vector animal diseases will be imported in *Phalaenopsis* spp. plants from Taiwan. First, the growing medium in which the plants are potted is very unlikely to contain midges when it enters the greenhouse, and even if it did, under the regulations, in § 319.37–8(e)(2)(ii) measures must be applied to ensure that pests are excluded from the greenhouse, and that action is taken against pests that do enter the greenhouse. While the regulations do not require any specific pest-control measures such as pesticide applications to be applied in the greenhouse, it is the responsibility of the greenhouse owner to ensure that plants exported to the United States are free of all pests, including biting midges. Furthermore, it is the responsibility of Taiwan's plant protection organization to verify that growers follow the conditions of the regulations. This involves ensuring that the growing media (likely sphagnum moss imported from another country) is safeguarded against pest infestation at all times prior to entry of the media into the greenhouse, and that, in the highly unlikely event that pests enter the greenhouse, they are dealt with accordingly.

Furthermore, sphagnum moss has been imported into the United States for years, and there is no evidence to suggest that media used for commercial plant production has been or will be a pathway for entry of biting midges into the United States.

One commenter questioned whether sphagnum moss must be sterilized or pasteurized, and claimed that the regulations should include such a requirement.

Based on years of importations and inspections of various types of approved growing media, including sphagnum moss, we are confident that approved media, by virtue of their natural composition, are inhospitable to most pest species. Further, under the conditions of the bilateral workplan for this program, media will have to be safeguarded against pest infestation prior to entry into the greenhouse.

One commenter claimed that snail eggs may be laid in growing media and are not visible to inspectors.

While it is possible to detect the presence of snail eggs visually under certain circumstances, it is highly unlikely, given the measures required under § 319.37–8(e), that quarantine significant snails will have access to plants.

Several commenters expressed confusion over what type of growing medium will be used. The commenters stated that the proposed rule discusses sphagnum moss in several places but speaks of "other approved media" such as coconut fiber and tree fern. The commenters claimed that the pest risk associated with each medium will vary based on various factors, including the source of the medium, its age, and state of decomposition, among others.

Under this final rule, plants may be imported in any approved growing medium listed in § 319.37–8(e)(1), although sphagnum moss will likely be the most commonly used type. The following growing media are also approved: Baked expanded clay pellets, cork, glass wool, organic and inorganic fibers, peat, perlite, polymer stabilized starch, plastic particles, phenol formaldehyde, polyethylene, polystyrene, polyurethane, rock wool, sphagnum moss, ureaformaldehyde, vermiculite, or volcanic rock, or any combination of these media. Growing media must not have been previously used.

Several commenters expressed concern that the importation of *Phalaenopsis* spp. orchids in sphagnum moss could have serious ecological consequences in Hawaii. One commenter stated that scientists have found that one transplanted *Sphagnum* species that is native to Hawaii has spread vigorously when moved out of its natural habitat. The commenter expressed concern that this could happen with imported species of sphagnum as well. Another commenter stated that sphagnum moss used domestically as a growing medium consistently contains damaging insects and noxious weeds.

Sphagnum moss is an approved growing medium and is listed in § 319.37–8(e)(1). There are already nine genera and one order of plants that may be imported into any U.S. State (including Hawaii) in sphagnum moss. Ferns from Taiwan are known to be imported in sphagnum moss, and are already eligible for importation into Hawaii. At present, we have no reason to believe that unused sphagnum moss that is produced according to standard industry practice presents any risk of pest introduction in and of itself, nor does it behave as a weed. Nonetheless, growing media are subject to inspection at any point in the production process, from rooting to importation into the United States, to ensure against pest infestation.

One commenter stated that when sphagnum is of low quality or advancing age, it proves to be an attractive home for all manner of insect and arthropod life as well as fungi, algae, etc. The commenter stated that, while these plants would not be coming from the wild, it is disingenuous to suggest that the addition of a growing medium will not increase the risk of pest introduction.

As stated elsewhere in this document, the regulations require that sphagnum moss used as growing media must not have been previously used. We do not deny that the pest risk posed by bare-rooted *Phalaenopsis* plants would be lower than that posed by *Phalaenopsis* imported in growing media if the plants in media were not subject to the mitigation measures in § 319.37–8(e). However, when the mitigation measures are applied to such plants, the risk they pose drops to a level equal to or below that posed by bare-rooted plants. Plants imported in growing media are subject to many additional requirements that do not apply to bare-rooted plants. These requirements are designed to mitigate the added risk posed by the addition of growing media. As stated elsewhere in this document, the risk management section of the 2003 risk analysis provides a detailed discussion of how the measures ensure that pests are removed from the import pathway.

One commenter stated that the current plants in growing media program is very limited as to country of origin, and that plants grown under the existing program have failed to guard against pest intrusion. The commenter stated that citing the debatable success of the existing program is misleading. The commenter stated that APHIS failed to consider that the first five genera approved for importation in growing media are all short term crops compared to the genera proposed in 1993 (*Alstroemeria*, *Ananas*, *Anthurium*, and *Nidularium*) and claimed that APHIS

also did not consider that the first five genera came from countries north of 30° north latitude while noting that the genera proposed in 1993 and *Phalaenopsis* (as proposed) may be imported from any foreign country. The commenter stated that short term crops grown in northern areas present a lower pest risk than what was proposed in 1993 or what is being considered in the proposed rule.

As stated elsewhere in this document, the risk analysis conducted in support of this rulemaking action assesses the risk posed by known quarantine pests of *Phalaenopsis* spp. orchids that are present in Taiwan. The findings of the risk analysis have led the Secretary to determine that *Phalaenopsis* spp. orchids imported in growing media from Taiwan can be safely imported into the United States. Furthermore, the risk analysis is independent of previous analyses of other plants in growing media, though we do cite the success of the program as evidence that the program is effective in producing pest-free plants for export to the United States.

One commenter stated that a potted plant is difficult to inspect because unlike bare-root plants, a potted plant cannot be turned upside down or turned in such a way to make it easier for the inspector to see tiny signs of infestations, such as entry holes on the plant's stems. The commenter stated that entry holes of weevils and other internal feeders are difficult to detect because the holes are generally small and may be hidden in protected areas of the plants, such as where the leaf and stem meet, or on the stem near the media level.

A plant potted in growing media can be removed from media such that the roots can be inspected for signs of pest infestation. This is common practice in APHIS's plant inspection stations, and will be practiced as part of the inspection of plants imported under this final rule. Additionally, inspectors do inspect all accessible parts of the plant, including the leaf and root interface. Furthermore, while inspection at the port of entry is the last mitigation measure employed under the growing media program, it is only one in a series of measures that are collectively designed to reduce the risk that quarantine pests that are known to infest *Phalaenopsis* spp. orchids could be introduced into the United States.

One commenter stated that, in the 1997 risk assessment for the proposed rule, only the weediness potential of *Phalaenopsis* spp. orchids was assessed, and that there was no assessment of the weediness potential of sphagnum moss. The commenter stated that this oversight renders the proposal arbitrary, capricious, and an abuse of discretion, because sphagnum moss can contain viable weed seeds which may sprout and grow after the orchids are potted.

The commenter is correct that the 1997 risk assessment did not assess the weediness potential of sphagnum moss itself, as sphagnum moss is allowed to be imported without restriction from all parts of the world, as is the case with bare-rooted *Phalaenopsis* plants. As such, we conducted the 1997 risk assessment in accordance with our regulations to specifically address the unique risk posed by *Phalaenopsis* plants imported in growing media—that is, the risk caused by the interaction of plant and the media which, in this case, is tied to the fact that growing media increases the risk posed by an imported plant by providing harborage for pests that would not likely be present on bare-root plants, or that would be easier to inspect for if the plants were imported with bare roots. The measures contained in § 319.37–8(e) are designed to mitigate the risk posed by those pests, as described and evaluated in the risk management portion of the 2003 risk analysis.

One commenter stated that inspection of growing media is necessary to ensure that snails are not present in imported orchids, and alleged the current regulations do not provide for such inspection. The commenter stated that snails, including the quarantine pest *Bradybaena* spp., are known to occur on roots of potted orchids, and that others have observed *Sublina octona* and the bush snail, *Bradybena similaris,* occurring on orchids in Hawaii and stunting potted orchid plants. The commenter stated that interception records from the Hawaii Department of Agriculture report snails even on bare-rooted *Phalaenopsis* spp. orchids from Taiwan.

The risk analysis identified only one quarantine pest of *Phalaenopsis* spp. orchids in Taiwan that is a mollusk: *Acusta tourranensis.*[10] The risk posed by this snail and related pests is mitigated by the measures contained in § 319.37–8(e), as explained in detail in the risk management portion of the 2003 risk analysis.

One commenter stated that the greenhouses in which *Phalaenopsis* spp. orchids would be grown are likely to be invaded by *Frankliniella schultezi, Spodoptera litura, Thrips palmi,* and other quarantine pests, and that *Phalaenopsis* spp. orchids potted in sphagnum moss provide an excellent habitat for the pupal or resting stage of those pests, which could pupate in the growing media, thereby infesting it.

There are no quarantine significant thrips that have been confirmed to be associated with *Phalaenopsis* spp. plants in Taiwan. We have responded to the commenter's concern regarding the risk posed by *S. litura* earlier in this document.

Preemption

Several commenters expressed concern or confusion as to whether the proposed regulations would preempt Hawaiian quarantine restrictions on the importation of *Phalaenopsis* spp. orchids from Taiwan. One commenter requested that the rule include a special exemption for Hawaii and stated that all orchid plants imported into Hawaii should still be subject to the mandatory 60-day quarantine. Two commenters stated that such an exemption would not suffice, as plants which contain pests could be imported into the mainland and then be moved interstate into Hawaii. The Department of Agriculture of the State of Hawaii (HDOA) commented on the proposal, and specifically objected to the adoption of the rule, which it believes would increase the risk of introducing more plant pests in the State. HDOA stated that a number of the pests do not yet occur in Hawaii, but have been documented to have passed through APHIS inspection in Hawaii only to be stopped by a more thorough Hawaii Department of Agriculture quarantine requirement.

This final rule preempts applicable State regulations, as the Federal Government is responsible for regulating foreign and interstate commerce. States have authority to regulate intrastate commerce. In this case, we do not believe it is necessary to provide an exception for the rule for Hawaii, given the fact that plants imported in growing media are subject to the requirements of § 319.37–8(e), these plants present a level of pest risk equal to or below that posed by bare-rooted plants.

HDOA also stated that Federal preemption limits States' ability to protect themselves from risks that the Federal government does not acknowledge. HDOA expressed concern as to whether APHIS is facilitating international trade at the expense of its mission to prevent the introduction or dissemination of pests.

APHIS is charged with regulating the importation and interstate movement of plants and plant products according to

[10] For purposes of the 2003 risk analysis, *Acusta* (=*Bradybaena*) *tourranensis* and *Bradybaena* spp. are analyzed together.

the best available science. Our authority does not allow us to make exceptions to our regulatory policy unless they are science-based. In this case, we are confident that this final rule is based on sound scientific data.

One commenter stated that plants imported into Hawaii should be subject to a mandatory 60-day quarantine.

APHIS disagrees with the commenter that any further risk management is necessary beyond what we originally proposed. The 2003 risk analysis shows that the risks posed by the identified pests are mitigated by the measures contained in § 319.37–8(e).

Safeguarding Report

One commenter noted that at the time comments were being accepted on the proposed rule, the National Plant Board and APHIS were initiating a review of U.S. pest safeguarding systems. The commenter stated that it would be premature to make further modifications to Quarantine 37 pending the results of that review, and suggested that APHIS withdraw the proposal pending completion of that review, and re-propose it in light of future results.

The "Safeguarding American Plant Resources" report was completed in July 1999, and efforts to implement its recommendations are ongoing. The report is posted on the Internet at *http://www.safeguarding.org/*. The report did not contain any recommendations specific to the importation of plants in growing media, though it did recommend that APHIS consider revisions to Quarantine 37 under which decisions to allow the importation of propagative material would be made based on risk analysis as is the case with Quarantine 56 (7 CFR 319.56 through 319.56–8). Given that plants in growing media are the only propagative materials that are always subject to risk analysis as a condition of determining their enterability, we see no reason to further delay modifications to the regulations in § 319.37–8.

OMB Designation of Significance

One commenter stated that the proposed rule would result in increased inspection and regulatory activity by APHIS and that the conclusion that the rule is "not significant for the purposes of Executive Order 12866" is incorrect. The commenter claimed that review by the Office of Management and Budget (OMB) is necessary.

The determination that the proposed rule was "not significant for the purposes of Executive Order 12866" was made by OMB. This final rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by OMB.

Economics

General

Several commenters claimed that adoption of this rule would result in unfair "dumping" of cheap imports in the United States and that there must be assurances that such dumping will not occur.

As stated elsewhere in this document, determinations as to whether a new agricultural commodity can be safely imported are based on the findings of risk analysis. The regulation of "dumping" is administered by (1) the U.S. Department of Commerce (with respect to the determination of dumping margins), and (2) the International Trade Commission (with respect to determinations of injury). APHIS has no authority to adopt regulations to guard against "dumping" of imported plants.

Several commenters claimed that *Phalaenopsis* spp. orchids shipped specifically from Taiwan would have an unfair marketing advantage over domestically grown plants due to growers being subsidized and the plants may be shipped on subsidized airlines.

APHIS has no reason to believe that *Phalaenopsis* producers or shippers are subsidized by Taiwan. However, even if they were, as stated elsewhere in this document, APHIS's determinations as to whether a new agricultural commodity can be safely imported are not affected by factors such as economic competitiveness.

One commenter claimed that this rule is unnecessary because Hawaiian orchid growers can supply the epiphytic orchids needed by Hawaiian citizens and the Hawaiian visitor industry. Another commenter stated that because imported plants would spend an extended period of time in transit and would require shorter acclimation time, plants offered for sale will be in a stressed condition resulting in shorter bloom life and reduced overall quality, which would be a disservice to consumers. The commenter claimed that since the plants may not appear stressed at the time of sale, the latent damage would lead to overall dissatisfaction of the consumer, which in turn would be damaging to the *Phalaenopsis* industry.

APHIS is bound under international trade agreements to remove technical barriers to trade in the event that such barriers are found by scientific analysis to be unnecessary. In this case, we have conducted a risk analysis that found that all quarantine pests associated with *Phalaenopsis* spp. orchids in Taiwan are effectively removed from the import pathway by the measures required under § 319.37–8(e). As such, the Secretary of Agriculture has determined that it is not necessary to prohibit the importation of orchids of the genus *Phalaenopsis* from Taiwan in approved growing media. Considerations such as quality and consumer preference are not factors considered by APHIS or USDA in general when authorizing the importation of new commodities. These considerations are addressed by retailers and consumers who purchase plants in a free market; if imported plants are of insufficient quality or are perceived in a particular light due to their origin, the need for those imports will be dictated by the marketplace.

Economic and Regulatory Flexibility Analysis

Several commenters claimed that, contrary to the initial regulatory flexibility analysis that APHIS has prepared and published, the proposed rule will have a significant economic impact on a substantial number of small entities, and the economic analysis for the proposal greatly underestimates the consequences that will be associated with adoption of the proposal. The commenters claimed that adoption of the proposed rule would harm or perhaps destroy the domestic orchid industry, especially the industry in Hawaii, which will be unable to compete with new, cheaper imports. Commenters stated that the economic effect of the rule on small and family operated nurseries needs study and claimed that those types of businesses should be nurtured, not threatened, by government policies, especially in economically depressed areas.

Our initial regulatory flexibility analysis did not make a determination as to whether adoption of the proposed rule would have a significant economic effect on a substantial number of small entities. Our final regulatory analysis, however, found this final rule will likely have a significant adverse economic impact on many U.S. growers of potted *Phalaenopsis* plants, many of whom are probably small entities. Our analysis also found that an adverse impact on U.S. growers of orchids other than *Phalaenopsis* spp. orchids, many of whom are also probably small in size, is possible, but less certain. As noted elsewhere in this document, determinations as to whether a new agricultural commodity can be safely imported are not affected by factors such as economic competitiveness.

One commenter stated that the intent of the Regulatory Flexibility Act is not to limit regulations having adverse

economic impacts on small entities; rather the intent is to have agencies (1) focus special attention on the effects their proposed actions would have on small entities, (2) disclose to the public which alternatives they considered to lessen adverse impacts, (3) consider public comments on impacts and alternatives, and (4) state reasons for not adopting an alternative that has less of an adverse impact on small entities. The commenter stated that APHIS must fully comply with the Regulatory Flexibility Act, and must consider the impact of "inevitable proposals" for importing flowering potted orchids from other orchid genera. The commenter claimed that if APHIS issues a final rule for this action, the Agency must state in detail all of the reasons it has for making no changes in the regulations, the only alternative that can "minimize the significant economic impact on small entities."

APHIS believes that it has complied with the requirements of the Regulatory Flexibility Act. In our proposed rule, APHIS proposed to allow the importation of *Phalaenopsis* in growing media from all countries of the world. We also explained that we considered two alternatives to the proposed rule: (1) to make no changes to the regulations; and (2) to limit the scope of the rule to potted *Phalaenopsis* plants from Taiwan only, not all countries. In light of the comments we received on the proposed rule, we reconsidered the selection of alternatives for our final rule. As such, we are adopting the second alternative to our proposal as a final rule because our risk analysis for this action applies only to imports of *Phalaenopsis* from Taiwan, and as such should not be used as a technical justification for imports of *Phalaenopsis* from other countries. We rejected the first alternative because, given APHIS's obligations under the Plant Protection Act and international trade agreements, we do not believe continuing to prohibit the importation of *Phalaenopsis* in growing media from Taiwan is justified, since we have determined that *Phalaenopsis* from Taiwan can be imported in growing media without introducing plant pests or noxious weeds into the United States.

Regarding the "inevitable proposals" referred to by the commenter, we have considered the potential effects associated with importing *Phalaenopsis* in growing media from Taiwan. An analysis of future revisions and potential imports from other countries is not appropriate at this time, as any such changes to the regulations would have to be the subject of a future rulemaking action.

One commenter stated that there is a mass-market domestic trade that establishes *Phalaenopsis* spp. orchids, and other epiphytic orchids, in pots, and then sells these potted epiphytic orchids, primarily at wholesale. The commenter claimed that adoption of the proposed rule will severely compromise, even devastate, domestic orchid growers' participation in this mass-market trade, noting that Hawaiian orchid growers import about half of the orchid plants that they use to establish potted epiphytic orchids.

Our regulatory impact analysis and final regulatory flexibility analysis consider the potential economic effects of the adoption of this rule on persons who import orchid plants into Hawaii and pot them for sale in the domestic market. As noted earlier in this document, our final regulatory analysis found this final rule will likely have a significant adverse economic impact on many U.S. growers of potted *Phalaenopsis* plants, many of whom are probably small entities. Our analysis also found that an adverse impact on U.S. growers of orchids other than *Phalaenopsis* spp. orchids, many of whom are also probably small in size, is possible, but less certain.

One commenter stated that APHIS has failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, because its economic analysis is rudimentary and superficial. The commenter claimed that the economic analysis ignores or diminishes the value of statistics that are available about the orchid industry in the United States, and that it makes an assumption that "cheaper foreign imports would likely benefit plant retailers and importers" without examining whether or not the statement might actually be true, or, for that matter, whether or not more "cheap foreign imports" would result from adoption of the proposal.

We believe our final regulatory flexibility analysis complies with the requirements of the Regulatory Flexibility Act, as amended. Further, our analysis makes use of all the relevant data that we could locate, including information provided to us by commenters.

We believe it is reasonable in this case to assume that the expected low prices of imported *Phalaenopsis* plants from Taiwan will lead to an expanded market for those plants, at the expense of more expensive domestically produced plants. While cheaper imports may not benefit retailers if importers do not pass on savings, it is certain that importers will benefit from adoption of this rule.

One commenter stated that APHIS's economic analysis should not attempt to draw conclusions and inferences regarding the proposed action, given that data on potted orchids are "scarce" and data on potted *Phalaenopsis* "are virtually nonexistent." The commenter claimed that the limitations on the data used in the analysis are significant; there are far more growers, far more space devoted to production, and greater gross sales than APHIS acknowledges in its analysis. The commenter noted that there is no industry sharing of data at present, and as a result, no accurate information on the state of the industry.

While economic data on potted orchids may be scarce, we have considered the data that are available. In any event, APHIS cannot prohibit imports of plants and plant products based on a lack of information regarding domestic production of those plants and plant products.

One commenter stated that the American Orchid Society's (AOS) estimate (cited in the proposed rule's economic analysis) that half of all orchids grown in the United States are *Phalaenopsis* is incorrect. The commenter claimed that while the percentage is significant, the AOS figure overstates the importance of the genus.

For the purposes of our analysis, we make the assumption that this estimate is appropriate, as the basis for the assumption is based on the judgment of an expert on the domestic orchid industry, and there is no substantive evidence to suggest that the expert's opinion is incorrect.

One commenter stated that, contrary to what was said in the economic analysis for the proposed rule, the majority of domestic orchids growers do not sell their plants primarily wholesale to general merchandise retailers and specialty stores.

The commenter did not provide any evidence to support his claim, and since revisions to the economic analysis for the rule based on this comment would not affect the overall conclusions of the analysis, we are making no changes in response to this comment.

One commenter stated that APHIS's economic analysis should consider the impact of the proposed rule on other orchids grown domestically such as dendrobium, cattleya, vanda, etc., since orchid buyers do not always distinguish what kind of orchid they are buying, as long they are cheap and attractive. Another commenter stated that potted Phalaenopsis spp. orchids imported from Taiwan will compete against all other potted plants as well—although to a lesser degree.

In our final regulatory flexibility analysis, we acknowledge that adoption of this final rule may have adverse economic effects on producers of other plants besides *Phalaenopsis* spp. orchids; however, the extent of the effect on those producers could not be determined.

One commenter stated that the economic analysis failed to analyze or consider extra costs that growers, importers, or retailers might face in case a pest is introduced into the United States via these imports.

Our regulatory impact analysis does not consider potential economic impacts associated with the introduction of a new pest into the United States because, based on the findings of our risk analysis, we believe such an occurrence to be highly unlikely. If we expected pest introductions to occur in association with this proposal, an assessment of the associated costs would be appropriate—but we would never have formally proposed the action in the first place.

One commenter stated that importers of potted orchids will benefit from adoption of the proposed rule, but it is a leap of faith to suppose that the rule will lead to increased sales volume benefitting retailers and consumers. The commenter claimed that, at retail flower shops and other mass marketers of floriculture products, the competition for shelf space is fierce and that orchids are minor items for most retail outlets. The commenter stated that owners might be inclined to pocket the savings from lower prices and earn a greater margin per square foot of shelf space devoted to potted orchids. The commenter claimed that it is naive to suggest that retail sales volume will increase or that retailers will pass their lower costs on to consumers.

As noted in our regulatory impact analysis, the availability of cheaper foreign imports would benefit plant importers in the United States. Importers would benefit from the income that the increased business activity would produce. U.S. retailers would also benefit if they kept the savings from lower wholesale prices for themselves instead of passing those savings on to their customers in the form of lower retail prices. Even if retailers did pass the savings on to their customers, they may still benefit, because the lower retail prices on potted plants may create an environment that leads to increased sales volume and revenue elsewhere. Consumers would benefit if retailers passed the savings on to them.

When a lower priced import is introduced, both consumer and producer surplus, as well as total surplus, are affected; consumers are better off because they pay a lower price for the good, and producers are hurt because they get a lower price. However, trade in the product always increases total surplus. In this case, the lack of information and uncertainties regarding certain data (*e.g.*, the volume of *Phalaenopsis* spp. orchid imports from Taiwan) has precluded a monetary quantification of the gains and losses for U.S. producers and consumers, and the net welfare effect to U.S. society. However, regardless of the specific dollar amounts, the net welfare effect of imports of *Phalaenopsis* from Taiwan to U.S. society will be positive.

One commenter stated that, given this rule's potential negative economic effects on small entities, APHIS should consider employing quotas on the number of imported plants it will allow from Taiwan to protect the domestic orchid industry from competition.

APHIS regulates the importation of agricultural products based on risk, and has no authority to issue quotas on the importation of agricultural products, since such quotas would be based on economic considerations.

One commenter stated that there would be a negative impact on Hawaii's tourism industry if biting fly *Forcipomyia taiwana* or other non-native biting flies were to become established in Hawaii.

We do not believe this action will have an impact on Hawaii's tourism industry because there is no evidence to suggest that the pests cited by the commenter will enter the United States in association with *Phalaenopsis* spp. plants imported in approved growing media from Taiwan.

Fish and Wildlife Consultation/Effects on Endangered Species

Several commenters stated that APHIS must enter into formal consultation with the U.S. Fish and Wildlife Service (FWS), as required by section 7 of the Endangered Species Act (ESA) for all Federal actions that may affect species listed under the ESA. The commenters stated that the importation of orchids in growing media may affect species of native Hawaiian orchids listed as threatened or endangered under the ESA and that the importation of sphagnum moss could be detrimental to these orchid species by altering the critical conditions required by Hawaiian orchids for successful germination, growth, and reproduction. This could come about through the introduction of the alien arthropods, snails, and fungi that have been identified in the 1997 risk assessment conducted by APHIS and summarized in the proposed rule.

In response to comments received on the proposed rule, APHIS narrowed the application of the rule to *Phalaenopsis* spp. orchids from Taiwan as the only point of origin and entered into informal section 7 consultation with FWS, as required under the ESA, to seek its concurrence with APHIS's determination that the proposed rule may affect, but is not likely to adversely affect, species proposed or listed by FWS as endangered or threatened. On April 7, 2003, FWS concluded the section 7 consultation process by concurring with APHIS's determination that the importation of *Phalaenopsis* spp. orchids from Taiwan in approved growing media will not adversely affect federally listed or proposed endangered or threatened species or their habitats.

One commenter claimed that APHIS did not provide FWS with sufficient information to make a valid determination of the impact of the rule on endangered or threatened species. The commenter noted that comments made by Hawaii's Department of Agriculture were not mentioned in the Biological Evaluation provided to FWS in support of the rule, and claimed that, since the Biological Evaluation was the document used by FWS to concur with APHIS's finding of "not likely to adversely affect," APHIS should reconsider its findings.

APHIS provided FWS with all of the information that we had related to imports of *Phalaenopsis* spp. orchids in growing media from Taiwan. FWS concluded that the information that we gave them was sufficient to produce a finding that the importation of *Phalaenopsis* spp. orchids from Taiwan in approved growing media will not adversely affect federally listed or proposed endangered or threatened species or their habitats.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rule. The economic analysis provides a cost-benefit analysis, as required by Executive Order 12866, and an analysis of the potential economic effects of this final rule on

small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**, or on the Internet at *http://www.aphis.usda.gov/ppd/rad/98-035-5_final_economic_analysis.pdf*.

Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to regulate the importation of plants, plant products, and other articles to prevent the introduction of injurious plant pests.

Summary of Economic Analysis

The regulations in 7 CFR part 319 prohibit or restrict the importation into the United States of certain plants and plant products to prevent the introduction of plant pests. The current regulations allow the importation of orchids from all countries of the world, but only under certain conditions, including the condition that the plants be free of sand, soil, earth, and other growing media.

We are amending the regulations to add orchids of the genus *Phalaenopsis* from Taiwan to the list of plants that may be imported in an approved growing medium, subject to specified growing, inspection, and certification requirements. We are taking this action in response to a request by Taiwan, and after determining that *Phalaenopsis* spp. plants established in growing media can be imported without resulting in the introduction into, or dissemination within, the United States of plant pests or noxious weeds.

Our economic analysis examines this final rule's economic impacts, as required by Executive Order 12866, and considers the potential economic effects of the rule on small entities, as required by section 604 of the Regulatory Flexibility Act. The analysis takes into account public comments received in response to the proposal. Comments were received primarily from Hawaiian orchid growers and organizations representing those growers.

The economic impact of potted plant imports from Taiwan on Hawaiian and other domestic growers is uncertain because information on relative costs of production and transportation costs is unknown. However, Taiwan's interest in access to the potted plant markets, as well as certain other information, suggest that imports will displace sales by at least some domestic growers. Accordingly, it is very possible that domestic growers would lose sales to Taiwanese producers if the rule is adopted.

The percentage of all potted orchid plants produced in the United States that fall within the *Phalaenopsis* genus is unknown but it is estimated to be significant, perhaps as high as 90 percent. In Hawaii, unlike the situation on the U.S. mainland, potted plants of *Phalaenopsis* spp. are only a small segment of the overall potted orchid plant market. (*Phalaenopsis* spp. plants are produced primarily by the larger growers, and many Hawaiian growers are small-scale producers that tend to grow primarily specialty orchids.) The data suggest that, on average, Hawaiian growers of *Phalaenopsis* spp. would not be price competitive with imports from Taiwan. However, the rule's impact on Hawaii's small scale producers, given their niche in the specialty market, is unclear.

The data suggest that growers of *Phalaenopsis* spp. in California and Florida would also not be price competitive with the Taiwanese imports. The number of producers of potted *Phalaenopsis* spp. plants in those two States is unknown, but it is believed to be significant. In California in 2002, there were 41 producers of potted orchid plants of all genera, including *Phalaenopsis* spp.; Florida also had 41 producers of all genera that year.

Excluding Hawaii, California, and Florida, there were 101 large growers of potted orchid plants in all of the other States in 2002, with no one State accounting for more than 10 producers. The number of producers of potted *Phalaenopsis* spp. plants in those States is unknown but they, too, stand to be undercut in price by the Taiwanese imports.

The data are less conclusive on whether growers of all potted orchid plants—not just *Phalaenopsis* spp.—would be affected. Most U.S. growers of potted orchid plants are small entities.

The impact on producers is unclear. The rule is expected to provide net social benefits to consumers (domestic importers, wholesalers, retailers, as well as final consumers) that would exceed potential losses to domestic growers. The rule is expected to increase net social welfare.

Executive Order 12988

This final rule allows plants of the genus *Phalaenopsis* to be imported in approved growing media into the United States from Taiwan. State and local laws and regulations regarding *Phalaenopsis* spp. plants imported under this rule will be preempted while the plants are in foreign commerce. Potted plants are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this final rule. The assessment provides a basis for the conclusion that the importation of orchids of the genus *Phalaenopsis* will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS's NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment may be viewed on the Internet at *http://www.aphis.usda.gov/ppd/es/ppqdocs.html*. You may request paper copies of the environmental assessment from the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the environmental assessment when requesting copies. The environmental assessment is also available for review in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Paperwork Reduction Act

This final rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 319

Bees, Coffee, Cotton, Fruits, Honey, Imports, Logs, Nursery Stock, Plant diseases and pests, Quarantine,

Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, we are amending 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450 and 7701–7772; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

§ 319.37–8 [Amended]

■ 2. In § 319.37–8, paragraph (e), the introductory text of the paragraph is amended by adding the words "*Phalaenopsis* spp. from Taiwan," immediately after the word "*Peperomia*,".

Done in Washington, DC, this 29th day of April 2004.

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 04–10067 Filed 5–4–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM277, Special Conditions No. 25–261–SC]

Special Conditions: Cessna Models 500, 550 and S550 Airplanes; High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for Cessna Models 500, 550 and S550 airplanes modified by Shadin Company, Inc. These modified airplanes will have novel and unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. The modification incorporates the installation of the Shadin Company dual ADC–6000 Air Data Computer (ADC) which will allow for the removal of the existing encoding altimeters, air data computer, and pneumatic altimeter. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that provided by the existing airworthiness standards.

DATES: The effective date of these special conditions is April 27, 2004. Comments must be received on or before June 4, 2004.

ADDRESSES: Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM277, 1601 Lind Avenue SW., Renton, Washington, 98055–4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked: Docket No. NM277.

FOR FURTHER INFORMATION CONTACT: Greg Dunn, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98055–4056; telephone (425) 227–2799; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that notice and opportunity for prior public comment are impracticable, because these procedures would significantly delay certification of the airplane and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance; however, the FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want the FAA to acknowledge receipt of your comments on these special conditions, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On March 1, 2004, Shadin Company, Inc. applied for a supplemental type certificate (STC) to modify Cessna Models 500, 550 and S550 airplanes. Cessna Model 500, 550 and S550 airplanes are currently approved under Type Certificate A22CE. The modification incorporates the installation of the Innovative Solutions & Support (IS & S) Duplex Reduced Vertical Separation Minimum (RVSM) system which will allow for the removal of the existing altitude alerter, encoding altimeters, air data computer, and standby altimeter. This system uses two air data computer ADC–6000s and interfaces to existing BA–141 altimeters. These ADCs can be susceptible to disruption to both command and response signals as a result of electrical and magnetic interference. This disruption of signals could result in the loss of all critical flight information displays and annunciations or the presentation of misleading information to the pilot.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Shadin Company, Inc. must show that Cessna Model 500, 550 and S550 airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate A22CE or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The certification basis for the modified Cessna Models 500, 550 and S550 airplanes includes 14 CFR 25, effective February 1, 1965 as described in Type Certificate A22CE.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, 14 CFR 25, as amended) do not contain adequate or appropriate safety standards for the Cessna Model 500, 550 and S550 airplanes because of novel or unusual design features, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as defined in 14 CFR 11.19, are issued in accordance with § 11.38 and become part of the type

certification basis in accordance with § 21.101.

Special conditions are initially applicable to the models for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on Type Certificate A22CE to incorporate the same novel or unusual design feature, the special conditions would also apply to the other models under the provisions of § 21.101.

Novel or Unusual Design Features

The modified Cessna Model 500, 550 and S550 airplanes will incorporate a new altitude display system, the Shadin Company ADC–6000 system, which will perform critical functions. This system may be vulnerable to high-intensity radiated fields (HIRF) external to the airplane. The current airworthiness standards of part 25 do not contain adequate or appropriate safety standards for the protection of this equipment from the adverse effects of HIRF. Accordingly, this system is considered to be a novel or unusual design feature.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground-based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the Cessna Models 500, 550 and S550 airplanes modified by the Shadin Company, Inc. These special conditions require that new electrical and electronic systems that perform critical functions, such as the ADC–6000, be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground-based transmitters and the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of critical digital avionic/electronics and electrical systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown in accordance with either paragraph 1 OR 2 below:

1. A minimum threat of 100 volts rms (root-mean-square) per meter electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the field strengths indicated in the table below for the frequency ranges indicated. Both peak and average field strength components from the table below are to be demonstrated.

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

The field strengths are expressed in terms of peak of the root-mean-square (rms) over the complete modulation period.

The threat levels identified above are the result of an FAA review of existing studies on the subject of HIRF, in light of the ongoing work of the Electromagnetic Effects Harmonization Working Group of the Aviation Rulemaking Advisory Committee.

Applicability

As discussed above, these special conditions are applicable Cessna Model 500, 550 and S550 airplanes modified by Shadin Company, Inc. Should Shadin Company, Inc. apply at a later date for design change approval to modify any other model included on the same type certificate to incorporate the same or similar novel or unusual design feature, these special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on Cessna Model 500, 550 and S550 airplanes modified by Shadin Company, Inc. It is not a rule of general applicability and affects only the applicant which applied to the FAA for approval of these features on these airplanes.

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

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for Cessna Model 500, 550 and S550 airplanes modified by the Shadin Company, Inc.

1. Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF). Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated fields.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions. Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on April 27, 2004.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10238 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–17–AD; Amendment 39–13505; AD 2004–05–10]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects a typographical error that appeared in airworthiness directive (AD) 2004–05–10 that was published in the **Federal Register** on March 5, 2004 (69 FR 10321). The typographical error resulted in an incorrect reference to a previous AD. This AD is applicable to certain Boeing Model 767 series airplanes. This AD requires repetitive detailed visual inspections of the aft pressure bulkhead for damage and cracking, and repair if necessary. This AD also requires eddy current inspections prior to the airplane accumulating 25,000 flight cycles.

DATES: Effective March 22, 2004.

FOR FURTHER INFORMATION CONTACT: Suzanne Masterson, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6441; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: Airworthiness Directive (AD) 2004–05–10, amendment 39–13505, applicable to certain Boeing Model 767 series airplanes, was published in the **Federal Register** on March 5, 2004 (69 FR 10321). That AD requires repetitive detailed visual inspections of the aft pressure bulkhead for damage and cracking, and repair if necessary. That AD also requires eddy current inspections prior to the airplane accumulating 25,000 flight cycles.

As published, the restatement heading on page 10323 specified that certain paragraphs were a "restatement of AD 88–09–03 R1." In paragraph (a) the compliance time was specified as, "Prior to the accumulation of 6,000 flight cycles or within the next 1,000 flight cycles after September 26, 1988 (effective date of AD 88–09–03 R1, amendment 39–6001). * * *" However, the preamble to that AD discusses and specifies in several places the correct referenced AD number as AD 88–19–03 R1.

Since no other part of the regulatory information has been changed, the final rule is not being republished in the **Federal Register**.

The effective date of this AD remains March 22, 2004.

§ 39.13 [Corrected]

■ On page 10323, in the first column, the restatement header and paragraph (a) of AD 2004–05–10 is corrected to read as follows:

* * * * *

Restatement of AD 88–19–03 R1

(a) Prior to the accumulation of 6,000 flight cycles or within the next 1,000 flight cycles after September 26, 1988 (effective date of AD 88–19–03 R1, amendment 39–6001), whichever occurs later, unless accomplished within the last 5,000 flight cycles, and thereafter at intervals not to exceed 6,000 flight cycles, perform a detailed inspection of the aft side of the entire body station 1582 pressure bulkhead for damage (as defined in the Structural Repair Manual) and cracking, in accordance with Boeing Service Bulletin 767–53–0026, dated November 19, 1987; or Revision 1, dated March 16, 1989.

* * * * *

Issued in Renton, Washington, on April 26, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10139 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–278–AD; Amendment 39–13608; AD 2004–09–19]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319 and A320 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Airbus Model A319 and A320 series airplanes, that requires modifying the electrical bonding of the fuel return line in each wing between ribs 7 and 8. This action is necessary to reduce the potential for electrical arcing within the fuel tank due to insufficient electrical bonding, which could result in a fire or explosion in the fuel tank. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Airbus Model A319 and A320 series airplanes was published in the **Federal Register** on February 6, 2004 (69 FR 5794). That action proposed to require modifying the electrical bonding of the fuel return line in each wing between ribs 7 and 8.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. The FAA has duly considered the single comment received.

The commenter supports the proposed rule.

Explanation of Change to Final Rule

The proposed AD states that the subject of the proposed AD is addressed in French airworthiness directive 2002–476(B), dated September 18, 2002. Since the preparation of the proposed AD, the Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, has issued French airworthiness directive F–2002–476 R1,

dated January 21, 2004. This French airworthiness directive clarifies the applicability for one subject airplane.

The new French airworthiness directive does not affect the content of the proposed AD. Thus, the only change to this final rule as a result of the issuance of the new French airworthiness directive is that we have revised Note 1 of this final rule to refer to French airworthiness directive F–2002–476 R1.

Difference Between the French Airworthiness Directive and This AD

The applicability of French airworthiness directive F–2002–476 R1 excludes airplanes on which Airbus Service Bulletin A320–28–1103 has been accomplished in service. However, we have not excluded those airplanes from the applicability of this AD. Rather, this AD includes a requirement to accomplish the actions specified in that service bulletin. Such a requirement ensures that the actions specified in the service bulletin and required by this AD are accomplished on all affected airplanes. Operators must continue to operate the airplane in the configuration required by this AD unless an alternative method of compliance is approved.

Conclusion

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

Cost Impact

We estimate that 534 airplanes of U.S. registry will be affected by this AD, that it will take approximately 3 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Required parts will cost approximately $100 per airplane. Based on these figures, the cost impact of this AD on U.S. operators is estimated to be $157,530, or $295 per airplane.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–19 Airbus: Amendment 39–13608. Docket 2002–NM–278–AD.

Applicability: Model A319 and A320 series airplanes, certificated in any category; except those on which Airbus Modification 31888 has been accomplished.

Compliance: Required as indicated, unless accomplished previously.

To reduce the potential for electrical arcing within the fuel tank due to insufficient electrical bonding, which could result in a fire or explosion in the fuel tank, accomplish the following:

Modification of Electrical Bonding

(a) Within 60 months after the effective date of this AD, modify the electrical bonding of the fuel return line in each wing between ribs 7 and 8, by installing a grounding tag to a certain check valve attachment bolt; installing bonding leads between the check valve, the fuel return line, and the adjacent rib 8; and performing an electrical bonding resistance test; per the Accomplishment Instructions of Airbus Service Bulletin A320–28–1103, Revision 01, dated April 1, 2003. If the electrical resistance test of any bonding lead fails: Before further flight, disassemble the bonding lead, repeat the applicable cleaning procedures, reassemble the bonding lead, and repeat the electrical resistance test per the Accomplishment Instructions of the service bulletin.

Credit for Actions Accomplished Previously

(b) Actions accomplished before the effective date of this AD per Airbus Service Bulletin A320–28–1103, dated June 14, 2002, are acceptable for compliance with the corresponding actions required by paragraph (a) of this AD.

Alternative Methods of Compliance

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

Incorporation by Reference

(d) Unless otherwise specified in this AD, the actions shall be done in accordance with Airbus Service Bulletin A320–28–1103, Revision 01, dated April 1, 2003. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 1: The subject of this AD is addressed in French airworthiness directive F–2002–476 R1, dated January 21, 2004.

Effective Date

(e) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 26, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10019 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–165–AD; Amendment 39–13604; AD 2004–09–15]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135 and EMB–145 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain EMBRAER Model EMB–135 and EMB–145 series airplanes, that requires replacement of the nose landing gear wheel nuts and associated inner and outer seals; and reidentification of the landing gear strut. This action is necessary to prevent separation of the wheels from the nose landing gear due to the failure of the outer wheel bearings, and consequent loss of control of the airplane during takeoff and landing. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer; International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB–135 and EMB–145 series airplanes was published in the **Federal Register** on January 5, 2004 (69 FR 282). That action proposed to require replacement of the nose landing gear wheel nuts and associated inner and outer seals; and reidentification of the landing gear strut.

Comments

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

Request To Add Replacement Seal Assembly

One commenter requests that replacement seal assembly part number (P/N) AEC–68–1498 be added to paragraph (a) of the proposed AD. The commenter states that Aviation Engineering Consultants, Inc. (AECI) has introduced an approved replacement seal assembly P/N AEC–68–1498 per Parts Manufacturer Approval (PMA) No. PQ1685CE, dated September 30, 2002. The commenter notes that P/N AEC–68–1498 is an FAA approved alternative to the P/N 68–1498 seal assembly. The commenter contends that P/N AEC–68–1498 should either be included in paragraph (a) of the proposed AD or be considered an alternative method of compliance (AMOC) for the proposed AD.

The FAA does not agree to add replacement seal assembly P/N AEC–68–1498 to paragraph (a) of the final rule. We recognize that there may be acceptable alternative parts to the manufacturer's specified part (*i.e.*, P/N 68–1498). We consider that the appropriate process for authorizing the use of an alternative replacement part to correct an unsafe condition to be per the provisions of paragraph (d) of the final rule. As stated in paragraph (d) of the final rule, an individual may submit a request for approval of the installation of a replacement seal assembly, such as the one to which the commenter refers, as an AMOC to the final rule. The request should include adequate data to justify that installation of a replacement seal assembly will provide an acceptable level of safety. No change to the final rule is necessary in this regard.

Explanation of Editorial Change

The title of Table 1 in paragraph (b) of the final rule has also been revised to indicate the content of the table: "Table 1—Service Bulletins Considered Acceptable for Compliance."

Conclusion

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

Cost Impact

The FAA estimates that 365 airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Required parts will be provided free of charge by the airplane manufacturer. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $23,725, or $65 per airplane.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–15 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–13604. Docket 2002–NM–165–AD.

Applicability: Model EMB–135 and –145 series airplanes having serial numbers (S/N) 145003 through 145373, 146375, 145377 through 145391 inclusive, and 145393 through 145408 inclusive; certificated in any category; equipped with nose landing gear struts, part number (P/N) 1170C0000–01 (including all modifications), P/N 1170C0000–02, or P/N 1170C0000–03.

Compliance: Required as indicated, unless accomplished previously.

To prevent separation of the wheels from the nose landing gear due to the failure of the outer wheel bearings, and consequent loss of control of the airplane during takeoff and landing, accomplish the following:

Replacement and Reidentification

(a) Within 12 months from the effective date of this AD, replace the nose landing gear wheel nuts, P/N 1170–0007, with new wheel nuts, P/N 170–0082; the associated inner and outer seals, P/N 68–1157 or P/N 72–290, with new seals, P/N 68–1498; and reidentify the struts; in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 145–32–0068, Change 04, dated January 20, 2003; or EMBRAER Service Bulletin 145LEG–32–0006, Change 01, dated January 20, 2003; as applicable.

(b) Actions accomplished before the effective date of this AD per EMBRAER Service Bulletins as listed in the following table are considered acceptable for compliance with the corresponding actions specified in this AD:

TABLE 1.—SERVICE BULLETINS CONSIDERED ACCEPTABLE FOR COMPLIANCE

EMBRAER service bulletin	Change level	Date
145–32–0068	Original	May 4, 2001.
145–32–0068	01	January 14, 2002.
145–32–0068	02	April 16, 2002.
145–32–0068	03	November 25, 2002.
145LEG–32–0006	Original	November 26, 2002.

Parts Installation

(c) As of the effective date of this AD, no person may install nose landing gear wheel nuts, P/N 1170–0007, or the associated inner and outer seals, P/N 68–1157 or P/N 72–290, on any airplane.

Alternative Methods of Compliance

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

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with the following EMBRAER Service Bulletins, as applicable:

TABLE 2.—APPLICABLE SERVICE DOCUMENTS

Service bulletin	Page Nos.	Change level shown on the page	Date shown on page
EMBRAER Service Bulletin 145–32–0068, Change 04, January 20, 2003.	1–2	04	January 20, 2003.
	3–19	01	January 14, 2002.
EMBRAER Service Bulletin 145LEG–32–0006, Change 01, dated January 20, 2003.	1–2	01	January 20, 2003.
	3–19	Original	November 26, 2002.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 1: The subject of this AD is addressed in Brazilian airworthiness directive 2002–03–01R2, dated April 22, 2003.

Effective Date

(f) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 26, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10018 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–CE–46–AD; Amendment 39–13596; AD 2004–09–07]

RIN 2120–AA64

Airworthiness Directives; Raytheon Aircraft Company Model 1900, 1900C, 1900C (C–12J), and 1900D Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT,

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain Raytheon Aircraft Company (Raytheon) Model 1900, 1900C, 1900C (C–12J), and 1900D airplanes that do not have canted bulkhead Kit No. 129–4005–1 S incorporated. This AD requires you to repetitively inspect the canted bulkhead located at Fuselage Station (FS) 588.10 for cracks and incorporate canted bulkhead Repair Kit No. 129–4005–1 S anytime cracks are found. When Kit No. 129–4005–1 S is incorporated, the repetitive inspection requirement in this AD is terminated and no further action is required. This AD is the result of numerous reports of multi-site cracks occurring in the canted bulkhead at FS 588.10. We are issuing this AD to detect and correct cracks in the canted bulkhead. These cracks could result in failure of the bulkhead. Failure of the canted bulkhead could lead to loss of rudder and elevator control, which could result in loss of control of the airplane.

DATES: This AD becomes effective on June 14, 2004.

As of June 14, 2004, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: You may get the service information identified in this AD from Raytheon Aircraft Company, 9709 E. Central, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140.You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 95–CE–46–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Steven E. Potter, Aerospace Engineer, Wichita Aircraft Certification Office (ACO), FAA, 1801 Airport Road, Wichita, Kansas 67209; telephone: (316) 946–4124; facsimile: (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? We have received numerous reports of multi-site cracks in the canted bulkhead at Fuselage Station (FS) 558.10 on Raytheon 1900 Series airplanes. Cracks were found at the outer flange radius, the outer flange stringer cutouts, and at the flight control system support brackets of the canted bulkhead.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Raytheon Aircraft Company Model 1900, 1900C, 1900C (C–12J), and 1900D airplanes that do not have canted bulkhead Kit No. 129–4005–1 S incorporated. This proposal was published in the **Federal Register** as a supplemental notice of proposed rulemaking (NPRM) on November 18, 2003 (68 FR 64996). The supplemental NPRM was proposed to require you to:

—Repetitively inspect the canted bulkhead located at FS 588.10 for cracks; and

—Incorporate canted bulkhead Repair Kit No. 129–4005–1 S if any cracks are found and as a terminating action for the repetitive inspection requirement. When Kit No. 129–4005–1 S is incorporated, no further action is required.

What is the potential impact if FAA took no action? This condition, if not detected and corrected, could prevent the bulkhead from carrying its limit and ultimate design load because of cracks in the canted bulkhead. Failure of the bulkhead could affect the rudder cable tension and result in loss of elevator and rudder control, which could result in loss of control of the airplane.

Comments

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

Conclusion

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

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

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

Changes to 14 CFR Part 39—Effect on the AD

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

Costs of Compliance

How many airplanes does this AD impact? We estimate that this AD affects 364 airplanes in the U.S. registry.

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

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 workhours × $65 per hour = $130	Not applicable	$130	$130 × 364 = $47,320.

We estimate the following costs to accomplish any necessary modification that will be required based on the results of the inspection(s). We have no way of determining the number of airplanes that may need this modification:

Labor cost	Parts cost	Total cost per airplane
80 workhours × $65 per hour = $5,200	$718	$5,200 + $718 = $5,918.

Regulatory Findings

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

Will this AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket No. 95–CE–46–AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. FAA amends § 39.13 by adding a new AD to read as follows:

2004–09–07 Raytheon Aircraft Company: Amendment 39–13596; Docket No. 95–CE–46–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on June 14, 2004.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects the following airplane models and serial numbers that:

(1) do not have canted bulkhead Kit No. 129–4005–1 incorporated; and

(2) are certificated in any category:

Model	Serial Nos.
1900	UA–1 through UA–3.
1900C	UB–1 through UB–74 and UC–1 through UC–174.
1900C (C12J)	UD–1 through UD–6.
1900D	UE–1 through UE–113.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of numerous reports of multi-site cracks occurring in the canted bulkhead at FS 588.10. We are issuing this AD to detect and correct cracks in the canted bulkhead, which could result in failure of the bulkhead. Failure of the canted bulkhead could lead to loss of rudder and elevator control, which could result in loss of control of the airplane.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Inspect the canted bulkhead at Fuselage Station (FS) 588.10 for fatigue cracks.	Initially inspect at whichever occurs later, unless already done: Upon the accumulation of 5,000 hours time-in-service (TIS) or within the next 600 hours TIS after June 14, 2004 (the effective date of this AD). If no cracks are found, repetitively inspect thereafter at intervals not to exceed 600 hours TIS until Kit No. 129–4005–1 S is incorporated. When Kit No. 129–4005–1 S is incorporated, no further action is required.	Follow Raytheon Aircraft Company Mandatory Service Bulletin SB 53–2564, Revision 2, Revised: July, 2003.
(2) If cracks exist or are found during any inspection required in paragraph (e)(1) of this AD, Kit No. 129–4005–1 S must be incorporated.	Before further flight after the inspection in which the cracks are found or known to exist.	Follow Raytheon Aircraft Company Mandatory Service Bulletin SB 53–2564, Revision 2, Revised: July, 2003.
(3) Incorporating Kit No. 129–4005–1 S is the terminating action for the repetitive inspection requirements specified in paragraph (e)(1) of this AD.	Kit No. 129–4005–1 S can be incorporated at any time. When incorporated, no further action is required.	Follow Raytheon Aircraft Company Mandatory Service Bulletin SB 53–2564, Revision 2, Revised: July, 2003.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Wichita Aircraft Certification Office (ACO), FAA. For information on any already approved alternative methods of compliance, contact Steven E. Potter, Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road, Wichita, Kansas 67209; telephone: (316) 946–4124; facsimile: (316) 946–4407.

Does This AD Incorporate Any Material by Reference?

(g) You must do the actions required by this AD following the instructions in Raytheon Aircraft Company Mandatory Service Bulletin SB 53–2564, Revision 2, Revised: July, 2003. The Director of the Federal Register approved the incorporation by reference of this service bulletin in

accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may get a copy from Raytheon Aircraft Company, 9709 E. Central, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140. You may review copies at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on April 21, 2004.

Dorenda D. Baker,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9898 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–112–AD; Amendment 39–13601; AD 2004–09–12]

RIN 2120–AA64

Airworthiness Directives; Dornier Model 328–100 and Model 328–300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Dornier Model 328–100 and Model 328–300 series airplanes, that requires repetitive detailed inspections of all attach caps of the passenger seats for cracks or defects; and replacement of the caps with new caps, if necessary. This action is necessary to prevent failure due to cracking of the seat frame attach caps on the passenger seat assemblies, which could result in separation of the passenger seat from the supporting structure during an emergency landing, hard landing, or turbulence, and consequent injury to the seat occupant. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from AvCraft Aerospace GmbH, P.O. Box 1103, D–82230 Wessling, Germany. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1503; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Dornier Model 328–100 and Model 328–300 series airplanes was published in the **Federal Register** on March 5, 2004 (69 FR 10372). That action proposed to require repetitive detailed inspections of all attach caps of the passenger seats for cracks or defects; and replacement of the caps with new caps, if necessary.

Comments

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

Conclusion

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

Cost Impact

The FAA estimates that 101 airplanes of U.S. registry will be affected by this AD, that it will take approximately 3 work hours to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $19,695, or $195 per airplane, per inspection cycle.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–12 Fairchild Dornier GMBH (Formerly Dornier Luftfahrt GmbH): Amendment 39–13601. Docket 2003–NM–112–AD.

Applicability: Model 328–100 and –300 series airplanes, equipped with B/E Aerospace passenger seats, Model part number (P/N) 2524.519–.() and Model P/N 2524.520–.(); certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure due to cracking of the seat frame attach caps on the passenger seat assemblies, which could result in separation of the passenger seat from the supporting structure during an emergency landing, hard landing, or turbulence, and consequent injury to the seat occupant; accomplish the following:

Service Bulletin References

(a) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of Dornier Service Bulletin SB–328–25–412, dated November 21, 2002 (for Model 328–100 series airplanes); and Dornier Service Bulletin SB–328J–25–143, dated November 21, 2002 (for Model 328–300 series airplanes); as applicable.

Note 1: The Dornier service bulletins refer to B/E Aerospace Service Bulletin 2524.519/520–2532, dated November 2, 2001; and B/E Aerospace Service Bulletin 2524.519/520–2530, Revision C, dated November 12, 2001; as additional sources of service information for accomplishment of the inspections and replacement of the passenger seat attach caps.

Inspection

(b) Within 100 flight hours from the effective date of this AD, perform a detailed inspection of all attach caps of the passenger seats for cracks or defects, in accordance with the Accomplishment Instructions of the applicable service bulletin. Repeat the detailed inspection thereafter at intervals not to exceed 8,000 flight hours or 48 months, whichever comes first.

Note 2: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

Replacement

(c) If any cracked or defective seat frame attach cap is found during any detailed inspection required by paragraph (b) of this AD, prior to further flight, replace the cap with a new cap in accordance with the applicable service bulletin.

Reporting Requirement

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

Alternative Methods of Compliance

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

Incorporation by Reference

(f) The actions shall be done in accordance with Dornier Service Bulletin SB–328–25–412, dated November 21, 2002; or Dornier Service Bulletin SB–328J–25–143, dated November 21, 2002; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from AvCraft Aerospace GmbH, P.O. Box 1103, D–82230 Wessling, Germany. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 3: The subject of this AD is addressed in German airworthiness directive 2003–063, dated March 6, 2003, and German airworthiness directive 2003–072, dated March 6, 2003.

Effective Date

(g) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 20, 2004.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9763 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–218–AD; Amendment 39–13602; AD 2004–09–13]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ and EMB–145XR Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain EMBRAER Model EMB–135BJ and EMB–145XR series airplanes, that requires repetitive inspections for cracking in the firewall of the auxiliary power unit (APU), and repair of the firewall if necessary. This action also provides an optional terminating action for the repetitive inspections. This action is necessary to detect and correct cracking in the APU firewall, which could result in reduced structural integrity of the firewall, and a consequent uncontained APU fire that could spread to the airplane structure. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB–135BJ and EMB–145XR series airplanes was published in the **Federal Register** on March 5, 2004 (69 FR 10362). That action proposed to require repetitive inspections for cracking in the firewall of the auxiliary power unit, and repair of the firewall if necessary. That action also provided an optional terminating action for the repetitive inspections.

Comments

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

Conclusion

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

Cost Impact

We estimate that 40 airplanes of U.S. registry will be affected by this proposed AD.

It will take approximately 1 work hour per airplane to accomplish the repetitive inspections, at an average labor rate of $65 per work hour. Based

on these figures, the cost impact of the repetitive inspections on U.S. operators is estimated to be $2,600, or $65 per airplane, per inspection cycle.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–13 Empresa Brasileria de Aeronautica S.A. (EMBRAER): Amendment 39–13602. Docket 2003–NM–218–AD.

Applicability: Model EMB–135BJ series airplanes as listed in EMBRAER Service Bulletin 145LEG–53–0010, dated June 5, 2003; and Model EMB–145XR series airplanes as listed in EMBRAER Service Bulletin 145–53–0037, dated April 30, 2003; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct cracking in the firewall of the auxiliary power unit (APU), which could result in reduced structural integrity of the firewall, and a consequent uncontained APU fire that could spread to the airplane structure, accomplish the following:

Initial Inspection

(a) Within 200 flight hours or 90 days after the effective date of this AD, whichever is first: Do a detailed inspection of the APU firewall for cracking, per Part I of the Accomplishment Instructions of EMBRAER Service Bulletin 145–53–0037 (for Model EMB–145XR series airplanes), dated April 30, 2003; or Service Bulletin 145LEG–53–0010 (for Model EMB–135BJ series airplanes), dated June 5, 2003; as applicable.

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

Repetitive Inspections/Repair

(b) If no cracking is found during any inspection required by paragraph (a) of this AD: Repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 200 flight hours or 90 days, whichever is first. Accomplishment of the replacement specified in paragraph (d) of this AD terminates the repetitive inspections required by this paragraph.

(c) If any cracking is found during any inspection required by paragraph (a) of this AD: Before further flight, determine if the cracking can be repaired per Part I of the Accomplishment Instructions of EMBRAER Service Bulletin 145–53–0037, dated April 30, 2003; or Service Bulletin 145LEG–53–0010, dated June 5, 2003; as applicable.

(1) If the cracking can be repaired: Before further flight, repair the cracking per Part I of the Accomplishment Instructions of the applicable service bulletin. Repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 200 flight hours or 90 days, whichever is first.

(2) If the cracking cannot be repaired: Before further flight, replace the APU firewall with a new firewall by accomplishing all of the actions per Part II of the Accomplishment Instructions of the applicable service bulletin. Accomplishment of the replacement terminates the repetitive inspections required by paragraphs (b) and (c)(1) of this AD.

Optional Terminating Action

(d) Replacement of the APU firewall with a new firewall by accomplishing all of the actions per Part II of the Accomplishment Instructions of EMBRAER Service Bulletin 145–53–0037, dated April 30, 2003; or 145LEG–53–0010, dated June 5, 2003; as applicable; constitutes terminating action for the repetitive inspections required by paragraphs (b) and (c)(1) of this AD.

Alternative Methods of Compliance

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

Incorporation by Reference

(f) The actions shall be done in accordance with of EMBRAER Service Bulletin 145–53–0037, dated April 30, 2003; or EMBRAER Service Bulletin 145LEG–53–0010, dated June 5, 2003; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.nara.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in Brazilian airworthiness directive 2003–07–02, dated August 18, 2003.

Effective Date

(g) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 21, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9762 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–275–AD; Amendment 39–13603; AD 2004–09–14]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767 Series Airplanes Powered by General Electric or Pratt & Whitney Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 767 series airplanes powered by General Electric or Pratt & Whitney engines, that currently requires repetitive inspections to detect discrepancies of the four aft-most fastener holes in the horizontal tangs of the midspar fitting of the strut, and corrective actions, if necessary. That AD also provides an optional terminating action for repetitive inspections. This amendment expands the area on which the inspections are required. The actions specified by this AD are intended to prevent fatigue cracking in the primary strut structure and reduced structural integrity of the strut, which could result in separation of the strut and engine. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002, as listed in the regulations, is approved by the Director of the Federal Register as of June 9, 2004.

The incorporation by reference of Boeing Service Bulletin 767–54A0101, Revision 1, dated February 3, 2000, as listed in the regulations, was approved previously by the Director of the Federal Register as of May 15, 2001 (66 FR 18523, April 10, 2001).

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Suzanne Masterson, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (425) 917–6441; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2001–07–05, amendment 39–12170 (66 FR 18523, April 10, 2001), which is applicable to certain Boeing Model 767 series airplanes powered by General Electric or Pratt & Whitney engines, was published in the **Federal Register** on December 8, 2003 (68 FR 68308). The action proposed to continue to require repetitive inspections to detect discrepancies of the four aft-most fastener holes in the horizontal tangs of the midspar fitting of the strut, and corrective actions, if necessary. The action also proposed to continue to provide an optional terminating action for repetitive inspections. In addition, the action proposed expanding the area on which the inspections are required.

Comments

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

Concurs With the Proposed AD

One commenter concurs with the contents of the proposed AD.

Request To Clarify the Difference Between the Proposed AD and the Service Bulletin

One commenter requests clarification of the difference between the proposed AD and the service bulletin. The commenter's understanding of the intent of the "Difference Between Proposed Rule and Service Bulletin" paragraph of the proposed AD is that operators are allowed to inspect the four forward fastener holes not inspected per paragraph (a)(1), (a)(2), or (b) of the proposed AD at the next repetitive inspection specified in Table 1 of the proposed AD for all eight fastener holes. However, the commenter notes that paragraph (e) of the proposed AD requires, within 10,000 total flight cycles or 600 flight cycles after the effective date of this AD, whichever occurs later, inspection of all eight aft-most fastener holes or the four forward fastener holes not inspected per paragraph (a)(1), (a)(2), or (b) of the proposed AD. The commenter states that paragraph (e) appears to contradict the "Difference Between Proposed Rule and Service Bulletin" paragraph in that the compliance time of within 600 flight cycles specified by paragraph (e) would require the inspection of the four fastener holes not inspected per paragraph (a)(1), (a)(2), or (b) prior to the next repetitive inspection specified in Table 1 of the proposed AD.

The FAA agrees that clarification of the difference between the proposed AD and the service bulletin is necessary in the final rule. The commenter is correct in its understanding of paragraph (e) that the compliance time of within 600 flight cycles would require the inspection of the four fastener holes not inspected per paragraph (a)(1), (a)(2), or (b) prior to the next repetitive inspection specified in Table 1 of the proposed AD. Our intention in the "Difference Between Proposed Rule and Service Bulletin" paragraph was to allow operators to inspect the four forward fastener holes inspected per paragraph (a)(1), (a)(2), or (b) of the proposed AD at the next repetitive inspection specified in Table 1 of the proposed AD. In our explanation in that paragraph, we did not include the phrase "not inspected per paragraph (a)(1), (a)(2), or (b)" when we stated, "during the first detailed inspection, this proposed AD allows for the inspection of only four of the aft most fastener holes." However, no change to the final rule is necessary in this regard, since the "Difference Between Proposed Rule and Service Bulletin" paragraph is not restated in the final rule.

Request To Revise Wording in Paragraph (f) of the Proposed AD

One commenter requests that the wording in paragraph (f) of the proposed AD be revised to "Perform the follow-on actions specified in paragraph (a)(1) or (a)(2) of this AD." The commenter states that if no cracking or discrepancy is detected during the inspections required by paragraph (e) of the proposed AD, paragraph (f) requires operators to "Perform the follow-on actions specified in paragraph (a)(2)(i) or (a)(2)(ii) of this AD * * * and repeat the inspections of all eight aft-most fastener holes thereafter at the applicable intervals specified in Table 1 of this AD." The commenter contends this implies that the detailed inspection required by paragraph (a)(1) of the proposed AD is not allowed as an option for repeat inspections. However, the commenter points out that Table 1 of the proposed AD implies that detail inspections are an option. Revising the

wording to "Perform the follow-on actions specified in paragraph (a)(2)(i) or (a)(2)(ii) of this AD" would allow either detailed inspections or high frequency eddy current (HFEC) inspections for the repeat inspections.

We agree with the commenter that paragraph (f) needs to be revised. Either detailed inspections or HFEC inspections are allowed for the repeat inspections. However, we do not agree with the wording suggested by the commenter. Follow-on actions specified in paragraphs (a)(2)(i) and (a)(2)(ii), as applicable, are required if operators did the HFEC inspections required by paragraph (a)(2). There are no follow-on actions if operators did the detailed inspection required by paragraph (a)(1). Repeat inspections are required for operators that did either the detailed inspection or the HFEC inspections. We have revised paragraph (f) of the final rule and added paragraph (g) to the final rule to clarify this issue. Also, we have revised the paragraph numbering for the remainder of the final rule accordingly.

Request To Allow an Alternate Sealant

One commenter requests that part number (P/N) RTV108 be allowed as an alternate sealant to P/N BMS 5–95 for actions required by paragraph (d) of the proposed AD. The commenter did not submit justification for this request. The commenter did refer to Boeing's concurrence with this substitution via a telex but the telex was not submitted.

We do not agree with the request to allow P/N RTV108 as an alternate sealant. However, under the provisions of paragraph (k) of the final rule, we may consider requests for approval of an alternative method of compliance if sufficient data are submitted to substantiate that such a design change would provide an acceptable level of safety.

Clarification of Corrective Action Requirements

The corrective actions specified in paragraph (h) of the proposed AD are to be accomplished "if any cracking or discrepancy is detected during any inspection required by paragraph (e) of this AD." Since paragraphs (f) and (g) of the final rule require the repetitive inspections specified in paragraph (e), we determined that adding paragraphs (f) and (g) to paragraph (h) of the final rule would clarify the corrective action requirements. Accordingly, we have revised paragraph (h) of the final rule: "If any cracking or discrepancy is detected during any inspection required by paragraphs (e), (f), or (g) of this AD * * *"

Conclusion

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

Cost Impact

There are approximately 625 airplanes of the affected design in the worldwide fleet. The FAA estimates that 263 airplanes of U.S. registry will be affected by this AD.

The detailed inspection that is required in this AD action will take approximately 1 work hour per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the required inspection on U.S. operators is estimated to be $17,095, or $65 per airplane, per inspection cycle.

The eddy current inspection that is required by the AD action will take approximately 3 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the required inspection on U.S. operators is estimated to be $51,285, or $195 per airplane, per inspection cycle.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by removing amendment 39–12170 (66 FR 18523, April 10, 2001), and by adding a new airworthiness directive (AD), amendment 39–13603, to read as follows:

2004–09–14 Boeing: Amendment 39–13603. Docket 2002–NM–275–AD. Supersedes AD 2001–07–05, Amendment 39–12170.

Applicability: Model 767 series airplanes, as listed in Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking in the primary strut structure and reduced structural integrity of the strut, which could result in separation of the strut and engine, accomplish the following:

Requirements of AD 2001–07–05

Repetitive Inspections

(a) Except as provided by paragraph (b) of this AD, before the accumulation of 10,000 total flight cycles, or within 600 flight cycles after May 15, 2001 (the effective date of AD 2001–07–05, amendment 39–12170 (66 FR 18523, April 10, 2001), whichever occurs later: Accomplish the inspections required by paragraph (a)(1) or (a)(2) of this AD, as applicable.

(1) Perform a detailed inspection of the four aft-most fastener holes in the horizontal tangs of the midspar fitting of the strut to detect cracking, in accordance with Part 1, "Detailed Inspection," of the

Accomplishment Instructions of Boeing Service Bulletin 767–54A0101, Revision 1, dated February 3, 2000. If no cracking is detected, repeat the inspection thereafter at the applicable intervals specified in Table 1, "Reinspection Intervals for Part 1—Detailed Inspection" included in Figure 1 of the service bulletin.

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

(2) Perform a high frequency eddy current inspection of the four aft-most fastener holes in the horizontal tangs of the midspar fitting of the strut to detect discrepancies (cracking, incorrect fastener hole diameter), in accordance with Part 2, "High Frequency Eddy Current (HFEC) Inspection," of the Accomplishment Instructions of the service bulletin. Accomplish the requirements specified in paragraph (a)(2)(i) or (a)(2)(ii) of this AD, as applicable; and repeat the inspection thereafter at the applicable intervals specified in Table 2, "Reinspection Intervals for Part 2—HFEC Inspection" included in Figure 1 of the service bulletin.

(i) If no cracking is detected and the fastener hole diameter is less than or equal to 0.5322 inch, before further flight, rework the hole in accordance with Part 3 of the Accomplishment Instructions of the service bulletin.

(ii) If no cracking is detected and the fastener hole diameter is greater than 0.5322 inch, before further flight, accomplish the requirements specified in either paragraph (c)(1) or (c)(2) of this AD.

(b) For airplanes on which the two aft-most fasteners have been inspected in accordance with Boeing Service Bulletin 767–54A0101, Revision 1, dated February 3, 2000, prior to May 15, 2001: Perform the initial inspection of the four aft-most fasteners in accordance with paragraph (a) of this AD before the accumulation of 10,000 total flight cycles, or within 1,500 flight cycles after May 15, 2001, whichever occurs later.

Corrective Actions

(c) If any cracking is detected after accomplishment of any inspection required by paragraph (a) of this AD, before further flight, accomplish the requirements specified in either paragraph (c)(1) or (c)(2) of this AD.

(1) Accomplish the terminating action specified in Part 4 of the Accomplishment Instructions of Boeing Service Bulletin 767–54A0101, Revision 1, dated February 3, 2000; or Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002. Accomplishment of this paragraph terminates the requirements of this AD.

(2) Replace the midspar fitting of the strut with a serviceable part, or repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. Repeat the applicable inspection thereafter at the applicable time specified in paragraph (a)(1) or (a)(2) of this AD.

(d) If any discrepancies (cracking, incorrect fastener hole diameter) are detected during any inspection required by paragraph (a) of this AD, for which the service bulletin specifies that the manufacturer may be contacted for disposition of those repair conditions: Before further flight, accomplish the corrective actions (including fastener hole rework and/or midspar fitting replacement) in accordance with a method approved by the Manager, Seattle ACO; or in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

New Requirements of This AD

Additional Inspections

(e) Prior to the accumulation of 10,000 total flight cycles, or within 600 flight cycles after the effective date of this AD, whichever occurs later: Perform the inspections specified in paragraph (a)(1) or (a)(2) of this AD, as applicable, on all eight aft-most fastener holes or the four forward fastener holes in the group of eight aft-most fastener holes not inspected per paragraph (a)(1), (a)(2), or (b) of this AD. The inspection must be done per the Accomplishment Instructions in Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002. Accomplishment of the applicable inspection on all eight aft-most fastener holes constitutes terminating action for the repetitive inspection requirements of paragraphs (a)(1), (a)(2), and (b) of this AD.

(f) If no cracking or discrepancy is detected during any detailed inspection required by paragraph (e) of this AD, repeat the inspections of all eight aft-most fastener holes thereafter at the applicable intervals specified in Table 1 of this AD.

(g) If no cracking or discrepancy is detected during any HFEC inspection required by paragraph (e) of this AD: Perform the follow-on actions specified in paragraph (a)(2)(i) or (a)(2)(ii) of this AD, as applicable, per the Accomplishment Instructions in Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002; and repeat the inspections of all eight aft-most fastener holes thereafter at the applicable intervals specified in Table 1 of this AD.

TABLE 1.—REPETITIVE INSPECTION INTERVALS FOR ALL EIGHT AFT-MOST FASTENER HOLES

If—	Repetitive intervals—
(1) All eight aft-most fastener holes were inspected per paragraph (e) of this AD:	At the applicable intervals specified in Table 1, "Reinspection Intervals for Part 1—Detailed Inspection," or Table 2, "Reinspection Intervals for Part 2—HFEC Inspection," as applicable. Both tables are included in Figure 1 of the service bulletin.
(2) Only the four forward fastener holes in the group of eighnt aft-most fastener holes were inspected per paragraph (e) of this AD:	At the next scheduled repetitive inspection required by paragraph (a)(1) or (a)(2) of this AD, as applicable. Thereafter at the applicable intervals specified in Table 1, "Reinspection Intervals for Part 1—Detailed Inspection," or Table 2, "Reinspection Intervals for Part 2—HFEC Inspection," as applicable. Both tables are included in Figure 1 of the service bulletin.

Corrective Actions

(h) If any cracking or discrepancy is detected during any inspection required by paragraphs (e), (f), or (g) of this AD, before further flight: Accomplish the corrective actions described in paragraph (c) of this AD, per the Accomplishment Instructions in Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002, except as provided in paragraph (d) of this AD.

Service Bulletin Revisions

(i) Accomplishment of the terminating action in paragraph (c)(1) of this AD, per the original release of Boeing Service Bulletin 767–54A0101, dated September 23, 1999; or Revision 2 of Boeing Service Bulletin 767–54A0101, dated January 10, 2002; is acceptable for compliance with the requirements of this AD. As of the effective date of this AD, only Revision 3 of Boeing Service Bulletin 767–54A0101, dated September 5, 2002, may be used for accomplishment of the terminating action in paragraph (c)(1) of this AD.

Inspections Accomplished Per Previous Issue of Service Bulletin

(j) Inspections required by paragraphs (a) and (b) of this AD that are accomplished before the effective date of this AD per Revision 2 of Boeing Service Bulletin 767–54A0101, dated January 10, 2002; or Revision 3 of Boeing Service Bulletin 767–54A0101, dated September 5, 2002; are considered acceptable for compliance with the corresponding action specified in this AD.

Alternative Methods of Compliance

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

Incorporation by Reference

(l) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Service Bulletin 767–54A0101, Revision 1, dated February 3, 2000; and Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002; as applicable.

(1) The incorporation by reference of Boeing Service Bulletin 767–54A0101, Revision 3, dated September 5, 2002, is approved by the Director of the Federal Register, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Service Bulletin 767–54A0101, Revision 1, dated February 3, 2000, was approved previously by the Director of the Federal Register as of May 15, 2001 (66 FR 18523, April 10, 2001).

(3) Copies may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Effective Date

(m) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 22, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–9761 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–58–AD; Amendment 39–13607; AD 2004–09–18]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes, that requires repetitively inspecting the seat rails located in the passenger cabin for evidence of damage and corrosion, repairing any damage or corrosion, and replacing any floor panels found to be "soft" due to ingress of moisture. This action is necessary to detect and correct corrosion on the seat rails for the passenger seats, which could result in the reduced structural integrity of the passenger seats, detachment of the seats from the seat rails, and injury to passengers. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes was published in the **Federal Register** on September 25, 2003 (68 FR 55321). That action proposed to require repetitively inspecting the seat rails located in the passenger cabin for evidence of damage and corrosion, repairing any damage or corrosion, and replacing any floor panels found to be "soft" due to ingress of moisture.

Comments

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

Request To Withdraw Proposed AD

The commenter, an operator, states that the proposed AD is an unnecessary burden to operators. The commenter suggests that instead of an issuing an AD, the maintenance review board (MRB) report be revised to include the actions required by the proposed AD. The commenter states that it currently performs numerous corrosion inspections on its fleet of Jetstream Model 4101 airplanes using procedures specified in the commenter's maintenance programs. The commenter also notes that BAE Systems (Operations) Limited Service Bulletin J41–53–050, dated January 25, 2002, specifies that when the inspection and procedure recommended in the service bulletin are published in the MRB report and the maintenance planning document (MPD), the service bulletin will be canceled.

The FAA infers that the commenter is requesting that the proposed AD be withdrawn. We do not agree. The procedures specified in MRB reports are not mandatory. Therefore, we must issue an AD to ensure that the identified unsafe condition is properly addressed. We acknowledge that some operators may currently have maintenance programs which address the unsafe condition. If a program is adequate, an operator would already be in compliance with the AD, or would be in a position to obtain approval for an alternative method of compliance with the AD (i.e., to follow the operator's current program rather than revise it to comply with the AD). Our obligation to issue the AD and address an unsafe condition remains, however; the rule must apply to everyone to ensure that all affected airplanes are covered, regardless of who operates them. Furthermore, the airworthiness authority for the state of design issued an airworthiness directive mandating the same actions required by this AD.

Request To Revise Cost Impact Information

The commenter notes that the figure in the cost impact section of the proposed AD does not include incidental costs, such as the time required to gain access and close up an airplane. The commenter states that these costs are not incidental, and that the majority of time required to perform the detailed inspection required by the proposed AD involves removing and reinstalling the lavatory, galley, passenger cabin seats, carpets, and cabin floor panels, to gain access to and close

up the areas to be inspected. The commenter also states that 30 work hours to perform the detailed inspection is not a true depiction of the required man hours, and that 300 work hours would be more accurate.

We infer that the commenter is requesting that the cost impact section of the proposed AD be revised. We do not agree. As stated in the proposed AD, "the figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions." The specific action required by the proposed AD is a repetitive detailed inspection of the seat rails located in the passenger cabin. The time necessary for gaining access to and closing the inspection area is incidental. The final rule has not been changed regarding this issue.

Conclusion

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

Cost Impact

The FAA estimates that 57 airplanes of U.S. registry will be affected by this AD, that it will take approximately 30 work hours per airplane to accomplish the required inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $111,150, or $1,950 per airplane, per inspection cycle.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–18 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–13607. Docket 2002–NM–58–AD.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct corrosion on the seat rails for the passenger seats, which could result in the reduced structural integrity of the passenger seats, detachment of the seats from the seat rails, and injury to passengers, accomplish the following:

Inspection and Corrective Actions

(a) Within 1 year after the effective date of this AD, do a detailed inspection of the seat rails located in the passenger cabin, two above and two below the floor panels, for evidence of damage (missing paint from the frames or support angles) or corrosion, in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin J41–53–050, dated January 25, 2002.

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

(1) If no damage (missing paint from the frames or support angles) or corrosion is found, repeat the detailed inspection thereafter at intervals not to exceed 2 years.

(2) If any damage (missing paint from the frames or support angles) is found, before further flight, re-protect the area per the Accomplishment Instructions of the service bulletin. Repeat the detailed inspection thereafter at intervals not to exceed 2 years.

(3) If any corrosion is found, before further flight, repair in accordance with the Accomplishment Instructions of the service bulletin. Where the service bulletin specifies that the manufacturer may be contacted for disposition of certain repair conditions, repair per a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Civil Aviation Authority (or its delegated agent). Repeat the detailed inspection thereafter at intervals not to exceed 2 years.

(b) During any inspection required by paragraph (a) of this AD: If any floor panels are found to be "soft" due to ingress of moisture, before further flight, replace them in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin J41–53–050, dated January 25, 2002.

Submission of Information to the Manufacturer Not Required

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

Alternative Methods of Compliance

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

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with BAE Systems (Operations) Limited Service Bulletin J41–53–050, dated January 25, 2002. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in British airworthiness directive 005–01–2002.

Effective Date

(f) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 26, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10020 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–120–AD; Amendment 39–13606; AD 2004–09–17]

RIN 2120–AA64

Airworthiness Directives; Dornier Model 328–100 and –300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Dornier Model 328–100 and –300 series airplanes, that requires a one-time inspection for fracture and/or breakage of the hinge bolt of the output rod of the rudder spring tab lever assembly, and corrective action if necessary. This AD also requires modification of the hinge bolt. This action is necessary to prevent fracture and/or breakage of the hinge bolt, which could result in migration of the bolt tail, a loose spring tab, and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from AvCraft Aerospace GmbH, P.O. Box 1103, D–82230 Wessling, Germany. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Dornier Model 328–100 and –300 series airplanes was published in the **Federal Register** on March 5, 2004 (69 FR 10379). That action proposed to require a one-time inspection for fracture and/or breakage of the hinge bolt of the output rod of the rudder spring tab lever assembly, and corrective action if necessary. That action also proposed to require modification of the hinge bolt.

Comments

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

Conclusion

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

Cost Impact

We estimate that 112 airplanes of U.S. registry will be affected by this AD, that it will take about 1 work hour per airplane to accomplish the inspection and modification, and that the average labor rate is $65 per work hour. Required parts will cost about $205 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $30,240, or $270 per airplane.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–17 Fairchild Dornier GmbH (Formerly Dornier Luftfahrt GmbH): Amendment 39–13606. Docket 2003–NM–120–AD.

Applicability: All Model 328–100 and 328–300 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent fracture and/or breakage of the hinge bolt of the output rod of the rudder spring tab lever assembly, which could result in migration of the bolt tail, a loose spring tab, and consequent reduced controllability of the airplane, accomplish the following:

One-Time Inspection/Corrective Action/ Modification

(a) Within 4 months after the effective date of this AD: Do a one-time detailed inspection of the hinge bolt of the output rod of the rudder spring tab lever assembly for fracture and/or breakage of the hinge bolt by doing all the applicable actions per the Accomplishment Instructions of Dornier Service Bulletin SB–328–27–423 (for Model 328–100 series airplanes) or SB–328J–27–159 (for Model 328–300 series airplanes), both dated February 4, 2002, as applicable.

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

(1) If no fracture or breakage is found: Before further flight, modify the hinge bolt by doing all the applicable actions per the Accomplishment Instructions of the applicable service bulletin.

(2) If any fracture or breakage is found: Before further flight, replace the bolt per a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Luftfahrt-Bundesamt (or its delegated agent); then modify the hinge bolt as required by paragraph (a)(1) of this AD.

Alternative Methods of Compliance

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

Incorporation by Reference

(c) Unless otherwise provided in this AD, the actions shall be done in accordance with Dornier Service Bulletin SB–328–27–423, dated February 4, 2002; or Dornier Service Bulletin SB–328J–27–159, dated February 4, 2002; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from AvCraft Aerospace GmbH, P.O. Box 1103, D–82230 Wessling, Germany. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 2: The subject of this AD is addressed in German airworthiness directives 2003–137 and 2003–143, both dated May 15, 2003.

Effective Date

(d) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 26, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10021 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–263–AD; Amendment 39–13605; AD 2004–09–16]

RIN 2120–AA64

Airworthiness Directives; Dornier Model 328–100 and –300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Dornier Model 328–100 and –300 series airplanes, that requires repetitive inspections of the bearing lugs of the rudder spring tab lever assembly for cracking, and corrective action if necessary. This action is necessary to prevent failure of the rudder flight control system due to such cracking, which could result in loss of rudder control and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from AvCraft Aerospace GmbH, P.O. Box 1103, D–82230 Wessling, Germany. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http//www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Dornier Model 328–100 and –300 series airplanes was published in the **Federal Register** on March 5, 2004 (69 FR 10381). That action proposed to require repetitive inspections of the bearing lugs of the rudder spring tab lever assembly for cracking, and corrective action if necessary.

Comments

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

Conclusion

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

Cost Impact

We estimate that 112 airplanes of U.S. registry will be affected by this AD, that it will take about 1 work hour per airplane to do the inspections, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $7,280. or $65 per airplane, per inspection cycle.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–16 Fairchild Dornier GmbH (Formerly Dornier Luftfahrt GmbH): Amendment 39–13605. Docket 200–NM–263–AD.

Applicability: All Model 328–100 and –300 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the rudder flight control system due to cracking of the bearing lugs of the rudder spring tab lever assembly, which could result in loss of rudder control and consequent reduced controllability of the airplane, accomplish the following:

Repetitive Inspections

(a) Within 400 flight hours or 2 months after the effective date of this AD, whichever is first: Do detailed and eddy current inspections for cracking of the bearing lugs of the rudder spring tab lever assembly by doing all the actions per Paragraphs 2.A., 2.B., and 2.D. of the Accomplishment Instructions of Dornier Alert Service Bulletin ASB–328–27–036 (for Model 328–100 series airplanes); or ASB–328J–27–013 (for Model 328–300 series airplanes); both dated February 12, 2003; as applicable. If no cracking is found, repeat the inspections thereafter at intervals not to exceed 24 months.

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

Corrective Action/Repetitive Inspections

(b) If any cracking is found during any inspection required by paragraph (a) of this AD: Before further flight, replace the spring tab lever assembly with a new assembly by doing all the actions per Paragraph 2.C. of the Accomplishment Instructions of Dornier Alert Service Bulletin ASB–328–27–036; or ASB–328J–27–013, both dated February 12, 2003; as applicable. Repeat the inspections required by paragraph (a) of this AD thereafter at intervals not to exceed 24 months.

(c) Dornier Alert Service Bulletins ASB–328–27–036 and ASB–328J–27–013, both dated February 12, 2003, recommend reporting crack findings and returning damaged lever assemblies to the manufacturer, but this AD does not contain such requirements.

Note 2: There is no terminating action available at this time for the repetitive inspections required by this AD.

Alternative Methods of Compliance

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

Incorporation by Reference

(e) The actions shall be done in accordance with Dornier Alert Service Bulletin ASB–328–27–036, dated February 12, 2003; or Dornier Alert Service Bulletin ASB–328J–27–013, dated February 12, 2003; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from AvCraft Aerospace GmbH, P.O. Box 1103, D–82230 Wessling, Germany. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, Call 202–741–6030, or go to: *http//www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 3: The subject of this AD is addressed in German airworthiness directives 2003–383 and 2003–384, both dated November 13, 2003.

Effective Date

(f) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 26, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10022 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–253–AD; Amendment 39–13613; AD 2004–09–23]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F27 Mark 100, 200, 300, 400, 500, 600, and 700 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Fokker Model F27 Mark 100, 200, 300, 400, 500, 600, and 700 series airplanes, that requires repetitive inspections of the control panel of the direct current (DC) generator for discrepancies, and replacement of any discrepant part. This action is necessary to prevent loss of both DC generator systems and loss of several other airplane systems, which could lead to the pilot's inability to maintain controlled flight. This action is intended to address the identified unsafe condition.

DATES: Effective June 9, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 9, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands. This information may be examined at the Federal Aviation Administration (PAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA,

Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Fokker Model F27 Mark 100, 200, 300, 400, 500, 600, and 700 series airplanes was published in the **Federal Register** on July 29, 2003 (68 FR 44493). That action proposed to require repetitive inspections of the control panel of the direct current (DC) generator for discrepancies, and replacement of any discrepant part.

Comments

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

The commenter asks that the wording specified in paragraph (b) of the proposed AD that states, "* * * prior to further flight, replace any discrepant part with a new part having the same part number * * *" be changed due to limited availability of new parts. The commenter suggests the following wording: "* * * prior to further flight, replace any discrepant part with a serviceable part having the same part number. * * *" The commenter states that finding new internal parts for this unit may cause unnecessary delays in returning the airplane to service, when a serviceable part is acceptable for the replacement.

The FAA agrees with the intent of the commenter's request. We have changed paragraph (b) of this final rule to allow for installation of either new or serviceable parts.

Conclusion

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

Cost Impact

The FAA estimates that 39 airplanes of U.S. registry will be affected by this AD, that it will take about 4 work hours per airplane to accomplish the inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $10,140, or $260 per inspection cycle.

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

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding the following new airworthiness directive:

2004–09–23 Fokker Services B.V: Amendment 39–13613. Docket 2002–NM–253–AD.

Applicability: All Model F27 Mark 100, 200, 300, 400, 500, 600, and 700 series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of both direct current (DC) generator systems and loss of several other airplane systems, which could lead to the pilot's inability to maintain controlled flight, accomplish the following:

Initial and Repetitive Inspections

(a) Within 60 days after the effective date of this AD, do a detailed inspection of the control panel of the DC generator for discrepancies, per the Accomplishment Instructions of Fokker Service Bulletin F27/24–79, dated April 28, 1999. Repeat the inspection thereafter at intervals not to exceed 4,000 flight hours.

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

(b) If any discrepancy is found during any inspection required by paragraph (a) of this AD, prior to further flight, replace any discrepant part with a new or serviceable part having the same part number, per the Accomplishment Instructions of Fokker Service Bulletin F27/24–79, dated April 28, 1999.

Note 2: The service bulletin references Bendix (Allied Signal) publication R766–28, Technical Manual, Maintenance Instructions with Illustrated Parts Catalog for Generator Control Panel type no. 1539–11–B and 1539–12–B, paragraphs 2–12 through 2–15, as an additional source of service information for accomplishing the inspections and any parts replacement required by paragraphs (a) and (b) of this AD.

Alternative Methods of Compliance

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

Incorporation by Reference

(d) The actions shall be done in accordance with Fokker Service Bulletin F27/24–79, dated April 28, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Fokker Services B.V., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on

the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 3: The subject of this AD is addressed in Dutch airworthiness directive 1999–093, dated June 30, 1999.

Effective Date

(e) This amendment becomes effective on June 9, 2004.

Issued in Renton, Washington, on April 22, 2004.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10138 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30412; Amdt. No. 448]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

EFFECTIVE DATE: 0901 UTC, June 10, 2004.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–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 amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment 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 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. 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 95

Airspace, Navigation (air).

Issued in Washington, DC on April 30, 2004.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, June 10, 2004.

■ 1. The authority citation for part 95 continues to read as follows:

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

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS

[Amendment 448—Final Effective Date June 10, 2004]

From	To	MEA
§ 95.6001 Victor Routes—U.S.		
§ 95.6003 VOR Federal Airway 3 Is Amended To Read in Part		
Savannah, GA VORTAC	Owens, SC FIX	*3,000
*1,500–MOCA		
Owens, SC FIX	Vance, SC VORTAC	2,000
§ 95.6016 VOR Federal Airway 16 is Amended To Read in Part		
Damas, TN FIX	*Stove, VA FIX	7,500
*7,500–MCA Stove FIX SW BND		
Stove, VA FIX	Speel, VA FIX	6,000
Speel, VA FIX	Pulaski, VA VORTAC	5,400

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS—Continued

[Amendment 448—Final Effective Date June 10, 2004]

From	To	MEA
§ 95.059 VOR Federal Airway 58 Is Amended To Read in Part		
Grace, PA FIX	*Eared, PA FIX	3,400
*3,400–MRA		
§ 95.6136 VOR Federal Airway 136 Is Amended To Read in Part		
Damas, TN FIX	*Stove, VA FIX	7,500
*7,500–MCA Stove FIX SW BND		
Stove, VA FIX	Speel, VA FIX	6,000
Speel, VA FIX	Pulaski, VA VORTAC	5,400
§ 95.6226 VOR Federal Airway 226 Is Amended To Read in Part		
Grace, PA FIX	*Earned, PA FIX	3,400
*4,000–MRA		
Earned, PA FIX	Clarion, PA VOR/DME	3,400
§ 95.6330 VOR Federal Airway 330 Is Amended To Read in Part		
Osity, ID FIX	*Jackson, WY VOR/DME	14,000
*13,200–MCA Jackson VOR/DME		
§ 95.6465 VOR Federal Airway 465 Is Amended To Read in Part		
Malad City, ID VOR/DME	Lundi, ID FIX	
	SW BND	11,400
	NE BND	14,000
Lundi, ID FIX	Jackson, WY VOR/DME	*15,000
*13,100–MOCA		
§ 95.6520 VOR Federal Airway 520 Is Amended To Read in Part		
Dubois, ID VORTAC	*Jackson, WY VOR/DEM	15,000
*14,600–MCA Jackson VOR/DME		

From	To	Changeover Points	
		Distance	From
§ 95.8003 VOR Federal Airway Changeover Points			
V–16 Is Amended To Delete Changeover Point			
Holston Mountain, TN VORTAC	Pulaski, VA VORTAC	69	Holston Mountain
V–136 Is Amended To Delete Changeover Point			
Holston Mountain, TN VORTAC	Pulaski, VA VORTAC	69	Holston Mountain
V–328 Is Amended To Delete Changeover Point			
Big Piney, WY VOR/DME	Jackson, WY VOR/DM	51	Big Piney
V–330 Is Amended To Delete Changeover Point			
Idaho Falls, ID VOR/DME	Jackson, WY VOR/DME	48	Idaho Falls
V–465 Is Amended To Add Changeover Point			
Malad City, ID VOR/DME	Jackson, WY VOR/DME	60	Malad City
V–520 Is Amended To Delete Changeover Point			
Dubois, ID VORTAC	Jackson, WY VOR/DME	60	Dubois

[FR Doc. 04–10237 Filed 5–4–04; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Ivermectin Liquid

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an abbreviated new animal drug application (ANADA) filed by Veterinary Laboratories, Inc. The ANADA provides for oral use of ivermectin solution in horses for the treatment and control of various species of internal and cutaneous parasites.

DATES: This rule is effective May 5, 2004.

FOR FURTHER INFORMATION CONTACT: Lonnie W. Luther, Center for Veterinary Medicine (HFV–104), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–8549, e-mail: *lluther@cvm.fda.gov*.

SUPPLEMENTARY INFORMATION: Veterinary Laboratories, Inc., 12340 Santa Fe Dr., Lenexa, KS 66215, filed ANADA 200–341 that provides for oral use of SPARMECTIN–E (ivermectin) Liquid for Horses for the treatment and control of various species of internal and cutaneous parasites. Veterinary Laboratories' SPARMECTIN–E Liquid for Horses is approved as a generic copy of Merial Ltd.'s EQVALAN (ivermectin) Oral Liquid for Horses, approved under NADA 140–439. The ANADA is approved as of March 8, 2004, and the regulations are amended in 21 CFR 520.1195 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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

List of Subject in 21 CFR Part 520

Animal drugs.

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

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

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

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

§ 520.1195 [Amended]

■ 2. Section 520.1195 is amended in paragraph (b)(1) by adding "000857" in numerical sequence.

Dated: April 23, 2004.

Catherine P. Beck,

Acting Director, Center for Veterinary Medicine.

[FR Doc. 04–10193 Filed 5–4–04; 8:45 am]
BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Moxidectin Gel

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Fort Dodge Animal Health, Division of Wyeth. The supplemental NADA provides for oral use of moxidectin gel in horses and ponies for the treatment and control of an additional species of small strongyle.

DATES: This rule is effective May 5, 2004.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7543, e-mail: *mberson@cvm.fda.gov*.

SUPPLEMENTARY INFORMATION: Fort Dodge Animal Health, Division of Wyeth, 800 Fifth St. NW., Fort Dodge, IA 50501, filed a supplement to NADA 141–087 for QUEST (moxidectin 2.0%) Gel, used for the treatment and control of various species of internal parasites in horses and ponies. The supplemental NADA provides for the addition of one new species of adult small strongyle and for the speciation of adult small strongyles in product labeling. The supplemental NADA is approved as of March 17, 2004, and 21 CFR 520.1452 is amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this approval qualifies for 3 years of marketing exclusivity beginning March 17, 2004. Exclusivity applies only to the new effectiveness claim for adult *Coronocyclus labratus* for which new data were required.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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

List of Subjects in 21 CFR Part 520

Animal drugs.

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

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

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

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

■ 2. Section 520.1452 is amended by revising the heading of paragraph (d) and by revising paragraph (d)(2) to read as follows:

§ 520.1452 Moxidectin gel.

* * * * *

(d) *Conditions of use in horses and ponies*—* * *

(2) *Indications for use.* For the treatment and control of large strongyles: *Strongylus vulgaris* (adults and L4/L5 arterial stages), *S. edentatus* (adult and tissue stages), *Triodontophorus brevicauda* (adults), and *T. serratus* (adults); small strongyles (adults): *Cyathostomum* spp., including *C. catinatum* and *C. pateratum*; *Cylicocyclus.* spp., including *C. insigne*, *C. leptostomum*, and *C. nassatus*; *Cyliocostephanus. spp.*, including *C. calicatus*, *C. goldi*, *C. longibursatus*, and *C. minutus*; *Coronocyclus* spp., including *C. coronatus*, *C. labiatus*, and *C. labratus*; and *Gyalocephalus capitatus*; small strongyles: undifferentiated lumenal larvae; encysted cyathostomes (late L3 and L4 mucosal cyathostome larvae); ascarids: *Parascaris equorum* (adults and L4 larval stages); pinworms: *Oxyuris equi* (adults and L4 larval stages); hairworms: *Trichostrongylus axei* (adults); large-mouth stomach worms: *Habronema muscae* (adults); and horse stomach bots: *Gasterophilus intestinalis* (2nd and 3rd instars) and *G. nasalis* (3rd instars). One dose also suppresses strongyle egg production for 84 days.

* * * * *

Dated: April 14, 2004.

Steven D. Vaughn,

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

[FR Doc. 04–10210 Filed 5–4–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 206

RIN 1010–AD04

Federal Oil Valuation

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: MMS is amending the existing regulations governing the valuation of crude oil produced from Federal leases for royalty purposes, and related provisions governing the reporting thereof. The current regulations became effective on June 1, 2000.

These amendments primarily affect which published market prices are most appropriate to value crude oil not sold at arm's length and what transportation deductions should be allowed.

DATES: *Effective date:* July 6, 2004.

FOR FURTHER INFORMATION CONTACT: Sharron L. Gebhardt, Lead Regulatory Specialist, Chief of Staff Office, Minerals Revenue Management, MMS, telephone (303) 231–3211, fax (303) 231–3781.

The principal authors of this rule are Mary A. Williams, Kenneth R. Vogel, and James P. Morris of Minerals Revenue Management, MMS, and Martin C. Grieshaber of Policy and Management Improvement, MMS, and Geoffrey Heath of the Office of the Solicitor, Department of the Interior.

SUPPLEMENTARY INFORMATION:

I. Background

The MMS is amending the existing regulations at 30 CFR 206.100 *et seq.*, governing the valuation of crude oil produced from Federal leases for royalty purposes, and related provisions governing the reporting thereof. The current regulations became effective on June 1, 2000 (June 2000 Rule).

After conducting several public workshops, MMS issued a proposed rule that was published in the **Federal Register** on August 20, 2003 (64 FR 50088). The original comment period for this proposed rule closed on September 19, 2003. However, MMS received requests to extend the comment period and on September 26, 2003, MMS reopened the comment period until November 10, 2003 (68 FR 55556).

The amendments do not alter the basic structure or underlying principles of the June 2000 Rule. In proposing these amendments, the Department of the Interior reaffirmed that the value for royalty purposes of crude oil produced from Federal leases is the value at or near the lease. However, in determining value at the lease of production not sold under an arm's-length contract, MMS is not restricted to a comparison to arm's-length sales of other production occurring in the field or area. MMS may begin with a "downstream" price or value, and determine value at the lease by deducting the costs of transporting oil to downstream sales points or markets, or by making appropriate adjustments for location and quality.

Federal lessees are not obligated to sell crude oil downstream of the lease. Lessees are at liberty to sell production at or near the lease, even if selling downstream might have resulted in a higher royalty value for the production than selling it at the lease. If lessees do choose to sell downstream, the choice to sell downstream does not make otherwise non-deductible costs deductible (for example, marketing costs). *See Independent Petroleum Association of America, et al.* v. *DeWitt*, 279 F.3d 1036 (DC Cir. 2002), *cert. denied sub nom., Independent Petroleum Association of America, et al.* v. *Watson*, 537 U.S. 1105 (2003). In addition, MMS may choose to use downstream values when a lessee sells to an affiliate at or near the lease.

II. Comments on the Proposed Rule

Public comments received in response to the proposed rule favored most of the proposed changes. MMS received some negative comments regarding the proposed method for valuing California and Alaska crude oil, some of the specifications of allowable transportation costs, and changing the rate of return on undepreciated capital investments in calculating non-arms-length transportation allowances. We will group the comments received and the MMS responses generally according to the order of the substantive provisions of the rule (with related changes to definitions), with discussion of miscellaneous technical changes thereafter. MMS received comments on the proposed rule from 27 respondents.

A. Changing to NYMEX-Based Valuation and Determining the NYMEX Price To Use for Valuation—§ 206.103

MMS proposed using New York Mercantile Exchange (NYMEX)-based value with a roll as one of the measures of value for production not sold at arm's length in all areas except for California, Alaska, and the Rocky Mountain Region where MMS proposed to use NYMEX-based value without the roll. In the Rocky Mountain Region, NYMEX-based value without the roll would be used as the revised third benchmark (proposed to be redesignated as § 206.103(b)(3)). The base NYMEX price would be adjusted for location and quality differentials and actual transportation costs back to the lease.

Summary of Comments: Fifteen respondents submitted comments on the use of NYMEX pricing. There were several comments about our rationale for changing from a spot market index price to NYMEX and adjusting for

location and quality differentials. Industry commenters generally supported using NYMEX, although they believe that spot market index prices are a workable starting point for valuation of oil not sold at arm's length. Some industry commenters believe that the NYMEX calendar month average is closer to the actual value of oil produced in the Rocky Mountain Region than the West Texas Intermediate (WTI) (Cushing, Oklahoma) spot prices prescribed as the third benchmark value in the June 2000 Rule. Industry comments were not opposed to retaining Alaska North Slope (ANS) spot prices as the basis for valuing oil produced in California and Alaska.

Industry commenters generally believe that the roll should not apply to oil produced in California, Alaska, or the Rocky Mountain Region. One industry group further suggested that the roll should not apply to oil produced in the Western Gulf of Mexico, or the San Juan Basin, or any other area that does not have a market center where physical exchanges occur between that market center and Cushing.

Industry believes that MMS should choose whether to include weekends and holidays in the calculation of the average NYMEX price, and is comfortable with MMS's choice to exclude them. Industry suggested that the three benchmarks and the alternative valuation provision for the Rocky Mountain Region are adequate.

State comments on the use of NYMEX were mixed. Two States supported the use of NYMEX. One State does not agree with using NYMEX as the third benchmark for the Rocky Mountain Region, and believes that non-arm's-length royalties should be determined by the affiliate's downstream sales price. The California State Controller's Office (SCO) strongly objected to using the adjusted NYMEX price for California and suggested retaining ANS spot prices. Several members of the California congressional delegation concurred with the California SCO comments.

MMS Response: MMS believes that, at this time, NYMEX futures prices probably represent a more reliable and better assessment of current oil values than spot prices. Use of the NYMEX price as the basis for royalty value has several advantages, not the least of which is the fact that the volume of transactions and the number of participants is so large that, at least theoretically, no one entity could manipulate the resultant price. This is an issue partly because of the recent publicity and questions about the information provided to spot price reporting services and the effect such potentially inaccurate information has on spot prices in general. In addition, there is only one NYMEX price, and it is available from any number of sources. There would be no question about the correct publication to use to obtain the applicable index price.

Further, various questions have arisen about the timing of application of index prices. Published spot prices for specific months generally represent the market's assessment of prices for crude oil delivered during that month, but determined between the 26th day of the month 2 months prior to the delivery month and the 25th day of the month immediately preceding the delivery month. MMS has reviewed the correlation between several public indicia of crude oil prices (*e.g.*, trading month spot prices, NYMEX prices, etc.) and the values actually used in paying royalties to MMS on crude oil sold at arm's length. This review demonstrated that calendar-month NYMEX prices (applying the roll, as discussed below, to production from areas outside the Rocky Mountain Region, California, and Alaska) have the highest correlation to reported arm's-length sales values of any publicly-available indices.

The June 2000 Rule used spot market index prices determined for the trading period that is closest to concurrent with the production month. However, this period is not consistent with the way industry does business. First, as explained above, the published spot market index price relevant to spot market deliveries during the production month is actually the price published the month before the month used to value the current month's production in the existing rule. For example, while the price determined in the period January 26 to February 25 may be the correct timing for spot sales at the market center for deliveries in March, that price may not reflect prices received in March for actual arm's-length sales by producers that are often made more contemporaneously with production. Second, the spot price used in the existing rule is not the price used for spot sales, but occurs 1 month later. It overlaps, but is not the same as, the production month. A price for production in March should be the most current and accurate information that a purchaser or seller would have at the time of production. The NYMEX prices are available on a real time basis to traders and, therefore, are the ones used most commonly to determine the base price of oil during the month of production. Comments received concur with the proposition that using the calendar month average of the daily NYMEX settlement prices will correlate more closely to prices received in the current production month than the index prices used in the existing rule.

A recent MMS review compared valuation of a common crude oil grade (Eugene Island) produced in the Gulf of Mexico using both the calendar month NYMEX price, with a roll (discussed below), and the spot market index price provisions of the existing crude oil valuation rule that became effective on June 1, 2000. The review found that the calendar month NYMEX price (with the roll) is advantageous to the public when futures prices in the out months are lower going forward (when the market is in "backwardation"). Existing spot market index price provisions, or the use of NYMEX without the roll, are advantageous to the public when futures prices in the out months are higher going forward (when the market is in "contango"). Using historical NYMEX data since the NYMEX oil market began in 1986, prices in the out months have been lower going forward approximately 60 percent of the time. Thus, taking a conservative and long-term approach to royalty valuation supports use of the NYMEX price with the roll.

MMS proposed to exclude weekends and holidays from the calculation of the average NYMEX price because NYMEX does not publish prices on those days. Commenters generally supported that choice and said that the agency should clearly choose either exclusion or inclusion. In addition, the WTI differential (based on WTI spot market prices) excludes weekends and holidays. In the final rule, MMS is adopting the proposal, and the rule excludes weekends and holidays from the calculation of the average NYMEX price.

MMS proposed the average NYMEX price as the basis for valuing oil produced in California and Alaska that is not sold at arm's length. MMS believes that choosing either ANS spot prices or NYMEX prices would lead to substantively the same result in royalty valuation over time. Publications that publish ANS spot prices also publish differentials between ANS and WTI crude oil at Cushing. The spot price for WTI at Cushing is similar to the NYMEX price. Thus, the NYMEX price adjusted by the differential between ANS and WTI at Cushing would yield a result very similar to ANS spot prices. After consideration of comments from the California SCO and related congressional comments, and because using ANS spot prices will be somewhat simpler than using NYMEX prices minus the WTI-ANS differential, MMS

has decided to retain adjusted ANS spot pricing for valuing crude oil produced from Federal leases in California and Alaska.

As a result of moving to NYMEX pricing generally but retaining ANS spot pricing for oil produced in California and Alaska, the references to "index price" in several sections of the existing rule are replaced by a reference to "ANS spot price."

The comments received supported MMS's proposal to use NYMEX prices as the third benchmark for valuing oil produced from leases in the Rocky Mountain Region that is not sold at arm's length if the lessee does not have an approved tendering program. As in the proposed rule, the final rule retains the other three benchmarks for the Rocky Mountain Region from the existing rule.

MMS proposed applying a roll as an adjustment to the initial NYMEX prices for oil produced from leases outside the Rocky Mountain Region, California, and Alaska. One of the reasons that MMS proposed use of the roll was its own experience in selling crude oil taken as royalty in kind in the Gulf of Mexico under 43 U.S.C. 1353 and sold competitively to small refiners. MMS found that a substantial portion of the crude oil produced in the Gulf, and sold at arm's length was sold on the basis of a NYMEX price methodology, including the roll. MMS found that use of the roll resulted in increased return to the public on oil taken in kind and sold.

The roll is a commonly used measure of the trend of NYMEX prices for future deliveries in those areas. Prices reported for futures contracts on the NYMEX are not limited to deliveries in the prompt month as defined in this rule. Rather, trades could be made in March 2003 for deliveries in April 2003 or in several subsequent months. Due to the fact that the NYMEX prices are future price estimates and, therefore, inherently reflect increases or decreases in prices based upon expected trends, an adjustment to such estimates may be appropriate to extrapolate back to current price estimates, upon which royalty calculations are based. This adjustment factor is the roll, which is added to the initial NYMEX price when prices for the out months are in backwardation (to correct for the fact that the current price should be higher than the future price in this circumstance), and subtracted from the initial NYMEX price when prices for the out months are in contango (to correct for the fact that the current price should be lower than the future price in this circumstance). MMS proposed to add the roll to the initial NYMEX price used as the basis for royalty valuation, except for leases in the Rocky Mountain Region, California, and Alaska. As explained in the preamble to the proposed rule, the roll is not commonly used in transactions involving oil produced in the Rocky Mountain Region, California, or Alaska. For California and Alaska, the roll is irrelevant in the final rule because MMS is retaining ANS spot prices as the basis for royalty value. Commenters generally agreed that the roll should not be applied to oil produced in the Rocky Mountain Region, California, or Alaska.

MMS does not agree with the suggestion of one commenter to apply the roll to production from the Gulf of Mexico that goes to market centers from which there are trades to Cushing, but not to production that goes to market centers from which there are not trades to Cushing. Determining which production from which leases goes to which market centers, and whether it is common for those market centers to have trades to Cushing, would add substantial administrative burden and cost to both royalty payors and the Government. Further, there was no explanation of why this alleged difference was relevant to applying the roll.

The proposed use of the roll also necessitated a corresponding proposed change to the definition of "trading month." In § 206.101 of the existing rule, "trading month" is defined in terms of spot market sales. MMS proposed to change the definition of "trading month" to conform with NYMEX definitions and practice. It will be used only to calculate the roll. MMS received no comments opposing that change, and is adopting it in the final rule.

Based on the comments received, the final rule prescribes the NYMEX price with a roll as the royalty valuation basis for production from areas outside of the Rocky Mountain Region, California, and Alaska that is not sold at arm's length, and NYMEX with no roll as the third benchmark for production from the Rocky Mountain Region.

Additionally, in § 206.103(b), the paragraphs for the four benchmarks in the Rocky Mountain Region are renumbered (b)(1) through (b)(4) to correspond with the benchmark numbers as proposed. Industry supported the clarification.

While MMS expects the basic operation of the NYMEX market to be the same for the foreseeable future, it is not so clear that the roll will be a permanent feature of the marketplace. When MMS believes that using the roll is no longer a common industry practice, the MMS Director may terminate the use of the roll. However, the MMS Director may terminate the use of the roll only at the end of each 2-year period following the effective date of this rule, through notice published in the **Federal Register** no later than 60 days before the end of such 2-year period. Further, MMS also will have the option to redefine how the roll is calculated to comport with changes in industry practice, through notice published in the **Federal Register** no later than 60 days before the end of each 2-year period. MMS will explain its rationale when it publishes the notice. MMS believes that this flexibility is appropriate so that the valuation standards more closely reflect market developments. As proposed, MMS is adding at § 206.103(c)(2) the option to terminate or modify the roll at the end of each 2-year period after the effective date of this rule.

MMS sought comments in the proposed rule on allowing the use of the NYMEX price to value oil sold at arm's length in multiple sales downstream of the lease where the lessee does not first transfer to an affiliate and where "tracing" the production from the lease or unit to the specific sale is burdensome. MMS received positive comments from industry concerning the option to use an index-based value when a producer has numerous arm's-length sales downstream of the lease. Allowing producers to use NYMEX prices for these transactions might alleviate some administrative burden. However, we believe that royalty payments should be based on actual sale prices whenever possible. Also, under the existing regulations, producers have the option of petitioning MMS for alternative valuation procedures if they believe the administrative burden of tracing sales is excessive. In fact, MMS received requests for alternative valuation approvals to alleviate the tracing burden and is in the process of finalizing the requests. Based on these facts, MMS believes the existing regulations are working and do not need to be modified.

B. Adjusting the NYMEX Price for Transportation Costs and Location and Quality Differentials—§§ 206.109 and 206.112

1. Adjustments of NYMEX Prices to Market Centers Generally and Use of WTI Differentials

MMS proposed to adjust the base NYMEX price for location and quality differentials and actual transportation costs back to the lease. Using NYMEX prices necessitates adjusting values

between market centers and Cushing (the location of the NYMEX price), because the value of the commodity (oil) varies by location and quality. Crude oil will be worth more the closer it is to 40 degrees API gravity, and the nearer it is located to markets or refineries. To adjust for the differences in location and quality, MMS proposed to use actual arm's-length exchange agreements, which are the market's valuation of the difference. MMS also proposed to allow the use of published differentials between the market center and Cushing when lessees do not actually exchange oil to Cushing at arm's length. In that connection, MMS proposed to add a definition of a new term, "WTI differential," which is the term for that published differential. MMS also proposed to amend the definition of "MMS-approved publication" to include the WTI differential.

Summary of Comments: Ten respondents provided comments on adjusting the NYMEX price for transportation costs and location and quality differentials. The California SCO objected to adjusting the NYMEX price for quality and location in California by using the difference between the WTI spot price and the market center spot prices for crude oil. Additionally, the California SCO asserted that using a WTI differential fails to account for uplift in value due to location and gives industry a lower price. Another State believes that differentials should be allowed only if they are reasonable and actually incurred.

Industry commenters believe that requiring lessees to calculate a weighted-average arm's-length differential between a market center and Cushing could result in an unnecessary administrative burden and suggested that lessees should be allowed to use published WTI differentials in lieu of calculating their own location and quality differentials. Comments received from one trade publication indicated that restricting to a 2-year period the ability of lessees to change from one approved publication for WTI differentials to another is fundamentally anti-competitive. The commenter suggested allowing companies to choose a new publication every 90 days.

One commenter observed that there is a difference between the basis on which the WTI differential is calculated and the basis on which the NYMEX price is calculated. The commenter believed that this would lead to an inaccuracy in the adjustments to the NYMEX price. The concern arose principally because the WTI differential is the basis for adjusting the NYMEX price between the market center and Cushing (the location of the NYMEX price) if the lessee does not have an exchange agreement between the market center and Cushing. Additionally, the same commenter expressed concern that this difference would affect the use of the roll, because the prices incorporated in the roll calculation would all be determined on different basis months from the WTI differential that is used to adjust the NYMEX price.

MMS Response: As explained above, adopting the NYMEX price as the basis (or, in the Rocky Mountain Region, an alternative basis) for royalty valuation for oil produced from leases in areas other than California and Alaska and not sold at arm's length requires an additional adjustment beyond those in the current rule because the NYMEX price is defined only at Cushing for light sweet crude oil. Therefore, differentials from Cushing to other market centers are necessary. These differentials can be both positive and negative, depending on the quality and location of the alternative crude oil. They will also vary from month to month depending on relative market forces, *e.g.* tanker shortages in the Gulf, pipeline problems in Cushing, etc.

Under the final rule, the average of the daily NYMEX settlement prices published during the calendar month of production (including the roll, if applicable) at Cushing is adjusted to the market center by the differentials derived from the lessee's actual arm's-length exchange agreements between the market center and Cushing applicable to production during the production month. However, MMS believes that many lessees do not have arm's-length exchange agreements, for significant volumes of the oil they own at market centers, between Cushing and each market center to which they transport or exchange crude oil. If the lessee does not have arm's-length exchange agreements between a particular market center and Cushing for at least 20 percent of the oil it owns at that market center (as discussed further below), the adjustment to Cushing for the oil that is not exchanged at arms-length between that market center and Cushing would be the WTI published differential. (For the less than 20 percent of the lessee's oil that is exchanged at arm's-length between that market center and Cushing, the lessee will use the differential derived from the arm's-length exchange agreement(s).) If the lessee has arm's-length exchange agreements for more than 20 percent of the oil it owns at that market center, it may use the arm's-length differential for all of its oil at that market center. The lessee would then calculate a further adjustment from the market center to the lease.

MMS does not believe that it would be the best choice to allow lessees to use WTI differentials in lieu of calculating their own location and quality differentials when they have significant arm's-length exchanges. If actual arm's-length data is available, MMS believes that is preferable to using a published differential and more accurately represents the actual value of the lessee's oil.

With respect to the comment regarding the difference between the basis on which the WTI differential is calculated and the basis on which the NYMEX price is calculated, we recognize that the WTI differential is the average of the daily high and low differentials published for each day for which price publications perform surveys for deliveries during the production month, calculated over the number of days on which those differentials are published (excluding weekends and holidays). For a given delivery month, the industry trade publications perform their price surveys for the WTI spot market price and determine differentials from the 26th day of the second month before the delivery month to the 25th day of the month preceding the delivery month. For the same delivery month, the NYMEX price, in contrast, is calculated on a different basis. As defined in the final rule, the NYMEX price is the calendar month of production average of the daily NYMEX settlement prices. MMS knows of no more contemporaneous published value that it could use that might give more accurate market differences.

MMS understands that the bases for calculating the WTI differential and the NYMEX price (and the roll) are not identical. However, as explained above, MMS believes that using the calendar month average NYMEX price is the most accurate measure of the base price of oil because it accounts for all the contemporaneous information available to traders during the production month. MMS also believes that using the WTI differential applicable to deliveries in the production month is the most accurate market measure of the expected difference in value between the market centers and Cushing.

MMS believes that over time, marginal losses from adjustments to the NYMEX price due to the difference in basis between the NYMEX price and the WTI spot market price (and, therefore, the WTI differentials) will be offset by marginal gains from those adjustments, and that the net effect should be immaterial. MMS believes these

differences are not as important as the gain in public confidence from the use of NYMEX prices, which are less likely to be manipulated than index prices and are more easily obtained from a number of non-proprietary sources. Additionally, WTI differentials are not the preferred method of calculating the adjustment from Cushing to a market center; under the regulation they are to be used only when a lessee does not have significant actual arm's-length exchanges.

Changing from spot market index price-based valuation to NYMEX-based valuation and adding a definition for "WTI differential" also require a revision in the definition of "MMS-approved publication." Under the existing rule, the term "MMS-approved publication" referred to which publications of spot market index price MMS would accept. Under the final rule, the term now refers to the publications MMS approves for determining WTI differentials and ANS spot prices (because ANS spot market pricing is retained for production from leases in California and Alaska).

MMS does not agree with the comment that lessees should be able to choose a new publication once every 90 days. In the final rule, §§ 206.103(a)(4) and 206.112(b)(2) do not permit lessees to choose an MMS-approved publication for ANS spot market prices or WTI differentials for any period less than 2 years, which is consistent with current practice. Using any period less than 2 years may be viewed as being more prone to market manipulation to the benefit of the lessee.

2. Adjustments to NYMEX Prices for Crude Oil Produced From Leases in the Rocky Mountain Region and California

MMS proposed adding a market center at Guernsey, Wyoming, for sweet crude oil produced from Federal leases in Wyoming, and requested comments regarding alternative valuation procedures, including differentials, in valuing sour crude produced from Federal leases in Wyoming. With regard to Wyoming sour grades, MMS asked whether it would be useful to include a market center for valuation of sour crude produced in the Rocky Mountain Region at Hardisty, Alberta, Canada (at which spot market prices for sour crude are published in trade publications), and adjust the Hardisty price for the cost of transportation from Casper, Wyoming (a typical delivery point) to Hardisty and from the lease to Casper. MMS also proposed adding possible market centers at Kern River for valuing San Joaquin Heavy produced from Federal leases in California and at Hynes Station on Line 63 for San Joaquin Light produced from Federal leases in California.

Summary of Comments: Wyoming opposed the suggested use of spot prices from Hardisty, Alberta, Canada, stating that Hardisty prices would be less accurate than using NYMEX prices at Cushing. The State also believed that the use of WTI differentials in general is not appropriate because they (like spot prices) potentially are susceptible to manipulation. The California SCO believed that the use of Hynes Station and Kern River as market centers would not increase accuracy in valuing production from Federal leases in California for Federal royalties.

Industry appeared to agree that there was no need to add Hardisty or Guernsey as new market centers. The two industry publications that submitted responses suggested that should MMS decide to use prices from Hardisty, Alberta, Canada, then their publications be utilized. Industry further recommended that MMS consider application of market center differentials such as Kern River and Line 63 to the ANS spot price to establish location and quality differentials between Long Beach and other market centers, should MMS decide to retain ANS pricing for Alaska and California production.

MMS Response: MMS agrees with the comments regarding the use of prices from Hardisty, Alberta, Canada, and Guernsey, Wyoming, and is not including either Hardisty or Guernsey as a market center at the present time. Using Hardisty as a market center would create a number of difficulties involved in making the adjustments back to the leases. MMS also agrees with the California SCO that the use of Kern River and Line 63 will not lead to improved accuracy at this time because of the apparently continued small volumes reported at those locations. Lessees who do not have their own exchanges of production from leases in the Rocky Mountain Region to Cushing, or of production from leases in California to Long Beach or San Francisco, may make proposals to MMS for adjustments.

3. Adjusting Values Between the Lease and the Market Center

The proposed rule retained the basic principles in the existing rule of adjusting value between the market center and the lease for location and quality and actual transportation costs. The proposed rule included two changes. First, the proposed rule (at § 206.112(b)) included a provision that if you transport or exchange (or both transport and exchange) at least 20 percent, but not all, of your oil produced from a lease to a market center, you must use the weighted average of the adjusted values of that oil to value oil not transported or exchanged to the market center. Second, the proposed rule deleted the provision (at existing § 206.112(c)) that allowed lessees to use market center values at locations other than market centers (primarily refineries).

MMS also proposed that if you transport your oil from the lease to a market center, and your oil has a higher or lower gravity and a higher or lower sulfur content than the crude oil for which a price is published at the market center, you should make an adjustment for quality even though you have no existing exchange agreements or quality banks. MMS proposed that in such circumstances, you would use appropriate posted price gravity tables to adjust the value of your produced crude for gravity differences from the market center benchmark crude, and use a factor of 2.5 cents per one-tenth percent difference in sulfur content to adjust for quality when you have neither exchange agreements nor quality banks to fully adjust the quality of your oil at the market center. MMS based this factor on our understanding of common sulfur bank adjustments for California.

Summary of Comments: Three respondents submitted comments on what adjustments and transportation allowances apply when valuing production using index pricing. An industry respondent agreed with the proposal to have a lessee base its adjustment for the portion of its production that does not go to the market center (*e.g.*, goes to a refinery) on the portion that goes to the market center, when it amounts to at least 20 percent of production. Industry commenters believed that the proposed sulfur adjustment was inadequate, and that it should be between $.50 and $1.00 per percent.

MMS Response: MMS made extensive changes to this section to clarify how and when to apply location and quality differentials and transportation allowances when calculating royalty value. MMS has changed this section to first show (in § 206.112(a)) how adjustments should be made between the lease and the market center, which applies regardless of whether NYMEX prices or ANS spot prices are used. Section 206.112(b) then shows how differentials should be calculated between the market center and Cushing when the NYMEX price is used as the basis of value.

The basic concepts of the proposed rule have been retained in the final rule. A lessee must use its arm's-length exchange agreements, if it has any, to determine the adjustment between the lease and market center or for any intermediate segments between those points. It may continue to use its actual transportation costs for any portion of the distance between the lease and market center over which oil is actually transported and not exchanged. If the lessee has an exchange agreement that is not at arm's length, the lessee must obtain MMS approval for using it as a location and quality adjustment. Until MMS approves a proposed location and quality differential, the lessee may use the location and quality differential in its non-arm's-length exchange agreement. If MMS prescribes a different differential, the lessee will need to adjust previously reported and paid royalties, together with appropriate interest payments or credits, based on the approved differential. To prevent "double dipping," the lessee may not take both a transportation allowance and apply a location and quality differential between the same two points.

In the final rule, in § 206.112(a)(3), MMS has decided to retain the provision that requires a lessee to use its arm's-length exchange agreements that cover at least 20 percent of its production from the lease during the production month for the portion of oil from that lease for which the lessee does not have exchange agreements between the lease and the market center (or between some intermediate points). MMS believes that 20 percent is appropriate because it is greater than the royalty percentage under a typical onshore lease (12½ percent) or offshore lease (16⅔ percent).

Section 206.112(a)(4) of the final rule addresses the situation where a lessee does not transport or exchange at least 20 percent of its oil produced from the lease to a market center. In that instance, you would use paragraphs (a)(1) and (a)(2) to value the less than 20 percent portion (if any) that you transport or exchange (or transport and exchange) to a market center. For the remainder of your lease production, you must submit a proposal to MMS for a location and quality differential between the lease and the market center. You may use your proposed differential until MMS disapproves it. If MMS approves a different differential, you will need to adjust the previously reported and paid royalties, together with an interest payment or credit.

Paragraph (c) addresses situations in which an additional quality differential is appropriate. For instance, MMS understands from our royalty-in-kind program that the All America Pipeline uses a sulfur adjustment of 50 cents per full percent, after the first percent difference in sulfur. MMS believes that the typical sulfur content of oil produced from Federal leases is in the 1 to 3 percent range. Therefore, MMS will change its proposed use of a 2.5 cent per 0.1 percent adjustment to 5.0 cents per 0.1 percent sulfur unless MMS approves a higher adjustment. This adjustment would be similar to the factor used by the All America Pipeline and is consistent with the comments received from industry on common industry practice.

Our intent in rewriting § 206.112 was to clarify and simplify the existing rules. Certain technical issues were identified and evaluated to improve the effectiveness and efficiency of the rules by reducing litigation, assuring more contemporaneous compliance, reducing administrative cost to the Federal Government and lessees, and making Federal lands more attractive for development and leasing.

C. Transportation Cost Issues—§§ 206.110 and 206.111

1. Proposed Change to Rate of Return on Undepreciated Capital Investment—§ 206.111(i)(2)

MMS proposed an amendment to the regulations governing calculation of actual transportation costs in non-arm's-length situations by changing the allowed rate of return on undepreciated capital investment from 1.0 times the Standard & Poor's BBB bond rate to 1.5 times the Standard & Poor's BBB bond rate.

Summary of Comments: Two States commented specifically that 1.5 times the Standard & Poor's BBB bond rate is too high and does not reflect actual cost of capital. One State was particularly concerned that increasing the rate of return deduction would negatively impact State royalty income. It also believes the rate is not consistent with either MMS's former practice of rejecting the equity component of capital costs in determining a proper rate of return or with findings of the Energy Information Administration (EIA) that the rates of return are lower in the pipeline segment than in the exploration and production segment of the oil and gas industry. Specifically, the EIA found that the pipeline line of business averaged a return on investment approximately 50 percent of the return in the exploration line of business, and approximately 60 percent of the return in the oil and gas industry as a whole. This return was also slightly less than the Standard & Poor's BBB bond rate. Another State suggested a possible alternative to the proposal by applying the 1.5 times the Standard & Poor's BBB bond rate to pipelines constructed after the passage of the new regulations and retaining the 1.0 times Standard & Poor's BBB bond rate for existing infrastructure. Congressional commenters were concerned that the rate would negatively affect revenues.

Industry commenters asserted that 1.5 times the Standard & Poor's BBB bond rate was not sufficient. Based on a study from the American Petroleum Institute (API), industry argued that although pipelines are not as risky as drilling wells, some risk is involved, and that the cost of rate of return allowable should be between 1.6 and 1.8 times the Standard & Poor's BBB bond rate. Industry further suggests that non-pipeline-based transportation should be dealt with on a case-by-case basis.

MMS Response: MMS has examined some rates of return in the oil industry and believes that some weighted average rate of return considering both equity and debt is appropriate as an actual market-based cost of capital. An investor will choose to have a mix of debt and equity for many reasons, not the least of which is that companies that choose to finance their investments solely by debt will pay a higher interest rate due to the increased risk on the part of the creditor. Both debt and equity costs are actual costs of capital. The choice of Standard & Poor's BBB bond rate in 1988 was made, at least in part, in recognition of some equity component because the majority of companies with non-arm's-length transportation arrangements have debt costs lower than the Standard & Poor's BBB bond rate.

MMS continues to believe that establishing a uniform rate of return on which all parties can rely is preferable to the costs, delays, and uncertainty inherent in attempting to analyze appropriate project-specific or company-specific rates of return on investment. MMS, through its Offshore Minerals Management, Economics Division, has studied several years' worth of data for both non-integrated oil transportation companies and larger oil producers, both integrated and independent, that MMS believes are more likely to invest in oil pipelines. After a thorough review of the MMS and API studies, and consideration of the comments submitted by States and industry, we believe that the allowance for the rate of return on capital should be adjusted to 1.3 times the Standard & Poor's BBB bond rate. This number is

the mid-point of the range suggested by the MMS study, which concluded that the range of rates of return appropriate for oil pipelines would be in the range of 1.1 to 1.5 times the Standard & Poor's BBB bond rate. MMS also believes that although there are some very high risks involved with certain oil and gas ventures, such as wildcat drilling, the risk associated with building and developing a pipeline to move oil that has already been discovered is much less and of a different nature. Both the MMS study and the data from EIA demonstrate that the market also perceives that the risk is lower in the transportation lines of business than in the exploration and production lines of business.

MMS believes that the study conducted by its Offshore Minerals Management Economics Division used the most relevant data for a reasonable period and is therefore the best source to decide on the appropriate rate of return. The fact that it also fell between the study cited by industry and the data cited by the State reaffirms our belief in its reasonableness.

2. Specific Transportation Cost Issues—§§ 206.110 and 206.111

(i) Arm's-Length Transportation

In § 206.110, MMS proposed to add new paragraphs (b) and (c) that would specify many of the costs incurred for transporting oil under an arm's-length contract that are allowable deductions and those that are not deductible, respectively. MMS believes some costs are directly related to the movement of crude oil to markets away from the lease. MMS proposed that the rule include specific costs of transportation that are allowable.

MMS also proposed to include specific costs as not being costs of transportation, either because they were costs of placing oil in marketable condition or costs of marketing, or otherwise simply not costs of transportation. They were proposed to be non-allowable as deductions from royalty value.

(ii) Non-Arm's-Length Transportation

In § 206.111, MMS proposed to add new paragraphs (b)(6) and (b)(7) that would specify many of the costs incurred for transporting oil under a non-arm's-length contract that are allowable deductions, but only to the extent they have not already been included in the actual cost calculation under paragraphs (d) through (j) of this section. MMS believes these costs are directly related to the movement of crude oil to markets away from the lease. MMS proposed that the rule include specific costs of transportation that are allowable.

MMS also proposed specific costs as not being costs of transportation, either because they were costs of placing oil in marketable condition or costs of marketing, or otherwise simply not costs of transportation. They were proposed to be non-allowable as deductions from royalty value.

(iii) Technical Correction to § 206.111(h)(5) Regarding Redepreciation

We proposed to modify existing § 206.111(h)(5) to delete the words "who owned the system on June 1, 2000" and replace them with the words "from whom you bought the system" to remedy an unintended consequence regarding depreciation when calculating a transportation allowance not involving an arm's-length transportation contract. The language in the June 2000 Rule would allow and require a second purchaser to go back to the depreciation schedule of the original owner, rather than continuing the depreciation of the first purchaser. This could result in either a higher or lower depreciable basis than was intended.

Summary of Comments: States were uniformly opposed to modification of the transportation allowances in the June 2000 Rule and most questioned whether MMS was proposing to designate marketing costs as transportation. One State suggested that MMS is acting contrary to its long-held policy, which does not allow the deduction of direct or indirect marketing costs. The State further suggests that expanding the cost deductions will not serve to streamline the audit process because it believes that the expanded transportation costs will inevitably lead to litigation. Another State commented that MMS has proposed allowing some costs which it traditionally has not allowed as transportation. The commenter requested that MMS insert a provision stating that reimbursements for any or all of these cost elements received by the lessee, its affiliate, or its marketing agent, be included either in gross receipts or included as offsets to the expenses incurred in calculating transportation allowances. No State pointed to a single specific cost listed as allowable in the proposed rule that MMS has ever considered to be marketing or non-transportation related.

Industry strongly supported the inclusion of specific transportation costs in the rule as a powerful tool for averting disputes arising out of lack of clarification of issues, but suggested that gauging and scheduling fees be included as deductible transportation costs.

MMS Response: MMS intends to clarify and simplify the existing rule to reduce litigation, assure more contemporaneous compliance, reduce administrative costs to the Federal Government and lessees, and make Federal lands more attractive for development and leasing. MMS does not believe it can eliminate all disputes, but clarity within the regulatory structure affords the benefits listed above. After clarifying the costs that would be considered to be gas transportation costs and those that would be considered not to be transportation costs in the amendments to the gas valuation regulations promulgated in 1997, one lawsuit resolved whether the lines that MMS had drawn were reasonable. That case, *Independent Petroleum Ass'n of America* v. *DeWitt*, 279 F.3d 1036, *cert. denied*, 537 U.S. 1105 (2003) upheld all of MMS's determinations, except one involving unused firm capacity charges. Regarding unused firm capacity charges, the court held that MMS had not sufficiently explained why they were not related to transportation. MMS believes that by more fully explaining the distinctions, its policy is more likely to be upheld.

In this rule, MMS does not modify its long-standing policy of not allowing as a deduction from gross proceeds the costs of placing production in marketable condition or costs of marketing production, including indirect or internal costs, or any other costs that are not necessary for the lessee to incur in order to move its oil. MMS believes that the costs it lists as transportation costs in the final rule are consistent with the reasoning that it has always followed in determining whether costs are for transportation or for something else.

In § 206.110(b), MMS identifies specific costs as allowable. You may not use any cost as a deduction that duplicates all or part of any other cost that you use under § 206.110(b). The costs are:

(1) The amount that you or your affiliate pay under an arm s-length transportation contract or tariff. This is the base price paid to transport oil at arm's length. It has always been allowable as a transportation expense.

(2) Fees paid (either in volume or in value) for actual or theoretical line losses. Pipeline losses are actual or theoretical reductions in the volume of oil that travels through a pipeline. Pipeline losses are the result of either real, physical losses, or errors in the measurement of the oil. The lessee or its

affiliate may incur the cost of a pipeline loss either by a reduction in the volume of oil, resulting in lower gross proceeds received, or by a reduction in the value of oil on which the lessee received payment. Again, this is specifically allowable under existing regulations because these fees must be paid to a pipeline owner if they are part of the fee structure.

(3) Fees paid for administration of a quality bank. Quality banks are the means by which the various shippers compensate each other if their oil is of higher or lower quality than the standard for the pipeline. Those shippers with higher quality oil receive a payment from the quality bank and those with lower quality oil must pay into the bank. Those payments are not usually taken into account to determine the value of the oil for Federal royalty purposes due to the provisions of § 206.119. The fees allowed in this paragraph are fees paid to the person who administers the quality bank, not the payments made or received in adjusting the qualities of the injected oils. These banks are usually administered by pipeline owners, but may be administered by third parties. MMS is changing the final rule language by eliminating the phrase "to a pipeline owner" to acknowledge the fact that sometimes these fees may be paid to other persons who administer the quality bank. These fees are allowable because they are costs that are required to be incurred in order to ship oil through the pipeline to which they apply, and are not costs of placing the oil in marketable condition.

(4) The cost of carrying on your books as inventory a volume of oil that the pipeline operator requires you to maintain, and that you do maintain, in the line as line fill. Some oil pipelines require that shippers leave oil in the pipeline so that the pipeline is full. Oil will not flow through the pipeline unless it is filled. The oil that the shipper (lessee) owns in the pipeline is, in effect, inventory that cannot ever be sold as long as the shipper uses the pipeline to transport its oil. If a shipper is required to maintain inventory, it loses the time value of money on the value of that oil for every month it is maintained in the line. For lines that do not require the shippers to maintain line fill, the pipeline owner will own the oil that fills the line and will charge the shipper as part of the arm's-length price or tariff a cost at least equal to its capitalized costs. In order to treat lessees who ship through pipelines that require shippers to maintain line fill the same as lessees who ship through pipelines in which the owner provides line fill, MMS is allowing a deduction equal to the capitalized costs of the line fill—the monthly value of the oil that the shipper owns that serves as line fill times the rate of return.

(5) Fees paid to a terminal operator for loading and unloading of crude oil into or from a vessel, vehicle, pipeline, or other conveyance.

(6) Fees paid for short-term storage (30 days or less) incidental to transportation as required by a transporter.

(7) Fees paid to pump oil to another carrier's system or vehicles as required under a tariff.

(8) Transfer fees paid to a hub operator associated with physical movement of crude oil through the hub when you do not sell the oil at the hub. These fees do not include title transfer fees. Allowable costs (5) through (8) are all fees paid, as part of the cost of moving oil, to various persons who perform intermediate services associated with physical movement of oil. Specifically, the final rule allows fees paid to terminal operators for loading or unloading oil, fees paid for short-term storage incidental to transportation, fees paid to pump oil from one system or vehicle to another, and fees paid to physically move oil through a hub because they are costs incurred to move oil. Even short-term storage, if it is required by the transporter and not incurred for marketing purposes, is a cost associated with the movement of oil. MMS does not intend to allow any costs associated with marketing to be deducted. Therefore, the regulation limits storage costs to those required by transporters and limits transfer fees to those needed to physically move the oil, but disallows fees that merely transfer title—which is clearly a cost of marketing.

(9) Payments for a volumetric deduction to cover shrinkage when high-gravity petroleum (generally in excess of 51 degrees API) is mixed with lower-gravity crude oil for transportation. These payments account for the fact that when high-gravity oil is mixed with lower-gravity oil, the volume of oil in the pipeline shrinks. If the charge is levied because your oil is of a significantly different quality than the other oil in the system, it is allowable as a transportation deduction because it affects the overall ability of the pipeline to transport oil. You may not deduct charges to adjust the quality of the oil to meet pipeline standards because that would be a cost of placing the oil in marketable condition.

(10) Costs of securing a letter of credit, or other surety, that the pipeline requires you as a shipper to maintain. MMS believes that this is a cost that the lessee or its affiliate must incur to obtain the pipeline's transportation service, and therefore is a cost of moving the oil. It is not incurred for marketing purposes or to put the oil in marketable condition, but is paid solely to procure transportation services. Again, MMS will allow only the capitalized costs, when that is all that is appropriate, or a one-time expense, if that is appropriate. These costs should only include the currently allocable costs applicable to the Federal lease. MMS believes that shippers generally use two different means of assuring creditworthiness. The first involves a deposit or advanced payment in which the shipper incurs only the costs associated with the time value of money because it receives its deposit back. The other involves actual out-of-pocket costs to obtain a letter of credit, guarantee, or surety bond. MMS believes that these two means should be accounted for differently in calculating your transportation allowance.

For example, in the first case, if you make a cash deposit of 2 months of the expected transportation charges (say $50,000), and transport 100,000 barrels per month, of which 75,000 barrels are from a Federal lease, you must calculate the cost as follows:

Multiply the deposit by the monthly rate of return, calculated by dividing the rate of return specified in § 206.111(i)(2) by 12, and multiply that result by the proportion of total production from each Federal lease. In this example, if the Standard & Poor's BBB bond rate was 8 percent, the allowable monthly rate would be

$$\left(\frac{.08 \times 1.3}{12} = .009\right),$$

and that would be multiplied by the amount of the deposit to get the monthly cost, which would be $450. Then you could include the share of that applicable to the Federal lease (75,000/100,000) = ¾. So you could include $337 as an allowable transportation cost for as long as the $50,000 is on deposit (and the other factors remain unchanged).

In the second case involving the expense of a letter of credit or other surety, if you pay your bank $5000 as a non-refundable fee for a letter of credit, you can include the proportion allocable to Federal production in the month that fee is paid, and then never again.

MMS does not allow deduction of costs that are not actual costs of transporting oil. A new § 206.110(c) lists the costs that MMS believes are clearly

not related to the transportation of oil. These are:

(1) Fees paid for long-term storage (more than 30 days). Fees paid for long-term storage are due to a marketing choice and are not a necessary transportation cost.

(2) Administrative, handling, and accounting fees associated with terminalling. Similarly, administrative fees associated with terminalling are not allowable because MMS believes that they are associated with administrative costs that are the lessee's obligation.

(3) Title and terminal transfer fees.

(4) Fees paid to track and match receipts and deliveries at a market center or to avoid paying title transfer fees. Non-allowable costs for title and terminal transfer fees and fees paid to avoid title and terminal transfer fees are associated with changes in ownership rather than movement and therefore are not costs of transportation.

(5) Fees paid to brokers. Fees paid to brokers are treated similarly to items (3) and (4) above, because they are also costs associated with changes in ownership.

(6) Fees paid to a scheduling service provider.

(7) Internal costs, including salaries and related costs, rent/space costs, office equipment costs, legal fees, and other costs to schedule, nominate, and account for sale or movement of production. Non-allowable costs (6) and (7) relate to scheduling, nominating, and accounting for sale and movement are internal costs that the lessee is required to provide at no cost to the lessor.

(8) Gauging fees. Gauging fees are simply costs of measuring the volume of oil, which have traditionally been the responsibility of the lessee.

Section 206.111 specifies how to calculate non-arm's-length transportation allowances. In § 206.111(b)(6), MMS proposed certain costs as allowable costs of transportation as follows:

(i) Volumetric adjustments for actual (not theoretical) line losses.

(ii) The cost of carrying on your books as inventory a volume of oil that the pipeline operator requires you to maintain, and that you do maintain, in the line as line fill.

(iii) Fees paid to a non-affiliated terminal operator for loading and unloading of crude oil into or from a vessel, vehicle, pipeline, or other conveyance.

(iv) Transfer fees paid to a hub operator associated with physical movement of crude oil through the hub when you do not sell the oil at the hub. These fees do not include title transfer fees.

(v) A volumetric deduction to cover shrinkage when high-gravity petroleum (generally in excess of 51 degrees API) is mixed with lower-gravity crude oil for transportation.

Several of these costs are the same as the costs allowed under § 206.110(b) for arm's-length transportation described above. For example, MMS will allow lessees who transport through a non-arm's-length arrangement to deduct the cost of carrying line fill on their books and will allow fees paid to non-affiliated terminal operators and hub operators associated with physical movement of oil. MMS is also adding a new cost parallel to these costs. If a lessee pays a non-affiliated quality bank administrator, those costs are comparable to those incurred by arm's-length shippers.

MMS will also allow certain costs similar to the costs allowed for arm's-length shippers. For example, MMS will allow volumetric losses, instead of fees, that cover shrinkage when high-gravity petroleum is mixed with low-gravity oil. Similarly, actual volumetric changes in line volume, whether they are losses or gains are allowable (or required to be added) for non-arm's-length shippers, in lieu of allowing fees for actual or theoretical line losses for arm's-length shippers.

The costs identified as not being allowable for arm's-length shippers in § 206.110(c) are also not allowed as transportation costs for shippers that transport their oil through non-arm's-length arrangements. In addition, MMS has specified that theoretical line losses are not allowable, because they are not actual costs to shippers who ship through non-arm's-length arrangements. The following have been designated as non-allowable transportation costs under § 206.111(b)(7):

(i) Fees paid for long-term storage (more than 30 days).

(ii) Administrative, handling, and accounting fees associated with terminalling.

(iii) Title and terminal transfer fees.

(iv) Fees paid to track and match receipts and deliveries at a market center or to avoid paying title transfer fees.

(v) Fees paid to brokers.

(vi) Fees paid to a scheduling service provider.

(vii) Internal costs, including salaries and related costs, rent/space costs, office equipment costs, legal fees, and other costs to schedule, nominate, and account for sale or movement of production.

(viii) Theoretical line losses; and

(ix) Gauging fees.

The final rule retains the lists of allowable and unallowable costs in §§ 206.110 and 206.111 because MMS believes they properly draw the line between those expenses that are needed for the movement of oil and those expenses that are incurred for some other purpose.

The final rule adopts the proposed rule's changes to § 206.111(h)(5) related to redepreciation as proposed. When we amended the rules in March 2000, we intended the revisions regarding depreciation in the current rule to permit, one time only, a new depreciation schedule based on your purchase price when you purchase a transportation system from a previous owner. If a transportation system were sold more than once, subsequent purchasers would have to maintain the then-existing depreciation schedule.

However, existing paragraph (h)(5) says "if you or your affiliate purchase a transportation system at arm's length after June 1, 2000, from anyone other than the original owner, you must assume the depreciation schedule of the person who owned the system on June 1, 2000." But if A were the original owner and still owned the system on June 1, 2000, and subsequently sold the system to B after June 1, 2000, who in turn sold it to C, the rule as written says that C would have to assume original owner A's depreciation schedule. This was not MMS s intent. To be consistent with the intended result, C should assume B's depreciation schedule in this situation.

Therefore, to reflect the original intent, MMS is modifying § 206.111(h)(5) to delete the words "who owned the system on June 1, 2000" and replace them with the words "from whom you bought the system." This change will enable C in the example above to assume the depreciation schedule of B based on B's purchase price of the transportation system and subsequent reinvestment.

D. Treatment of Joint Operating Agreements—§§ 206.102 and 210.53

MMS proposed to remove the presumption that sales to a co-lessee under a joint operating agreement (JOA) are not at arm's length. The proposal required changing the reporting instructions in 30 CFR § 210.53 with respect to sales under JOA to facilitate review and audit of these transactions.

Summary of Comments: A State respondent opposed the treatment of JOAs as arm's-length transactions. The State declared that MMS's treatment in the 2000 preamble was consistent with the practical realities of the "proceeds" received by co-lessees under JOAs. Co-

lessees are working interest owners. As such, they share in costs that royalty owners do not incur. The nature of the very lease interests between a royalty owner and a working interest owner differ. Co-lessees, in essence, are given a "deduction" benefit, which they would not receive if their royalty were calculated under the non-arm's-length rules.

The respondent from industry agreed with the proposed changes, but requested that the language under § 210.53(1)(c) be amended from "each working interest owner" to "the working interest owners." The change in wording would provide for a second reporting line but not more, easing reporting burdens.

MMS Response: MMS does not believe there should be a presumption that transactions under JOAs are sales or not sales. Neither does MMS believe that there should be a presumption that transactions under JOAs are at arm's length or are not at arm's length. When a party to a JOA, who is not the operator, allows the operator to dispose of the non-operator's share of oil production in exchange for the consideration provided under that agreement, MMS recognizes that some of these arrangements may be sales of the production. Holding that a disposition under a JOA is not a sale, while a disposition under a sales contract, with identical terms, is treated as a sale, would be a case of form over function. MMS believes that it is the substance of the transaction, rather than the form, that determines whether a transaction is treated as arm's length or not.

MMS believes that, when a contract of whatever form results in the Federal royalty owner sharing in costs that are not properly sharable, the definition of gross proceeds together with the exceptions in § 206.102(c)(2) provide sufficient tools for MMS to assure that the lessor will not share in costs that are not properly shareable. If the operator is providing marketing services to its co-lessees, the MMS may require that they be provided at no cost to the lessor, regardless of whether the oil is disposed through the JOA or through a sales contract.

MMS's current practice is to include detailed reporting guidance in the "Minerals Revenue Reporter Handbook". MMS decided that specific reporting guidance for JOA's should not be included in our regulations. MMS agrees with industry that having the designee report a separate line for each working interest owner on the Form MMS–2014, Report of Sales and Royalty Remittance, is not needed. Therefore, MMS is not modifying § 210.53 as proposed but will modify the Minerals Revenue Reporter Handbook to require a designee to report, on the Form MMS–2014, one line for the share of the production the designee purchased from the working interest owners at arm's length and report on separate lines the required information for the remaining shares of the production valued (1) as an arm's-length sale by you or your affiliate under § 206.102; or (2) at an index price under § 206.103.

E. Limit on Grace Period for Reporting Changes—§ 206.121

MMS proposed a technical correction to the regulation at § 206.121 that permitted a grace period for reporting and paying royalties after the June 2000 Rule became effective to give royalty payors adequate time to change their systems. We proposed to end-date the grace period for such adjustments, because we consider 3 years to be sufficient time to have reported and paid royalties under the regulations published in 2000.

Summary of Comments: One State commented that, if MMS decides to add a new grace period in the final rule, it should retain the system change requirement associated with the rule. Industry comments supported the elimination of the grace period associated with the June 2000 Rule, and recommended the implementation of a new grace period for the final rule primarily to account for system changes associated with the potential re-definition of JOAs.

MMS Response: MMS agrees that the grace period from the June 2000 Rule should be discontinued. We consider 3 years to be sufficient time to have reported and paid royalties under the June 2000 Rule. Further, since we received no requests for relief after the June 2000 Rule was published, MMS does not believe that implementation of a new grace period is necessary. This is especially true given the fact that we have modified the treatment of working interest owners under JOAs in the final rule to alleviate reporting of each interest owner's production. Therefore, § 206.121 is removed from the final rule.

F. Other Technical Changes

In addition, MMS proposed making a technical change to the definition of "affiliate" in § 206.101. MMS proposed changing paragraph (2) of the definition of "affiliate" by striking the words "of between 10 and 50 percent" and substituting therefore the words "10 through 50 percent" because the current definition does not specify the treatment of a situation in which one person owns exactly 50 percent of another person.

Summary of Comments: Industry supported the redefinition of affiliate.

MMS Response: Based on the comment received and the need for clarification, MMS is modifying the definition of "affiliate" in § 206.101(2) as proposed.

II. Procedural Matters

1. Summary Cost and Royalty Impact Data

Summary of Comments: MMS received comments questioning the following: (1) MMS assumptions used regarding the percentage of arm's-length sales and the percentage of not-at-arm's-length sales in the analysis, and (2) MMS assumptions on allowances. One State and several congressional commenters questioned (3) why revenue impacts published in the proposed rule were ranges instead of single figures.

MMS Response: On the question of assumptions of percentages of arm's-length sales and the percentage of not-at-arm's-length sales in the analysis, MMS provides the following information. At the time of the proposed rulemaking, MMS estimated the percentage of arm's-length sales and the percentage of not-at-arm's-length sales at 50 percent each. MMS did not use "Sales Type Code" data reported by companies on the Form MMS–2014, Report of Sales and Royalty Remittance. We have recently reviewed data reported using the "Sales Type Code" on the Form MMS–2014 from October 2002 to March 2003 and found that 70 percent of crude oil produced from Federal leases was reported as being sold at arm's length and 30 percent was reported as being not sold at arm's length. However, because the "Sales Type Code" is a new reporting requirement and because the reported data has not yet been audited, MMS believes that 50 percent is a better estimate of the actual amount of crude oil that is not sold at arm's-length.

On the question of assumptions on allowances, MMS provides the following information. When MMS was researching the revenue impacts associated with the proposed rule, we considered three variables associated with the transportation-related changes to the existing regulations: (a) Whether allowances are at arm's length or not at arm's length, (b) the range of the cost components, and (c) the amount of production taken in kind.

Regarding the first variable (a), since 1996, MMS has not collected forms which indicate if allowances are at arm's length or not at arm's length. In

preparing the proposed rule, certain assumptions were made concerning actual impacts to revenues.

MMS assumed 50 percent of transportation allowance transactions were at arm's length and that 50 percent were not at arm's length. MMS does not collect data on whether allowances are at arm's length. MMS does collect data on whether sales are at arm's length, but there is no relationship between the type of sale and the type of allowance.

Regarding the second variable (b), MMS also assumed that certain costs, such as the cost of a letter of credit, would range from $.02 to $.05 per barrel. Because of uncertainty associated with the exact amount of each deductible cost, MMS chose to publish a range of possible effects rather than an average. This explains why revenue impacts published in the proposed rule were ranges instead of single figures.

Regarding the third variable (c), because production taken in kind is not subject to the transportation regulations in the proposed rule, oil taken in kind has the potential to significantly affect the total of transportation allowances reported. MMS applied high (77 percent) and low (19 percent) range factors for production taken in kind to account for scenarios at either extreme, to demonstrate the potential range of revenue impacts.

Summarized below are the estimated costs and royalty impacts of this rule to all potentially affected groups: industry, the Federal Government, and State and local governments. The costs and the royalty collection impacts are segregated into two categories—those accruing in the first year after implementation of this rule and those accruing on a continuing basis each year thereafter.

A. Industry

(1) *Expected Royalty Increase—NYMEX-based valuation applied to oil not sold at arm's length.*

Under this rule, industry will value oil based on a market price that more closely represents the true value of the oil. We believe this may result in industry paying additional royalties compared to the Federal oil valuation rule that became effective June 1, 2000. Provided below are estimates of any significant increased royalties.

This rule maintains many of the provisions of the June 2000 Rule including the concept of separate valuation methodologies linked to different production locations. This analysis is divided into the two areas affected by these changes. They include the Rocky Mountain Region, and the "Rest of the Country," including the Gulf of Mexico. Since we retained the use of ANS spot prices for California and Alaska, we removed the royalty impacts of using NYMEX pricing in California and Alaska from the analysis. This analysis highlights the impacts of modifying the pricing provisions and methodologies. The allowed adjustments for transportation and quality as outlined in the June 2000 Rule also will change somewhat, and some additional corresponding analysis is included.

"Rest of the Country"

In valuing production not sold under an arm's-length contract, the June 2000 Rule employed the spot market index price of the oil most closely associated with the production, with appropriate adjustments for location and quality. The timing of the spot market that corresponds with the production month was the quoted average from an MMS-approved publication from the 26th day of the month prior to the current production month to the 25th day of the current production month. For example, December royalty production was valued using the spot quotes for the oil most similar in location and quality from November 26th through December 25th.

The new methodology for the "Rest of the Country," as discussed earlier, is the NYMEX Calendar Month Average daily settlement price with the roll and a quality and location differential. This method uses a trading month quality and location differential (found in MMS-approved publications and based on spot price quotes) applied to the average of the daily NYMEX prices, excluding weekends and holidays, during the production month for deliveries during the prompt month as defined in this rule. For example, for the month of December, assume a producer seeks to value production whose characteristics are closely related to Light Louisiana Sweet (LLS) crude oil. The grade differential established over the period October 26 through November 25 will be applied to the average of the daily NYMEX prompt month prices published for each day in the month of December. The grade differential is the WTI spot price for the period October 26–November 25 less the LLS spot price for the same period. Assuming the WTI value is $29.00 per barrel and the LLS value is $28.00 per barrel, the differential is $1.00 per barrel.

The forward roll is added to the calendar month average NYMEX value and is determined by adding ⅔ of the difference between the average daily NYMEX settlement prices for deliveries during the prompt month that is the same as the month of production and the average of those prices for deliveries during the next succeeding month plus ⅓ of the difference between the average of the daily NYMEX settlement prices for deliveries during the prompt month that is the same as the month of production and the average of those prices for deliveries during the second month following the month of production as specifically defined in the rule. Assuming the roll calculation results in a value of +$.30 per barrel, the calculated royalty value, assuming the NYMEX calendar month average price is $29.50 per barrel, is $28.80 per barrel (including both the roll and the differential). It is calculated as follows for all royalty production not disposed of at arm's length in the month of December:

(NYMEX Calendar Month Average + roll)—(Spot average WTI − Spot Average LLS)

($29.50 + $.30) − ($29 − $28) = $28.80 per barrel for December royalty production valued as not sold under an arm's-length contract.

We compared prices under NYMEX adjusted for the roll and the grade differential discussed above with prices calculated under the June 2000 Rule based on spot prices at each of the market centers applicable in the "Rest of the Country"—*e.g.*, Midland, Texas; St. James, Louisiana; and Empire, Louisiana. We found that over the period April 2000 through December 2002, or the period from approximately when the June 2000 Rule became effective through the end of calendar year 2002, the adjusted average monthly NYMEX price with the roll (adjusted from Cushing to each of these market centers) exceeded the monthly average spot prices for these market centers by an average of $.31 per barrel. We also performed this comparison back to the beginning of 1999 and found that the difference is slightly higher over the entire period January 1999 through December 2002. We chose the $.31 per barrel increment as the basis for our royalty impact estimates.

In estimating the impact of a change to NYMEX valuation, we made several assumptions in addition to the $.31 per barrel increment. We assumed that 50 percent of all Federal barrels would be valued under the non-arm's-length provisions, that the offshore royalty rate is one-sixth and the onshore royalty rate is one-eighth, and that volumes taken in kind would vary from 50,000 barrels per day to 180,000 barrels per day.

The 50,000 includes only barrels currently taken in the small refiner program, and the 180,000 includes

small refiner volumes plus barrels currently going to the Strategic Petroleum Reserve. We then subtracted the volumes taken in kind and applied the $.31 per barrel figure to the remaining barrels assumed to be valued under the non-arm's-length provisions. We estimate increased costs to industry in the form of higher royalty payments of $4,303,913 to $11,658,663 per year.

Rocky Mountain Region

Determining the impact of the final rule from the June 2000 Rule methodology for valuing oil not sold at arm's length in the Rocky Mountain Region is difficult. This is largely because there is no prescribed formula currently in place, but rather a series of benchmark procedures that lessees apply on an individual basis. The new methodology for the third benchmark is the NYMEX Calendar Month Average daily settlement price with appropriate differentials, but without the roll discussed above. This method uses a trading month differential (found in MMS-approved publications and based on spot price quotes) applied to the average of the daily NYMEX prices, excluding weekends and holidays, published for each day during the production month for deliveries during the prompt month as defined in this rule. This methodology will apply only if the lessee has no MMS-approved tendering program and elects to value production based on NYMEX prices rather than the volume-weighted average of gross proceeds received under arm's-length contracts. Where the third benchmark applies, valuation of Wyoming Sweet will rely on differentials between WTI at Cushing and the lease. For example, for the month of December, assume a producer seeks to value production for Wyoming Sweet crude oil. The grade differential established over the period October 26 through November 25 will be applied to the average of the daily NYMEX prompt month prices published for each day in the month of December. For December production, the average value of Wyoming Sweet against WTI determined October 26th through November 25th applied to the NYMEX calendar month average becomes the basis of value:

(Trading month WY Sweet spot oil assessment − Spot WTI assessment) + NYMEX calendar month average.

We compared prices under NYMEX adjusted for the grade differential (without the roll) with prices calculated under the existing rule based on spot prices at Cushing. We used the same time period, April 2000 through December 2002, as we did for the "Rest of the Country." Over this period, the monthly average spot price exceeded the adjusted average monthly NYMEX price by about $.06 per barrel. We also performed this comparison back to the beginning of 1999 and found that the adjusted NYMEX price exceeded the monthly average spot price by about $.02 per barrel over the entire period January 1999 through December 2002. To illustrate the highest potential cost to industry, we chose the $.02 per barrel increment of NYMEX over spot as the basis for our benefit and cost estimates.

In estimating the impact of a change to NYMEX valuation, we made several assumptions in addition to the $.02 per barrel increment. First, we assumed that 50 percent of all Federal barrels would be valued under the non-arm's-length provisions. Then, because there are four non-arm's-length benchmarks in the Rocky Mountain Region and only the third benchmark will rely on NYMEX prices, we assumed that 25 percent of all Federal barrels that are valued under the benchmarks will be valued under each of the benchmarks; therefore, only 25 percent of those barrels will rely on NYMEX prices. (None of the other three benchmarks will change.) Consequently, 12½ percent of all Federal barrels will be valued under the third non-arm's-length benchmark. We also assumed that the royalty rate is one-eighth, and that volumes taken in kind (these are from Wyoming only) would be about 4,000 barrels per day. We then subtracted the volumes taken in kind and applied the $.02 per barrel figure to the remaining barrels assumed to be valued under the non-arm's-length provisions. We estimate higher royalty payments to be about $11,738 per year.

(2) *Expected Royalty Decrease—Increased Allowable Costs.*

(i) *Increase Rate of Return in non-arm's-length situations from 1 times the Standard and Poor's BBB bond rate to 1.3 times the Standard and Poor's BBB bond rate.*

MMS does not routinely collect detailed allowance information, such as affiliation between the payor and transporter or the cost components used to calculate a non-arm's-length allowance rate. Therefore, we had to make several broad assumptions in order to estimate the impact of this rule. We assumed that 50 percent of all allowances are non-arm's-length. We also assumed that over the life of the pipeline, allowance rates are made up of ⅓ rate of return on undepreciated capital investment, ⅓ depreciation expenses, and ⅓ operation, maintenance and overhead expenses. During FY 2001, royalty payors reported transportation allowance deductions of $45,363,394 for Federal oil production. Based on our assumptions, if ⅓ of the allowance deductions are non-arm's-length, then $22,681,697 of the total allowances fell in this category. If ⅓ of the allowance is made up of the rate of return, this equals $7,560,565. Therefore, we estimate that increasing the basis for the rate of return by 30 percent could result in additional allowance deductions of $2,268,169 ($7,560,565 × .30). Our review of transportation allowances deducted from oil royalties in the States of Wyoming, Colorado, Utah, and New Mexico revealed minimal amounts reported for onshore leases. Therefore, we assumed that virtually this entire increase will impact offshore royalties only.

(ii) *Line Loss as a component of a non-arm's-length transportation allowance.*

For offshore production, the estimate is based on the total offshore oil royalties for FY 2001 of $2,069,450,791. We assumed that 50 percent of all allowances are non-arm's-length, and that oil pipeline losses are 0.2 percent of the volume of the production. Therefore, before making the further adjustments discussed below, we estimated this change could result in additional transportation allowances of $2,069,451 per year ($2,069,450,791 × .50 × .002). For onshore production, we used total onshore oil royalties for FY 2001 of $252,575,890. We assumed that 50 percent of all allowances are non-arm's-length, and that oil pipeline losses are 0.2 percent of the volume of the production. Therefore, before making the further adjustments discussed below, we estimated this change could result in additional transportation allowances of $252,576 per year ($252,575,890 × .50 × .002).

We also recognize that substantial volumes of offshore production are taken in kind and are not subject to the regulations regarding transportation. We estimated that between 50,000 barrels of oil per day (BOPD) and 180,000 BOPD may be taken in kind. The wide variance in this estimate is caused by the approximately 130,000 BOPD which may be taken in kind and placed into the Strategic Petroleum Reserve. Based on daily offshore Federal royalty share of 222,100 BOPD, the amount of oil transportation subject to these regulations could range from a high of 77 percent of the royalty share of production to a low of 19 percent of the royalty share of production. [(222,100 − 50,000) / 222,100 = 77 percent; (222,100 − 180,000) / 222,100 = 19 percent]. Applying the high and low range factors

for oil taken in kind, this could result in additional transportation allowance deductions for offshore leases ranging from $393,196 ($2,069,451 × 19 percent) to $1,593,477 ($2,069,451 × 77 percent) per year.

(iii) *Quality Bank Administration Fees as a component of an arm's-length and a non-arm's-length transportation allowance.*

For offshore oil production, our estimate is based on the total offshore oil royalty volume for FY 2001 of 81,066,567 barrels. We also estimated that quality bank administrative fees were $.002 per barrel. We estimated that allowing such fees could result in additional offshore transportation allowances of $162,133 (81,066,567 × $.002) per year before considering the effects of oil taken in kind. Applying the high and low range factors for oil taken in kind, this could result in additional transportation allowance deductions ranging from $30,805 ($162,133 × 19 percent) to $124,842 ($162,133 × 77 percent) per year. For onshore production, we used the onshore royalty volume for FY 2001 of 9,496,181 barrels. Allowing such fees could result in additional allowances of $18,992 (9,496,181 × $.002).

(iv) *Line Fill as a component of an arm's-length and a non-arm's-length transportation allowance.*

For offshore oil production, our estimate is based on the total offshore oil royalty volume for FY 2001 of 81,066,567 barrels. We estimated that line fill costs ranged from $.02 to $.05 per barrel. We then estimated that this factor could result in additional transportation allowances of $1,621,331 (81,066,567 × $.02) to $4,053,328 (81,066,567 × $.05) before considering the effects of oil taken in kind. Applying the high and low range factors for oil taken in kind, this could result in additional offshore transportation allowance deductions ranging from $308,052 ($1,621,331 × 19 percent) to $3,121,062 ($4,053,328 × 77 percent) per year. For onshore production, we estimated that this factor could result in additional transportation allowances of $189,924 (9,496,181 × $.02) to $474,809 (9,496,181 × $.05).

(v) *The cost of a Letter of Credit as a component of an arm's-length transportation allowance.*

Again, we assumed that 50 percent of allowances are at arm's length. We again based the estimate on the total offshore oil royalty volume for FY 2001 of 81,066,567 barrels. We estimated that letter of credit costs ranged from $.02 to $.05 per barrel. We thus estimated that this could result in additional transportation allowances of $810,666 (81,066,567 × $.02 × .5) to $2,026,664 (81,066,567 × $.05 × .5). Applying the high and low range factors for oil taken in kind, this could result in additional offshore transportation allowance deductions ranging from $154,027 ($810,666 × 19 percent) to $1,560,531 ($2,026,664 × 77 percent) per year. For onshore production, we estimated that this factor could result in additional transportation allowances of $94,962 (9,496,181 × $.02 × .5) to $237,405 (9,496,181 × $.05 × .5).

(vi) *Royalty Reduction Summary, items (i)–(v)—Additional Deductions for Allowances.*

We estimate that between $3,154,249 and $8,668,081 in additional transportation allowances could be deducted in determining Outer Continental Shelf lease royalties based on an increased rate of return and permissibility of line losses for non-arm's-length allowances; permissibility of quality bank administration fees and line fill costs for both arm's-length and non-arm's-length allowances; and permissibility of letter of credit costs for arm's-length allowances. Also, for these same items, we estimate that between $556,454 and $983,782 of additional transportation allowances may be deducted in determining onshore Federal lease royalties.

(3) *Net Expected Change in Royalty Payments from Industry.*

We estimate a net expected change in royalty payments from industry of $1,311,743. That amount is calculated by the sum of the Royalty Increase for the Rocky Mountain Region ($11,738) plus the mid point value of the "Rest of the Country" ($7,981,288) plus the mid point value of the Royalty Decrease for Increased Allowable Costs (−$6,681,283).

(4) *Expected Range of Royalty Impact on Industry.*

We estimate the expected range of the royalty impact on industry is −$5,336,212 to $7,959,698. The low end of that range is the sum of the Royalty Increase for the Rocky Mountain Region ($11,738) plus the lowest impact for the "Rest of the Country" ($4,303,913) plus the highest impact of the Royalty Decrease for Increased Allowable Costs (−$9,651,863). The high end of that range is the sum of the Royalty Increase for the Rocky Mountain Region ($11,738) plus the highest impact for the "Rest of the Country" ($11,658,663) plus the lowest impact of the Royalty Decrease for Increased Allowable Costs (−$3,710,703). For example, $11,738 + $4,303,913 −$9,651,863 = −$5,336,212 is the low range impact for Industry.

(5) *Cost—Administrative.*

(i) *System Modifications to reflect NYMEX pricing basis.*

We believe that any increases in administrative costs related to the changes in non-arm's-length valuation procedures will be minimal. These procedures involve NYMEX prices, which are readily available at no cost from numerous sources. They also involve determination of spot price differentials at various locations. We believe that anyone who used the non-arm's-length provisions of the June 2000 Rule already has access to the needed publications and exchange agreements. For some lessees, modification of computer programs related to royalty calculation and payment may be needed. We think that only about 50 of the approximately 800 Federal oil royalty payors will use the non-arm's-length provisions and thus might need to do some reprogramming. Using an estimated cost of $5,000 for each such payor to do its reprogramming, the added one-time cost will be $250,000.

(ii) *Location Differential under § 206.112(c)(1).*

We anticipate that, in a very few cases, companies may request approval of proposed differentials when less than 20 percent of the crude oil is transported or exchanged from the lease. These requests must: (1) Be in writing; (2) identify specifically all leases involved, the record title or operating rights owners of those leases, and the designees for those leases; (3) completely explain all relevant facts, including informing MMS of any changes to relevant facts that occur before MMS responds to a request; (4) include copies of all relevant documents; (5) provide the company's analysis of the issue(s), including citations to all relevant precedents (including adverse precedents); and (6) suggest the proposed differential. We estimate that there will be two such requests annually. We estimate the annual burden for these requests will be 660 hours (2 x 330), including recordkeeping. Based on a per-hour cost of $50, we estimate the cost to industry is $33,000.

B. State and Local Governments

This rule will not impose any additional burden on local governments. MMS estimates that States impacted by this rule may experience changes in royalty collections as indicated below:

(1) *Expected Royalty Increase—From Use of NYMEX Pricing.*

States receiving revenues from offshore OCS Section 8(g) leases will share in a portion of the estimated additional $4,303,913 to $11,658,663 in royalties that will accrue annually from

the "Rest of the Country," under this valuation methodology. Based on each OCS Section 8(g) State's share of total offshore royalties for FY 2001 and their OCS Section 8(g) disbursement percentage, we estimate the States' OCS Section 8(g) share to be between $26,363 and $71,119. Onshore States will receive additional revenue of $317,682.

For the Rocky Mountain Region, we estimate an increase in the States' share of royalty revenues of about $5,869 per year.

(2) *Expected Royalty Decrease—Allowable Costs: Increased Rate of Return and Inclusions of Line Loss, Quality Bank Administration Fees, Line Fill and Letters of Credit as components of allowance costs.*

(3) *Net Expected Change to Royalty Payments to States.*

We estimate that the net expected change to royalty payments to the States is −$55,553. That amount is calculated by the sum of the Royalty Increase for the Rocky Mountain Region ($5,869) plus the mid point value of the "Rest of the Country" ($366,423) plus the mid point value of the Royalty Decrease for Increased Allowable Costs (−$42,786 for OCS 8(g) States and −$385,059 for all States).

(4) *Expected Range of Royalty Impact on States.*

We estimate the expected range of the royalty impact on States would be −$204,773 to $93,628. The low end of the range is the sum of the Royalty Increase for the Rocky Mountain Region ($5,869) plus the lowest impact for the "Rest of the Country" ($344,045) plus the highest impact of the Royalty Decrease for Increased Allowable Costs (−$62,756 and −$491,891). The high end of the range is the sum of the Royalty Increase for the Rocky Mountain Region ($5,869) plus the highest impact for the "Rest of the Country" ($388,801) plus the lowest impact of the Royalty Decrease for Increased Allowable Costs (−$22,815 and −$278,227).

C. Federal Government

Because many of the changes in this rule are technical clarifications and others are relatively minor changes to the valuation mechanisms, the impacts to the Federal Government should be minimal, especially in administration.

(1) *Expected Royalty Increase—from use of NYMEX pricing.*

The Federal Government will receive an estimated $4,303,913 to $11,658,663 in royalties each year from the "Rest of the Country," of which affected States will receive a portion. We estimate the Federal share of offshore royalties to be between $3,642,186 and $10,952,180 and the Federal share of onshore royalties at $317,682. For the Rocky Mountain Region, we estimate an increase in royalty revenues of about $5,869 per year of the estimated additional $11,738 in royalties accruing to production in the affected States.

(2) *Expected Royalty Decrease—Allowable Costs: Increased Rate of Return and Inclusions of Line Loss, Quality Bank Administration Fees, Line Fill and Letters of Credit as components of allowance costs.*

We estimate that between $3,710,703 and $9,651,863 per year in additional transportation allowances may be deducted in calculating Federal royalties. Of that, between $22,815 and $62,756 is attributed to OCS 8(g) States and between $278,227 and $491,891 per year is attributed to all other States.

(3) *Net Expected Change in Royalty Payments to the Federal Government.*

We estimate a net expected change in royalty payments to the Federal Government of $1,367,296. That amount is calculated by the sum of the Royalty Increase for the Rocky Mountain Region ($5,869) plus the mid point value of the "Rest of the Country" ($7,614,865) plus the mid point value of the Royalty Decrease for Increased Allowable Costs (−$6,253,438).

(4) *Expected Range of Royalty Impact on the Federal Government.*

We estimate the expected range of the royalty impact on the Federal Government is −$5,131,479 to $7,866,070. The low end of that range is the sum of the Royalty Increase for the Rocky Mountain Region ($5,869) plus the lowest impact for the "Rest of the Country" ($3,959,868) plus the highest impact of the Royalty Decrease for Increased Allowable Costs (−$9,097,216). The high end of that range is the sum of the Royalty Increase for the Rocky Mountain Region ($5,869) plus the highest impact for the "Rest of the Country" ($11,269,862) plus the lowest impact of the Royalty Decrease for Increased Allowable Costs (−$3,409,661).

(5) *Cost—Location Differential under § 206.112(c).*

We anticipate that companies may request approval of proposed differentials when they transport or exchange less than 20 percent of the crude oil from the lease. In processing these requests, MMS must: (1) Respond in writing; (2) verify for all leases involved, the record title or operating rights owners of those leases, and the designees for those leases; (3) completely explain all relevant facts; (4) obtain copies of all relevant documents; (5) analyze the issue(s), including citations to all relevant precedents (including adverse precedents); and (6) potentially defend our determination. For the above written requests, we estimate that there will be two responses annually. We estimate that the annual burden for these requests is 660 hours (2 × 330), including recordkeeping. Based on a per-hour cost of $50, we estimate the cost to the Federal Government is $33,000.

D. Summary of Royalty Impacts and Costs to Industry, State and Local Governments, and the Federal Government

In the table, a negative number means a reduction in payment or receipt of royalties or a reduction in costs. A positive number means an increase in payment or receipt of royalties or an increase in costs. For the purpose of calculation of the net expected change in royalty impact, we assumed that the average for royalty increases or decreases will be the midpoint of this range.

SUMMARY OF COSTS AND ROYALTY IMPACTS

Description	Costs and royalty increases or royalty decreases	
	First year	Subsequent years
A. Industry:		
(1) Royalty Increase from use of NYMEX pricing	Rocky Mountain Region: $11,738 "Rest of the Country": $4,303,913 to $11,658,663.	Rocky Mountain Region: $11,738. "Rest of the Country': $4,303,913 to $11,658,663.
(2) Royalty Decrease—Increased Allowable Costs	−$3,710,703 to −$9,651,863	−$3,710,703 to −$9,651,863.
(3) Net Expected Change in Royalty Payments from industry [1]	$1,311,743	$1,311,743.
(4) Expected Range of Royalty Impact [2]	−$5,336,212 to $7,959,698	−$5,336,212 to $7,959,698.

SUMMARY OF COSTS AND ROYALTY IMPACTS—Continued

Description	Costs and royalty increases or royalty decreases	
	First year	Subsequent years
(5) Administrative Cost—Modification of Systems and Submittal of Location Differential Requests.	$283,000	$33,000.
B. State and Local Governments:		
(1) Royalty Increase—Increased Royalty Revenue in Terms of the States' Share of Federal Royalties from use of NYMEX pricing.	Rocky Mountain Region: $5,869	Rocky Mountain Region: $5,869.
	"Rest of the Country": $344,045 to $388,801.	"Rest of the Country": $344,045 to $388,801.
(2) Royalty Decrease—Increased Allowable Costs in Terms of the States' Share of Federal Royalties.	OCS §8(g) States: −22,815 to −62,756.	OCS §8(g) States: −22,815 to −62,756.
	All Other States: −278,227 to −491,891.	All Other States: −278,227 to −491,891.
(3) Net Expected Change to Royalty Payments to States [1]	−55,553	−55,553.
(4) Expected Range of Royalty Impact [2]	−204,733 to 93,628	−204,733 to 93,628.
C. Federal Government:		
(1) Royalty Increase—Increased Royalty Revenues Net of the States' Share from use of NYMEX pricing.	Rocky Mountain Region: 5,869	Rocky Mountain Region: 5,869.
	"Rest of the Country": 3,959,868 to 11,269,862.	"Rest of the Country": 3,959,868 to 11,269,862.
(2) Royalty Decrease—Increased Allowable Costs Net of the States' Share.	−3,409,661 to −9,097,216	−3,409,661 to −9,097,216.
(3) Net Expected Change in Royalty Payments to the Federal Government [1].	1,367,296	1,367,296.
(4) Expected Range of Royalty Impacts [2]	−5,131,479 to 7,866,070	−5,131,479 to 7,866,070.
(5) Cost of Administering Location Differential Requests	33,000	33,000.

[1] The value is the sum of the Royalty Increase for the Rocky Mountain Region plus the mid point value of the "Rest of the Country" plus the mid point value of the Royalty Decrease for Increased Allowable Costs.

[2] The low range impact is the sum of the Royalty Increase for the Rocky Mountain Region plus the lowest impact for the "Rest of the Country" plus the highest impact of the Royalty Decrease for Increased Allowable Costs. The high range impact is the sum of the Royalty Increase for the Rocky Mountain Region plus the highest impact for the "Rest of the Country" plus the lowest impact of the Royalty Decrease for Increased Allowable Costs. For example $11,738+$4,303,913+($9,651,863)=($5,336,212) is the low range impact for Industry.

2. Regulatory Planning and Review, Executive Order 12866

Summary of Comments: One State suggested that the revenue impacts that would result constitute a significant regulatory action under Executive Order 12866.

MMS Response: This rule does constitute a significant regulatory action under Executive Order 12866, but not because of the potential revenue impacts. It constitutes a significant regulatory action because it may raise novel legal or policy issues.

In accordance with the criteria in Executive Order 12866, this rule is not an economically significant regulatory action, as it does not exceed the $100 million threshold. The Office of Management and Budget has made the determination under Executive Order 12866 to review this rule because it raises novel legal or policy issues.

1. This rule will not have an annual effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of Government. MMS evaluated the costs of this rule, and estimates that industry might incur additional administrative costs of approximately $283,000 in the first year of implementation, and $33,000 in additional administrative costs in subsequent years. The Federal Government might incur $33,000 each year in additional administrative costs.

2. This rule will not create inconsistencies with other agencies' actions.

3. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. This rule will raise novel legal or policy issues.

3. Regulatory Flexibility Act

The Department of the Interior certifies this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule applies primarily to large, integrated producers who either refine their oil or sell their oil to affiliated marketers. Small producers will continue to pay their royalties based on the proceeds they receive for the sale of their oil to third parties as they have done since 1988.

Your comments are important. The Small Business and Agricultural Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions in this rule, call 1–800–734–3247. You may comment to the Small Business Administration without fear of retaliation. Disciplinary action for retaliation by an MMS employee may include suspension or termination from employment with the Department of the Interior.

4. Small Business Regulatory Enforcement Act (SBREFA)

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

1. Does not have an annual effect on the economy of $100 million or more. See the above Analysis titled "Summary of Costs and Royalty Impacts."

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

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.

5. Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

1. This rule will not significantly or uniquely affect small governments. Therefore, a Small Government Agency Plan is not required.

2. This rule will not produce a Federal mandate of $100 million or greater in any year; *i.e.*, it is not a significant regulatory action under the Unfunded Mandates Reform Act. The analysis prepared for Executive Order 12866 will meet the requirements of the Unfunded Mandates Reform Act. See the above Analysis titled "Summary of Costs and Royalty Impacts."

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

In accordance with Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

7. Federalism, Executive Order 13132

In accordance with Executive Order 13132, this rule does not have federalism implications. A federalism assessment is not required. It will not substantially and directly affect the relationship between the Federal and State governments. The management of Federal leases is the responsibility of the Secretary of the Interior. Royalties collected from Federal leases are shared with State governments on a percentage basis as prescribed by law. This rule will not alter any lease management or royalty sharing provisions. It will determine the value of production for royalty computation purposes only. This rule will not impose costs on States or localities.

8. Civil Justice Reform, Executive Order 12988

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

9. Paperwork Reduction Act of 1995

The Office of Management and Budget (OMB) has approved a new collection of information contained in this rule, entitled 30 CFR 206, subpart C, Federal Oil under 44 U.S.C. 3501 *et seq.*, and assigned control number 1010–0157. The total hour burden currently approved under 1010–0157 is 1,608. The information collection applies only to §§ 206.103(b)(4), 206.112(a)(1)(ii), 206.112(b)(3), and 210.53(a) and (b) of this rule and the burden hours are allocated equally to each section. OMB approval of this collection expires October 31, 2006. We received comments from industry, but there were no changes in the information collection from the proposed rule to the final rule. We will use the information collected to ensure that proper royalty is paid on oil produced from Federal onshore and offshore leases.

Submit your comments on the accuracy of this burden estimate or suggestions on reducing the burden to Sharron L. Gebhardt, Lead Regulatory Specialist, Chief of Staff Office, Minerals Revenue Management, MMS, PO Box 25165, MS 320B2, Denver, Colorado 80225. If you use an overnight courier service, the MMS courier address is Building 85, Room A–614, Denver Federal Center, Denver, Colorado 80225. 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.

10. National Environmental Policy Act (NEPA)

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

11. Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and DOI DM 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes. This rule does not apply to Indian leases. However, these changes may have an impact on Indian leases. As such, by **Federal Register** notice (68 FR 7086) dated February 12, 2003, MMS reopened the comment period on the January 2000 supplementary proposed rule for valuing crude oil produced from Indian leases. The comment period closed on April 14, 2003. MMS will determine how to proceed with that rulemaking based on comments received, taking into account our trust responsibilities and safeguarding the competitiveness of Indian leases.

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

In accordance with Executive Order 13211, this regulation does not have a significant adverse effect on the Nation's energy supply, distribution, or use. The changes better reflect the way industry accounts internally for its oil valuation and provides a number of technical clarifications. None of these changes should impact significantly the way industry does business, and accordingly should not affect their approach to energy development or marketing. Nor does the rule otherwise impact energy supply, distribution, or use.

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

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

14. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Would the rule be easier to understand if it 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, § 204.200.

(5) What is the purpose of this part?

(6) Is the description of the rule in the "Supplementary Information" section of the preamble helpful in understanding this rule?

(7) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240.

List of Subjects in 30 CFR part 206

Continental shelf, Government contracts, Mineral royalties, Natural gas, Petroleum, Public lands--mineral resources.

Dated: March 17, 2004.

Chad Calvert,

Acting Assistant Secretary for Land and Minerals Management.

■ For the reasons set forth in the preamble, subpart C of part 206 of title 30 of the Code of Federal Regulations is amended as follows:

PART 206—PRODUCT VALUATION

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

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

■ 2. Section 206.101 is amended to:
■ a. Revise the introductory text and paragraph (2) of the definition of "affiliate."
■ b. Remove the definitions of "index pricing" and "index pricing point."
■ c. Revise the definitions of "MMS-approved publication" and "trading month."
■ d. Add definitions of "NYMEX price," "prompt month," "roll," and "WTI differential."

The revisions and additions read as follows:

§ 206.101 What definitions apply to this subpart?

* * * * *

Affiliate means a person who controls, is controlled by, or is under common control with another person. For purposes of this subpart:

* * * * *

(2) If there is ownership or common ownership of 10 through 50 percent of the voting securities or instruments of ownership, or other forms of ownership, of another person, MMS will consider the following factors in determining whether there is control under the circumstances of a particular case:

* * * * *

MMS-approved publication means a publication MMS approves for determining ANS spot prices or WTI differentials.

* * * * *

NYMEX price means the average of the New York Mercantile Exchange (NYMEX) settlement prices for light sweet crude oil delivered at Cushing, Oklahoma, calculated as follows:

(1) Sum the prices published for each day during the calendar month of production (excluding weekends and holidays) for oil to be delivered in the prompt month corresponding to each such day; and

(2) Divide the sum by the number of days on which those prices are published (excluding weekends and holidays).

* * * * *

Prompt month means the nearest month of delivery for which NYMEX futures prices are published during the trading month.

* * * * *

Roll means an adjustment to the NYMEX price that is calculated as follows:

Roll = $.6667 \times (P_0 - P_1) + .3333 \times (P_0 - P_2)$, where: P_0 = the average of the daily NYMEX settlement prices for deliveries during the prompt month that is the same as the month of production, as published for each day during the trading month for which the month of production is the prompt month; P_1 = the average of the daily NYMEX settlement prices for deliveries during the month following the month of production, published for each day during the trading month for which the month of production is the prompt month; and P_2 = the average of the daily NYMEX settlement prices for deliveries during the second month following the month of production, as published for each day during the trading month for which the month of production is the prompt month. Calculate the average of the daily NYMEX settlement prices using only the days on which such prices are published (excluding weekends and holidays).

(1) *Example 1. Prices in Out Months are Lower Going Forward:* The month of production for which you must determine royalty value is March. March was the prompt month (for year 2003) from January 22 through February 20. April was the first month following the month of production, and May was the second month following the month of production. P_0 therefore is the average of the daily NYMEX settlement prices for deliveries during March published for each business day between January 22 and February 20. P_1 is the average of the daily NYMEX settlement prices for deliveries during April published for each business day between January 22 and February 20. P_2 is the average of the daily NYMEX settlement prices for deliveries during May published for each business day between January 22 and February 20. In this example, assume that P_0 = $28.00 per bbl, P_1 = $27.70 per bbl, and P_2 = $27.10 per bbl. In this example (a declining market), Roll = $.6667 \times ($28.00 - $27.70) + .3333 \times ($28.00 - $27.10) = $.20 + $.30 = $.50. You add this number to the NYMEX price.

(2) *Example 2. Prices in Out Months are Higher Going Forward:* The month of production for which you must determine royalty value is July. July 2003 was the prompt month from May 21 through June 20. August was the first month following the month of production, and September was the second month following the month of production. P_0 therefore is the average of the daily NYMEX settlement prices for deliveries during July published for each business day between May 21 and June 20. P_1 is the average of the daily NYMEX settlement prices for deliveries during August published for each business day between May 21 and June 20. P_2 is the average of the daily NYMEX settlement prices for deliveries during September published for each business day between May 21 and June 20. In this example, assume that P_0 = $28.00 per bbl, P_1 = $28.90 per bbl, and P_2 = $29.50 per bbl. In this example (a rising market), Roll = $.6667 \times ($28.00 - $28.90) + .3333 \times ($28.00 - $29.50) = (-$.60) + (-$.50) = -$1.10. You add this negative number to the NYMEX price (effectively a subtraction from the NYMEX price).

* * * * *

Trading month means the period extending from the second business day before the 25th day of the second calendar month preceding the delivery month (or, if the 25th day of that month is a non-business day, the second business day before the last business day preceding the 25th day of that month) through the third business day before the 25th day of the calendar month preceding the delivery month (or, if the 25th day of that month is a non-business day, the third business day before the last business day preceding the 25th day of that month), unless the NYMEX publishes a different definition or different dates on its official Web site, *www.nymex.com*, in which case the NYMEX definition will apply.

* * * * *

WTI differential means the average of the daily mean differentials for location and quality between a grade of crude oil at a market center and West Texas Intermediate (WTI) crude oil at Cushing published for each day for which price publications perform surveys for

deliveries during the production month, calculated over the number of days on which those differentials are published (excluding weekends and holidays). Calculate the daily mean differentials by averaging the daily high and low differentials for the month in the selected publication. Use only the days and corresponding differentials for which such differentials are published.

(1) *Example.* Assume the production month was March 2003. Industry trade publications performed their price surveys and determined differentials during January 26 through February 25 for oil delivered in March. The WTI differential (for example, the West Texas Sour crude at Midland, Texas, spread versus WTI) applicable to valuing oil produced in the March 2003 production month would be determined using all the business days for which differentials were published during the period January 26 through February 25 excluding weekends and holidays (22 days). To calculate the WTI differential, add together all of the daily mean differentials published for January 26 through February 25 and divide that sum by 22.

(2) [Reserved]

■ 3. In § 206.103, paragraphs (b), (c), (d), and (e) introductory text, (e)(1)(ii), and (iii) are revised to read as follows:

§ 206.103 How do I value oil that is not sold under an arm's-length contract?

* * * * *

(b) *Production from leases in the Rocky Mountain Region.* This paragraph provides methods and options for valuing your production under different factual situations. You must consistently apply paragraph (b)(1), (b)(2), or (b)(3) of this section to value all of your production from the same unit, communitization agreement, or lease (if the lease or a portion of the lease is not part of a unit or communitization agreement) that you cannot value under § 206.102 or that you elect under § 206.102(d) to value under this section.

(1) If you have an MMS-approved tendering program, you must value oil produced from leases in the area the tendering program covers at the highest winning bid price for tendered volumes.

(i) The minimum requirements for MMS to approve your tendering program are:

(A) You must offer and sell at least 30 percent of your or your affiliates' production from both Federal and non-Federal leases in the area under your tendering program; and

(B) You must receive at least three bids for the tendered volumes from bidders who do not have their own tendering programs that cover some or all of the same area.

(ii) If you do not have an MMS-approved tendering program, you may elect to value your oil under either paragraph (b)(2) or (b)(3) of this section. After you select either paragraph (b)(2) or (b)(3) of this section, you may not change to the other method more often than once every 2 years, unless the method you have been using is no longer applicable and you must apply the other paragraph. If you change methods, you must begin a new 2-year period.

(2) Value is the volume-weighted average of the gross proceeds accruing to the seller under your or your affiliates' arm's-length contracts for the purchase or sale of production from the field or area during the production month.

(i) The total volume purchased or sold under those contracts must exceed 50 percent of your and your affiliates' production from both Federal and non-Federal leases in the same field or area during that month.

(ii) Before calculating the volume-weighted average, you must normalize the quality of the oil in your or your affiliates' arm's-length purchases or sales to the same gravity as that of the oil produced from the lease.

(3) Value is the NYMEX price (without the roll), adjusted for applicable location and quality differentials and transportation costs under § 206.112.

(4) If you demonstrate to MMS's satisfaction that paragraphs (b)(1) through (b)(3) of this section result in an unreasonable value for your production as a result of circumstances regarding that production, the MMS Director may establish an alternative valuation method.

(c) *Production from leases not located in California, Alaska, or the Rocky Mountain Region.* (1) Value is the NYMEX price, plus the roll, adjusted for applicable location and quality differentials and transportation costs under § 206.112.

(2) If the MMS Director determines that use of the roll no longer reflects prevailing industry practice in crude oil sales contracts or that the most common formula used by industry to calculate the roll changes, MMS may terminate or modify use of the roll under paragraph (c)(1) of this section at the end of each 2-year period following July 6, 2004, through notice published in the **Federal Register** not later than 60 days before the end of the 2-year period. MMS will explain the rationale for terminating or modifying the use of the roll in this notice.

(d) *Unreasonable value.* If MMS determines that the NYMEX price or ANS spot price does not represent a reasonable royalty value in any particular case, MMS may establish reasonable royalty value based on other relevant matters.

(e) *Production delivered to your refinery and the NYMEX price or ANS spot price is an unreasonable value.*

(1) * * *

(ii) You must value your oil under this section at the NYMEX price or ANS spot price; and

(iii) You believe that use of the NYMEX price or ANS spot price results in an unreasonable royalty value.

* * * * *

■ 4. In § 206.104, the section heading, the introductory text of paragraph (a), and paragraphs (a)(3), (c), and (d) are revised to read as follows:

§ 206.104 What publications are acceptable to MMS?

(a) MMS periodically will publish in the **Federal Register** a list of acceptable publications for the NYMEX price and ANS spot price based on certain criteria, including, but not limited to:

* * * * *

(3) Publications that use adequate survey techniques, including development of estimates based on daily surveys of buyers and sellers of crude oil, and, for ANS spot prices, buyers and sellers of ANS crude oil; and

* * * * *

(c) MMS will specify the tables you must use in the acceptable publications.

(d) MMS may revoke its approval of a particular publication if it determines that the prices or differentials published in the publication do not accurately represent NYMEX prices or differentials or ANS spot market prices or differentials.

■ 5. In § 206.109, paragraph (b) is revised to read as follows:

§ 206.109 When may I take a transportation allowance in determining value?

* * * * *

(b) *Transportation allowances and other adjustments that apply when value is based on NYMEX prices or ANS spot prices.* If you value oil using NYMEX prices or ANS spot prices under § 206.103, MMS will allow an adjustment for certain location and quality differentials and certain costs associated with transporting oil as provided under § 206.112.

* * * * *

■ 6. Section 206.110 is amended by:

■ A. Revising paragraph (a);

■ B. Redesignating existing paragraphs (b) through (e) as paragraphs (d) through (g); and
■ C. Adding new paragraphs (b) and (c).

The revisions and additions read as follows:

§ 206.110 How do I determine a transportation allowance under an arm's-length transportation contract?

(a) If you or your affiliate incur transportation costs under an arm's-length transportation contract, you may claim a transportation allowance for the reasonable, actual costs incurred as more fully explained in paragraph (b) of this section, except as provided in paragraphs (a)(1) and (a)(2) of this section and subject to the limitation in § 206.109(c). You must be able to demonstrate that your or your affiliate's contract is at arm's length. You do not need MMS approval before reporting a transportation allowance for costs incurred under an arm's-length transportation contract.

* * * * *

(b) You may deduct any of the following actual costs you (including your affiliates) incur for transporting oil. You may not use as a deduction any cost that duplicates all or part of any other cost that you use under this paragraph.

(1) The amount that you pay under your arm's-length transportation contract or tariff.

(2) Fees paid (either in volume or in value) for actual or theoretical line losses.

(3) Fees paid for administration of a quality bank.

(4) The cost of carrying on your books as inventory a volume of oil that the pipeline operator requires you to maintain, and that you do maintain, in the line as line fill. You must calculate this cost as follows:

(i) Multiply the volume that the pipeline requires you to maintain, and that you do maintain, in the pipeline by the value of that volume for the current month calculated under § 206.102 or § 206.103, as applicable; and

(ii) Multiply the value calculated under paragraph (b)(4)(i) of this section by the monthly rate of return, calculated by dividing the rate of return specified in § 206.111(i)(2) by 12.

(5) Fees paid to a terminal operator for loading and unloading of crude oil into or from a vessel, vehicle, pipeline, or other conveyance.

(6) Fees paid for short-term storage (30 days or less) incidental to transportation as required by a transporter.

(7) Fees paid to pump oil to another carrier's system or vehicles as required under a tariff.

(8) Transfer fees paid to a hub operator associated with physical movement of crude oil through the hub when you do not sell the oil at the hub. These fees do not include title transfer fees.

(9) Payments for a volumetric deduction to cover shrinkage when high-gravity petroleum (generally in excess of 51 degrees API) is mixed with lower-gravity crude oil for transportation.

(10) Costs of securing a letter of credit, or other surety, that the pipeline requires you as a shipper to maintain.

(c) You may not deduct any costs that are not actual costs of transporting oil, including but not limited to the following:

(1) Fees paid for long-term storage (more than 30 days).

(2) Administrative, handling, and accounting fees associated with terminalling.

(3) Title and terminal transfer fees.

(4) Fees paid to track and match receipts and deliveries at a market center or to avoid paying title transfer fees.

(5) Fees paid to brokers.

(6) Fees paid to a scheduling service provider.

(7) Internal costs, including salaries and related costs, rent/space costs, office equipment costs, legal fees, and other costs to schedule, nominate, and account for sale or movement of production.

(8) Gauging fees.

* * * * *

■ 7. Section 206.111 is amended by:
■ A. Revising the section heading and paragraph (a);
■ B. In paragraph (b), revising the introductory text and adding new paragraphs (b)(6) and (b)(7);
■ C. Revising paragraph (h)(5); and
■ D. Revising paragraph (i)(2).

The amendments read as follows:

§ 206.111 How do I determine a transportation allowance if I do not have an arm's-length transportation contract or arm's-length tariff?

(a) This section applies if you or your affiliate do not have an arm's-length transportation contract, including situations where you or your affiliate provide your own transportation services. Calculate your transportation allowance based on your or your affiliate's reasonable, actual costs for transportation during the reporting period using the procedures prescribed in this section.

(b) Your or your affiliate's actual costs include the following:

* * * * *

(6) To the extent not included in costs identified in paragraphs (d) through (j) of this section, you may also deduct the following actual costs. You may not use any cost as a deduction that duplicates all or part of any other cost that you use under this section:

(i) Volumetric adjustments for actual (not theoretical) line losses.

(ii) The cost of carrying on your books as inventory a volume of oil that the pipeline operator requires you as a shipper to maintain, and that you do maintain, in the line as line fill. You must calculate this cost as follows:

(A) Multiply the volume that the pipeline requires you to maintain, and that you do maintain, in the pipeline by the value of that volume for the current month calculated under § 206.102 or § 206.103, as applicable; and

(B) Multiply the value calculated under paragraph (b)(6)(ii)(A) of this section by the monthly rate of return, calculated by dividing the rate of return specified in § 206.111(i)(2) by 12.

(iii) Fees paid to a non-affiliated terminal operator for loading and unloading of crude oil into or from a vessel, vehicle, pipeline, or other conveyance.

(iv) Transfer fees paid to a hub operator associated with physical movement of crude oil through the hub when you do not sell the oil at the hub. These fees do not include title transfer fees.

(v) A volumetric deduction to cover shrinkage when high-gravity petroleum (generally in excess of 51 degrees API) is mixed with lower-gravity crude oil for transportation.

(vi) Fees paid to a non-affiliated quality bank administrator for administration of a quality bank.

(7) You may not deduct any costs that are not actual costs of transporting oil, including but not limited to the following:

(i) Fees paid for long-term storage (more than 30 days).

(ii) Administrative, handling, and accounting fees associated with terminalling.

(iii) Title and terminal transfer fees.

(iv) Fees paid to track and match receipts and deliveries at a market center or to avoid paying title transfer fees.

(v) Fees paid to brokers.

(vi) Fees paid to a scheduling service provider.

(vii) Internal costs, including salaries and related costs, rent/space costs, office equipment costs, legal fees, and other costs to schedule, nominate, and account for sale or movement of production.

(viii) Theoretical line losses.

(ix) Gauging fees.

(h) * * *

(5) If you or your affiliate purchase a transportation system at arm's length after June 1, 2000, from anyone other than the original owner, you must assume the depreciation schedule of the person from whom you bought the system. Include in the depreciation schedule any subsequent reinvestment.

(i) * * *

(2) The rate of return is 1.3 times the industrial bond yield index for Standard & Poor's BBB bond rating. Use the monthly average rate published in "Standard & Poor's Bond Guide" for the first month of the reporting period for which the allowance applies. Calculate the rate at the beginning of each subsequent transportation allowance reporting period.

* * * * *

■ 8. Section 206.112 is revised to read as follows:

§ 206.112 What adjustments and transportation allowances apply when I value oil production from my lease using NYMEX prices or ANS spot prices?

This section applies when you use NYMEX prices or ANS spot prices to calculate the value of production under § 206.103. As specified in this section, adjust the NYMEX price to reflect the difference in value between your lease and Cushing, Oklahoma, or adjust the ANS spot price to reflect the difference in value between your lease and the appropriate MMS-recognized market center at which the ANS spot price is published (for example, Long Beach, California, or San Francisco, California). Paragraph (a) of this section explains how you adjust the value between the lease and the market center, and paragraph (b) of this section explains how you adjust the value between the market center and Cushing when you use NYMEX prices. Paragraph (c) of this section explains how adjustments may be made for quality differentials that are not accounted for through exchange agreements. Paragraph (d) of this section gives some examples. References in this section to "you" include your affiliates as applicable.

(a) To adjust the value between the lease and the market center:

(1)(i) For oil that you exchange at arm's length between your lease and the market center (or between any intermediate points between those locations), you must calculate a lease-to-market center differential by the applicable location and quality differentials derived from your arm's-length exchange agreement applicable to production during the production month.

(ii) For oil that you exchange between your lease and the market center (or between any intermediate points between those locations) under an exchange agreement that is not at arm's length, you must obtain approval from MMS for a location and quality differential. Until you obtain such approval, you may use the location and quality differential derived from that exchange agreement applicable to production during the production month. If MMS prescribes a different differential, you must apply MMS's differential to all periods for which you used your proposed differential. You must pay any additional royalties owed resulting from using MMS's differential plus late payment interest from the original royalty due date, or you may report a credit for any overpaid royalties plus interest under 30 U.S.C. 1721(h).

(2) For oil that you transport between your lease and the market center (or between any intermediate points between those locations), you may take an allowance for the cost of transporting that oil between the relevant points as determined under § 206.110 or § 206.111, as applicable.

(3) If you transport or exchange at arm's length (or both transport and exchange) at least 20 percent, but not all, of your oil produced from the lease to a market center, determine the adjustment between the lease and the market center for the oil that is not transported or exchanged (or both transported and exchanged) to or through a market center as follows:

(i) Determine the volume-weighted average of the lease-to-market center adjustment calculated under paragraphs (a)(1) and (a)(2) of this section for the oil that you do transport or exchange (or both transport and exchange) from your lease to a market center.

(ii) Use that volume-weighted average lease-to-market center adjustment as the adjustment for the oil that you do not transport or exchange (or both transport and exchange) from your lease to a market center.

(4) If you transport or exchange (or both transport and exchange) less than 20 percent of the crude oil produced from your lease between the lease and a market center, you must propose to MMS an adjustment between the lease and the market center for the portion of the oil that you do not transport or exchange (or both transport and exchange) to a market center. Until you obtain such approval, you may use your proposed adjustment. If MMS prescribes a different adjustment, you must apply MMS's adjustment to all periods for which you used your proposed adjustment. You must pay any additional royalties owed resulting from using MMS's adjustment plus late payment interest from the original royalty due date, or you may report a credit for any overpaid royalties plus interest under 30 U.S.C. 1721(h).

(5) You may not both take a transportation allowance and use a location and quality adjustment or exchange differential for the same oil between the same points.

(b) For oil that you value using NYMEX prices, adjust the value between the market center and Cushing, Oklahoma, as follows:

(1) If you have arm's-length exchange agreements between the market center and Cushing under which you exchange to Cushing at least 20 percent of all the oil you own at the market center during the production month, you must use the volume-weighted average of the location and quality differentials from those agreements as the adjustment between the market center and Cushing for all the oil that you produce from the leases during that production month for which that market center is used.

(2) If paragraph (b)(1) of this section does not apply, you must use the WTI differential published in an MMS-approved publication for the market center nearest your lease, for crude oil most similar in quality to your production, as the adjustment between the market center and Cushing. (For example, for light sweet crude oil produced offshore of Louisiana, use the WTI differential for Light Louisiana Sweet crude oil at St. James, Louisiana.) After you select an MMS-approved publication, you may not select a different publication more often than once every 2 years, unless the publication you use is no longer published or MMS revokes its approval of the publication. If you are required to change publications, you must begin a new 2-year period.

(3) If neither paragraph (b)(1) nor (b)(2) of this section applies, you may propose an alternative differential to MMS. Until you obtain such approval, you may use your proposed differential. If MMS prescribes a different differential, you must apply MMS's differential to all periods for which you used your proposed differential. You must pay any additional royalties owed resulting from using MMS's differential plus late payment interest from the original royalty due date, or you may report a credit for any overpaid royalties plus interest under 30 U.S.C. 1721(h).

(c)(1) If you adjust for location and quality differentials or for transportation costs under paragraphs (a) and (b) of this section, also adjust the NYMEX price or ANS spot price for quality based on premiums or penalties determined by pipeline quality bank

specifications at intermediate commingling points or at the market center if those points are downstream of the royalty measurement point approved by MMS or BLM, as applicable. Make this adjustment only if and to the extent that such adjustments were not already included in the location and quality differentials determined from your arm's-length exchange agreements.

(2) If the quality of your oil as adjusted is still different from the quality of the representative crude oil at the market center after making the quality adjustments described in paragraphs (a), (b) and (c)(1) of this section, you may make further gravity adjustments using posted price gravity tables. If quality bank adjustments do not incorporate or provide for adjustments for sulfur content, you may make sulfur adjustments, based on the quality of the representative crude oil at the market center, of 5.0 cents per one-tenth percent difference in sulfur content, unless MMS approves a higher adjustment.

(d) The examples in this paragraph illustrate how to apply the requirement of this section.

(1) *Example.* Assume that a Federal lessee produces crude oil from a lease near Artesia, New Mexico. Further, assume that the lessee transports the oil to Roswell, New Mexico, and then exchanges the oil to Midland, Texas. Assume the lessee refines the oil received in exchange at Midland. Assume that the NYMEX price is $30.00/bbl, adjusted for the roll; that the WTI differential (Cushing to Midland) is −$.10/bbl; that the lessee's exchange agreement between Roswell and Midland results in a location and quality differential of −$.08/bbl; and that the lessee's actual cost of transporting the oil from Artesia to Roswell is $.40/bbl. In this example, the royalty value of the oil is $30.00 − $.10 − $.08—$.40 = $29.42/bbl.

(2) *Example.* Assume the same facts as in the example in paragraph (1), except that the lessee transports and exchanges to Midland 40 percent of the production from the lease near Artesia, and transports the remaining 60 percent directly to its own refinery in Ohio. In this example, the 40 percent of the production would be valued at $29.42/bbl, as explained in the previous example. In this example, the other 60 percent also would be valued at $29.42/bbl.

(3) *Example.* Assume that a Federal lessee produces crude oil from a lease near Bakersfield, California. Further, assume that the lessee transports the oil to Hynes Station, and then exchanges the oil to Cushing which it further exchanges with oil it refines. Assume that the ANS spot price is $20.00/bbl, and that the lessee's actual cost of transporting the oil from Bakersfield to Hynes Station is $.28/bbl. The lessee must request approval from MMS for a location and quality adjustment between Hynes Station and Long Beach. For example, the lessee likely would propose using the tariff on Line 63 from Hynes Station to Long Beach as the adjustment between those points. Assume that adjustment to be $.72, including the sulfur and gravity bank adjustments, and that MMS approves the lessee's request. In this example, the preliminary (because the location and quality adjustment is subject to MMS review) royalty value of the oil is $20.00 − $.72 − $.28 = $19.00/bbl. The fact that oil was exchanged to Cushing does not change use of ANS spot prices for royalty valuation.

§ 206.118 [Removed]

■ 9. Section 206.118 is removed.

■ 10. Paragraph (c) of § 206.119 is revised to read as follows:

§ 206.119 How are royalty quantity and quality determined?

* * * * *

(c) Any actual loss that you may incur before the royalty settlement metering or measurement point is not subject to royalty if BLM or MMS, as appropriate, determines that the loss is unavoidable.

* * * * *

§ 206.121 [Removed]

■ 11. Section 206.121 is removed.

[FR Doc. 04–10083 Filed 5–4–04; 8:45 am]
BILLING CODE 4310–MR–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 62, 66, 67, and 72

[USCG–2001–10714]

RIN 1625–AA34

Update of Rules on Aids to Navigation Affecting Buoys, Sound Signals, International Rules at Sea, Communications Procedures, and Large Navigational Buoys

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is revising its aids to navigation and maritime information regulations by updating technical information concerning buoys, sound signals, international rules at sea, communications procedures, and large navigational buoys, and by rewriting some regulations to make them clearer and gender-neutral. These changes will update existing rules to reflect current practices and make them easier to understand.

DATES: This final rule is effective June 4, 2004.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2001–10714 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Mr. Dan Andrusiak, Project Manager, Office of Short-Range Aids to Navigation (G–OPN), Coast Guard, telephone 202–267–0327 (e-mail: *dandrusiak@comdt.uscg.mil*). If you have questions on viewing the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION:

Regulatory History

On May 14, 2003, we published a notice of proposed rulemaking (NPRM) entitled "Update of Rules on Aids to Navigation Affecting Buoys, Sound Signals, International Rules at Sea, Communications Procedures, and Large Navigational Buoys" in the **Federal Register** (68 FR 25855). We also published a correction of a web address on May 22, 2003 (68 FR 28052). We are adopting that proposed rule as final with the exception of changes described in the *Discussion of Comments and Changes* and *Changes not related to comments* sections below.

We received two letters commenting on the proposed rule. No public hearing was requested and none was held.

Background and Purpose

The Coast Guard's Office of Short-Range Aids to Navigation frequently reviews the rules on Aids to Navigation. During our most recent review, we found that many rules do not reflect current technologies and practices. For example, what we formerly called "fog signals," we now call "sound signals." Also, we want to inform users that

certain safety information, such as "Notice to Mariners" can now be found on the World Wide Web. Therefore, we updated our aids to navigation rules and in the process attempted to eliminate ambiguous, confusing, or gender-specific language.

Discussion of Comments and Changes

From 2 individual commenters we received 15 specific comments to this rule. These comments and our responses follow:

Comment 1. Given the number of security zones that have been recently established, and the number of additional security zones that are likely to be established, the Coast Guard should establish a "special mark" or "regulatory mark" with unique coloration and light characteristics for delimiting security zones.

Response: This is already covered under paragraph (a)(2) of § 62.33, Information and regulatory marks. It specifies that vertical diamond-shape marks featuring a centered cross be used to indicate that vessels are excluded from an area. The Coast Guard, however, will not mark security zones as a general practice.

Comment 2. The Coast Guard should establish additional means (telephone, facsimile, e-mail, etc.) for receiving reports of defects or discrepancies in navigational aids and § 62.65(c)(2) should be revised accordingly.

Response: In the preamble of our NPRM, we stated there were many ways to reach the Coast Guard. Indeed, this was our primary reason for removing a collect-call option from § 62.65(c)(2). (68 FR 25856, May 14, 2003). The text of our proposed rule, however, did not convey this message clearly. To make it clear that we invite people to report aids to navigation defects or discrepancies to us by radio, or other means—including telephone, e-mail, or facsimile, we have revised § 62.65(c)(2) and eliminated the use of the undefined "commercial communications facilities."

Comment 3. We understand that the Coast Guard will be proposing new rules to, among other things, mandate certain vessels be equipped with Automatic Identification Systems (AIS) as aids to navigation. It would appear appropriate to consider allowing certain offshore installations and shore facilities to be equipped to transmit AIS information (*e.g.*, temporary, or newly established security zones). When the AIS regulations are proposed, the Coast Guard should consider the need to revise § 66.01–1(d) to allow such installations and facilities to apply for authorization to transmit AIS information.

Response: This suggestion is outside the scope of this rulemaking and therefore we did not change the rule based on this comment. In response to a notice and request for comments published July 1, 2003 (68 FR 39369), the commenter has sent the same comment to an AIS docket (see item number 2003–14878–50) where it will be considered.

Comment 4. The third sentence in § 66.10–15(b) should be revised by removing the word "a" in the phrase "looking upstream or toward the head of a navigation".

Response: We agree and have revised § 66.10–15(b) accordingly.

Comment 5. Further guidance should be provided in § 67.01–5(a) regarding the applicability of the "structures" requirements to mobile offshore drilling units (MODUs). The list of examples should be expanded to include "self-elevating MODUs elevated on location" and "floating MODUs when attached to the seabed by a marine drilling riser." While there is consistency in the application of the term "structure" to these units in the Gulf of Mexico, there has been historic inconsistency in other regions. It would be helpful if consistency could be achieved at this time, through rulemaking, while no such units are operating in areas of U.S. jurisdiction outside the Gulf of Mexico.

Response: We agree that the definition of "structures" should include a reference to MODUs and we have revised § 67.01–5(a) accordingly.

Comment 6. The Coast Guard should carefully differentiate between the actual "range" of sound signals and the "approved," "rated," or "nominal" range of such signals in its regulatory requirements. The actual range of such devices is dependent upon atmospheric conditions and cannot be assured. Regulations requiring sound signals should do so by referring to an approved, rated, or nominal range. Regulations where this change should be made include §§ 67.10–1(c), 67.10–5(a), 67.10–10(a)(3), 67.10–20, 67.10–25(a)(3), 67.20–10, 67.25–10, and 67.30–10.

Response: With the exception of § 67.10–20, Sound signal tests, we agree. In this final rule, we have changed "range" to "rated range" in §§ 67.10–1(c), 67.10–5(a), 67.10–10(a)(3), 67.10–25(a)(3), 67.20–10, 67.25–10, and 67.30–10. Section 67.10–20, however, dictates how the test will be conducted to verify that the signal performs at the rated range. Thus, we did not change the wording of § 67.10–20 based on this comment.

Comment 7. Section 67.10–5(b) should be revised to read: "Be located on the structure so that the sound signal produced is audible over 360 degrees in a horizontal plane at all distances up to and including the required range."

Response: We did not make any changes in the rule based on this comment. Wording nearly identical to the proposed language already appears in § 67.10–5(a) and we see no need to change the wording in paragraph (b), which contains a height-requirement for the installation of the sound signal.

Comment 8. Section 67.10–20(a)(2) should be revised to allow the Coast Guard to accept the use of sound level meters other than the ones that it supplies by referencing an appropriate industry specification for a meter that meets or exceeds the standards of the meter used by the Coast Guard.

Response: We appreciate this suggested change in § 67.10–20, but it is beyond the scope of this rulemaking, which is limited to updating existing rules to reflect current practices and making these regulations gender-neutral and easier to understand. Therefore, we did not change the rule based on this comment.

Comment 9. Section 67.10–25(a)(1) should be revised to eliminate "his."

Response: We agree. In the final rule we have changed "his" in § 67.10–25(a)(1) to "Requestor's".

Comment 10. Revise § 67.10–25(b) to provide guidance regarding how "all expenses of the U.S. Government in sending a Coast Guard representative to the test" are to be calculated. Does this include pro-rated salaries, or only additional costs of travel, etc.?

Response: We have revised § 67.10–25(b) to indicate that only costs associated with travel and per diem, and not salary, are chargeable.

Comment 11. It appears that the reference to "Subpart 62.25" in § 67.15–10(a) should be revised to refer to §§ 62.23 to 62.33.

Response: We agree. We have changed it from "Subpart 62.25" to "Subpart B." (Subpart B includes §§ 62.23 to 62.33.)

Comment 12. With regard to §§ 67.20–5 and 67.25–5(a), the regulatory requirement that "lights shall be of sufficient candlepower as to be visible at a distance of at least five nautical miles 90 percent of the nights of the year" is inappropriate. This language should be replaced by a requirement that lights for a specified range meet specific minimum intensity requirements based upon a desired range. As the requirement is written, specialized studies of historic atmospheric conditions for each light would be required and would need to be continuously revalidated.

Response: Because atmospheric conditions vary by locality, the minimum candlepower needed to meet visibility requirements will also vary. Contact your local District Commander for local guidance. Local candlepower requirements are based upon transmissivity data issued by the National Oceanic and Atmospheric Administration (NOAA).

Comment 13. In § 67.20–5, the cross-reference to § 67.05–1(f) should be corrected because § 67.05–1(f) does not address a maximum height for lights.

Response: While not expressly stated in § 67.05–1(f), maximum height is inferred. The maximum height at which a light could be installed and remain visible up until the mariner is within 50 feet of a structure depends on the vertical divergence of the optic for the installed light. We have revised the last sentence of § 67.20–5 to reflect that vertical divergence will dictate the maximum height as opposed to giving an impression the reader will find a specific maximum height in § 67.05–1(f).

Comment 14. The "3" in § 67.25–10(a)(2)'s phrase "less than 3 provisions of paragraph (b) or (c) of this section" appears to be in error and should be corrected.

Response: This portion of § 67.25–10(a)(2) in the CFR is indeed in error. With the exception of changing "fog signal" to "sound signal," paragraph (a)(2) should read the same as it did in the final rule published in the **Federal Register** July 8, 1972, (37 FR 13512, 13513): "Operate the fog signal when the visibility in any direction is less than 3 miles, unless the District Commander establishes a greater or lesser distance of visibility, not to exceed 5 miles, under the provisions of paragraph (b) or (c) of this section." We have included this amendatory instruction in our final rule.

Comment 15. The Coast Guard should remove the term "nun buoy" from its regulations and internal policies and procedures because, the term is not only "gender-specific," but also it has religious implications. These buoys are also commonly referred to as "conical buoys" and, in some regions, have historically been referred to as "nut buoys."

Response: Though we do seek to eliminate references in our rules to one gender to the exclusion of the other, this change would create problems for the boating public. We use the term "nun" to refer to tapered, conical-shaped buoys because they appear, to some, to resemble a nun's habit. This term has long been associated with such buoys both domestically and internationally. Unlike changing "his" to "his or her" in a rule, this request would require changes to nautical charts—can (cylindrical) buoys are indicated on charts by the letter "c" and "nun" buoys by the letter "n". Changing "nun" to "conical" would remove a means of identifying the aid as charted, and the term "nut buoy" is not commonly known.

Changes Not Related to Comments

In addition to revisions based on comments from the public, we made a few other changes. We changed our references to the National Imagery and Mapping Agency in notes to §§ 72.01–10 and 72.05–10 to reflect that agency's new name: the National Geospatial-Intelligence Agency. We also updated the citations for parts 62, 66, 67, and 72.

Regulatory Evaluation

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

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

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule will update technical information to reflect current practices and to rewrite some sections for clarity.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule affects your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Dan Andrusiak, Project Manager, Office of Short-Range Aids to Navigation (OPN), Coast Guard, telephone 202–267–0327 (e-mail: *dandrusiak@comdt.uscg.mil*). Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). You are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them.

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it 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.

Energy Effects

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(a), of the Instruction, from further environmental documentation because it is editorial in nature—updating rules to reflect current practices, and to make them both gender-neutral and easier to understand. An "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 62

Navigation (water).

33 CFR Part 66

Intergovernmental relations, Navigation (water), Reporting and recordkeeping requirements.

33 CFR Part 67

Continental shelf, Navigation (water), Reporting and recordkeeping requirements.

33 CFR Part 72

Government publications, Navigation (water).

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 62, 66, 67, and 72 as follows:

PART 62—UNITED STATES AIDS TO NAVIGATION SYSTEM

■ 1. The authority citation for part 62 continues to read as follows:

Authority: 14 U.S.C. 85; 33 U.S.C. 1222, 1233; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

§ 62.39 [Removed]

■ 2. Remove § 62.39.

§§ 62.55–62.61 (Subpart C) [Removed and Reserved]

■ 3. Remove and reserve subpart C, consisting of §§ 62.55 through 62.61.

■ 4. In § 62.65, revise paragraph (c)(2) to read as follows:

§ 62.65 Procedures for reporting defects and discrepancies.

* * * * *

(c) * * *

(2) Telephone, e-mail, or facsimile messages may also be used to advise the nearest Coast Guard unit of defects or discrepancies in aids to navigation.

PART 66—PRIVATE AIDS TO NAVIGATION

■ 5. The authority citation for part 66 is revised to read as follows:

Authority: 14 U.S.C. 83, 84, 85; 43 U.S.C. 1333; Pub. L. 107–296, 116 Stat. 2135; Department of Homeland Security Delegation No. 0170.1.

§ 66.01–5 [Amended]

■ 6. In § 66.01–5(g), remove the word "fog," and add in its place, the word "sound."

§ 66.05–10 [Amended]

■ 7. In § 66.05–10—

■ a. In paragraph (c), wherever the word "his" appears, remove it; and

■ b. In paragraph (e), in the first sentence, add the words "or her" immediately after the word "his", and add the word "or her" immediately after the words "by him."

■ 8. Revise § 66.05–25 to read as follows:

§ 66.05–25 Change and modification of State aids to navigation.

Wherever a State Administrator determines the need for change in State aids to navigation, he or she must inform the District Commander of the nature and extent of the changes, as soon as possible, but not less than 30 days in advance of making the changes.

■ 9. In § 66.05–30 revise paragraph (a) to read as set forth below.

§ 66.05–30 Notice to Mariners.

(a) To improve public safety, the District Commander may publish information concerning State aids to navigation, including regulatory markers, in the Coast Guard Local Notices to Mariners.

* * * * *

§ 66.05–100 [Amended]

■ 10. In § 66.05–100, in paragraph (e), remove the words "Each navigable water" and add, in their place, the words "Navigable waters."

§ 66.10–15 [Amended]

■ 11. In § 66.10–15—

■ a. In paragraph (b), in the third sentence remove the word "a" before "navigation".

■ b. In paragraphs (b) and (c), in the last sentence, remove the word "he" and add, in its place, the words "the user",

■ c. In paragraphs (e)(1), (e)(2) and (e)(3), remove the word "he" and add, in its place, the words "the operator".

PART 67—AIDS TO NAVIGATION ON ARTIFICIAL ISLANDS AND FIXED STRUCTURES

■ 12. The authority citation for part 67 is revised to read as follows:

Authority: 14 U.S.C. 85, 633; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

PART 67—[Amended]

■ 13. In part 67, remove the words "fog signal" and "fog signals" and add, in their place, respectively, the words "sound signal" and "sound signals" in the following places:

a. Section 67.01–1 (a);
b. Section 67.01–5 (e) and (f), including the section heading for (f);
c. Subpart 67.10, subpart heading;
d. Sections 67.10–1 introductory text;
e. Section 67.10–5 introductory text;
f. Section 67.10–10 (a) introductory text, (a)(3) and (b);
g. Section 67.10–15, section heading, paragraphs (a) introductory text, (a)(1), (a)(2), and (b);
h. Section 67.10–20, section heading, paragraphs (a) introductory text, and (a)(3);
i. Section 67.10–25 introductory text and (a)(2);
j. Section 67.10–30;
k. Section 67.10–35(a) and (b);
l. Section 67.10–40, section heading and text;
m. Section 67.20–10, section heading, and paragraphs (a)(1), (a)(2) and (b);
n. Section 67.25–10, section heading, paragraphs (a)(1), (a)(2), (b) introductory text, (b)(2), and (c)(1);
o. Section 67.30–10, section heading, paragraphs (a) introductory text, (b), (c), (d) introductory text and (d)(2);
p. Section 67.35–1 (b);
q. Section 67.35–5 (b);
r. Section 67.40–1 (a);
s. Section 67.40–5 (b);
t. Section 67.40–20; and
u. Section 67.50–25 (f).

PART 67—[Amended]

■ 14. In part 67, immediately before the word "range", add the word "rated" in the following places:

a. Section 67.10–1(c).
b. Section 67.10–5(a).
c. Section 67.10–10(a)(3).
d. Section 67.10–25(a)(3).
e. Section 67.20–10(a)(1).
f. Section 67.25–10(a)(1), (a)(1)(i), (b).
g. Section 67.30–10(b).

§ 67.01–5 [Amended]

■ 15. Amend § 67.01–5(a) by adding the words "Mobile Offshore Drilling Units (MODUs) when attached to the bottom," immediately after the words "all drilling platforms,".

■ 16. Revise § 67.01–10 to read as follows:

§ 67.01–10 Delegation of functions.

The Coast Guard District Commander may delegate the authority for performing inspections, enforcement, and administration of regulations to any civilian or military position in the Coast Guard.

■ 17. Revise § 67.01–15 to read as follows:

§ 67.01–15 Classification of structures.

(a) *When will structures be assigned to a Class?* The District Commander will assign structures to Class A, B, or C as part of processing an application for a permit to establish and operate lights and sound signals.

(b) *In general, where will the different classes of structures be located?* Specific criteria in paragraph (c) of this section may create exceptions, but, in general, structures the farthest from shore are likely to be assigned to Class A and required to have obstruction lights and sound signals that can be detected from the farthest distance. Structures closest to shore are likely to be assigned to Class C and, while subject to requirements to ensure that they are also detectable from a safe distance away, will be required to have the least powerful obstruction lights or sound signals. The location and standards for Class B structures will generally be in between Class A and C structures.

(c) *What criteria will be used to classify structures?* When assigning a structure to a class, the District Commander will take into consideration whether a line of demarcation has been prescribed, and matters concerning, but not necessarily limited to, the dimensions of the structure and the depth of water in which it is located, the proximity of the structure to vessel routes, the nature and amount of vessel traffic, and the effect of background lighting.

(1) If a line of demarcation has been prescribed, the District Commander will assign those structures seaward of the line of demarcation to Class A. He or she will assign all structures shoreward of the line of demarcation to either Class B or Class C, unless the District Commander determines under § 67.05–25 that the structure should be assigned to Class A because of the structure's proximity to a navigable channel, fairway or line of demarcation.

(2) If a line of demarcation has not been prescribed, the District Commander will assign a structure to Class A, B, or C as he or she deems appropriate.

■ 18. Revise § 67.01–20 to read as follows:

§ 67.01–20 Prescribing lines of demarcation.

The District Commander sends recommendations for establishing or changing lines of demarcation to the Commandant. For the purposes of this part, when the Commandant approves of additions to or changes in prescribed lines of demarcation, such additions or changes will be published in the **Federal Register** and will become effective on the date specified in that publication.

§ 67.05–1 [Amended]

■ 19. In § 67.05–1(f), immediately after the words, "the angle of the approach, until ", remove the word "he", and add, in its place, the words, "the mariner."

§ 67.10–10 [Amended]

■ 20. In addition to amendments set forth in the nomenclature instruction above, in § 67.10–10, in paragraph (a)(3), remove the third word ("fog").

§ 67.10–25 [Amended]

■ 21. In § 67.10–25—
■ a. Amend paragraph (a)(1), by removing "His" and adding, in its place, "Requestor's".
■ b. Amend (b) by adding the words "travel and per diem" after the words "including all".

■ 22. Revise § 67.15–1 to read as follows:

§ 67.15–1 Lights and signals on attendant vessels.

The requirements prescribed by this part apply to structures. The barges, vessels, and other miscellaneous floating plants in attendance must display lights and signals under the International Navigational Rules Act of 1977 (33 U.S.C. 1601–1608) that adopted the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), or the Inland Navigational Rules Act of 1980 (33 U.S.C. 2001–2038). When vessels are fixed to or submerged onto the seabed, however, they become structures as described in § 67.01–5.

■ 23. Revise § 67.15–10 to read as follows:

§ 67.15–10 Spoil banks, artificial islands, and dredged channels.

(a) All submerged spoil banks, or artificial islands resulting from the dredging of private channels, laying of pipelines, or any other private operation, and all privately dredged channels which, in the judgment of the

District Commander are required to be marked by aids to navigation, shall be marked by private aids to navigation conforming to the standard United States system of aids to navigation characteristics described in subpart B of part 62 of this subchapter.

(b) To receive a permit to establish and maintain a private aid to navigation for the purposes described in paragraph (a) of this section, submit your application to the District Commander. The District Commander will review all applications and issue all permits.

§ 67.20–5 [Amended]

■ 24. In § 67.20–5, remove the words "specified in § 67.05–1(f)", and add, in their place, the words "governed by the requirement in § 67.05–1(f) that mariners be able to see at least one of the lights, regardless of the angle of approach, until within 50 feet of the structure, visibility permitting".

§ 67.20–10 [Amended]

■ 25. In § 67.20–10, in paragraph (b), add the words "or she" immediately after the words "of this section if he ".

§ 67.25–10 [Amended]

■ 26. In § 67.25–10—

■ a. Amend paragraph (a)(2), by removing the words "in any direction is less than 3", and adding, in their place, the words ", not to exceed 5 miles, under the".

■ b. In the introductory text of paragraph (c), add the words "or she" immediately after the words "of this section, if he ".

§ 67.30–5 [Amended]

■ 27. In § 67.30–5, in paragraph (a), remove the address "Naval Supply Depot, 5801 Tabor Avenue, Philadelphia, Pa. 19120" and add, in its place, the following address: "Document Automation and Production Service, 700 Robbins Avenue, Building 4, Section D, Philadelphia, PA 19111–5091".

§ 67.40–1 [Amended]

■ 28. In § 67.40–1(a), remove the second sentence, and add, in its place, the two following sentences: "Persons constructing structures must notify the District Commander by either telegram or overnight mail on the day they begin construction. Within this notice, they must inform him or her of the lights and sound signals they will use during construction."

§ 67.40–5 [Amended]

■ 29. In § 67.40–5—

■ a. In paragraph (a), add the words "or her" immediately after the words "whenever, in his ", and

■ b. In paragraph (b), add the words "or she" immediately after the words "marine navigation, he " and add the words "or her" immediately after the words "revoke or revise his ".

§§ 67.50–5, 67.50–15, 67.50–20, 67.50–30, 67.50–35, 67.50–45, and 67.50–50 [Amended]

■ 30. In §§ 67.50–5(b), 67.50–15(b), 67.50–20(b), 67.50–30(b), 67.50–35(b), 67.50–45(b), and 67.50–50(b), remove the sentences: "The District Commander shall assign structures to classes as he deems appropriate at the time of application for a permit to establish and operate lights and fog signals. In so doing, he shall take into consideration matters concerning, but not necessarily limited to, the dimensions of the structure and the depth of water in which it is located; the proximity of the structure to vessel routes; the nature and amount of vessel traffic; and the effect of background lighting."

PART 72—MARINE INFORMATION

■ 31. The authority citation for part 72 is revised to read as follows:

Authority: 14 U.S.C. 85, 633; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 0170.1.

■ 32. In § 72.01–5, add a note at the end of the section that reads as follows:

§ 72.01–5 Local Notice to Mariners.

* * * * *

Note to § 72.01–5: You may also access Local Notice to Mariners free of charge on the Internet from the Coast Guard Navigation Center's Web site (*http://www.navcen.uscg.gov/*);* look for "Local Notice to Mariners".

■ 33. In § 72.01–10, add a note at the end of the section that reads as follows:

§ 72.01–10 Notice to Mariners.

* * * * *

Note to § 72.01–10: You may also access Notice to Mariners through the National Geospatial-Intelligence Agency's Web site (*http://pollux.nss.nima.mil*); look for "U.S. Notice to Mariners".

■ 34. In § 72.05–10, add a note at the end of the section that reads as follows:

§ 72.05–10 Free distribution.

* * * * *

Note to § 72.05–10: You may also access Coast Guard Light List data through the following National Geospatial-Intelligence Agency's Web site: (*http://pollux.nss.nima.mil/pubs/USCGLL/pubs_j_uscgll_list.html*).

Dated: February 25, 2004.

Jeffrey J. Hathaway,

Rear Admiral, U.S. Coast Guard, Acting Assistant Commandant for Operations.

[FR Doc. 04–9908 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2003–0281; FRL–7356–2]

Rhamnolipid Biosurfactant; Exemption from the Requirement of a Tolerance; Technical Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical correction.

SUMMARY: EPA issued a final rule in the **Federal Register** of March 31, 2004, concerning the establishment of an exemption from the requirement of a tolerance for residues of the biochemical, rhamnolipid biosurfactant, on all food commodities when applied/used as a fungicide. This document is being issued to correct a chemical name error.

DATES: This document is effective on May 5, 2004.

ADDRESSES: EPA has established a docket for this action under docket ID number OPP–2003–0281. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket/*. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Denise Greenway, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8263; e-mail address: *greenway.denise@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

The Agency included in the final rule a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

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

II. What Does this Correction Do?

FR Doc. 04–6933 published in the **Federal Register** of March 31, 2004 (69 FR 16796) (FRL–7347–7) is corrected as follows:

On page 16798, second column, first full paragraph under Unit VII., paragraph 1., line 17, the compound identified as "hexadecanoic acid" is corrected to read "hydroxydecanoic acid."

III. Why is this Correction Issued as a Final Rule?

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an Agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's technical correction final without prior proposal and opportunity for comment, because EPA is merely correcting a typographical error in the previously published final rule. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

IV. Do Any of the Statutory and Executive Order Reviews Apply to this Action?

This action implements a technical amendment to a **Federal Register** document which has no substantive impact on the undelying regulations, and it does not otherwise impose or amend any requirements. As such, the Office of Management and Budget (OMB) has determined that a technical amendment is not a "significant regulatory action" subject to review by OMB under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this technical amendment has been exempted from review under Executive Order 12866 due to its lack of significance, this technical amendment is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This technical amendment does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since the action does not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism*(64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). For these same reasons, the Agency has determined that this technical amendment does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes." This technical amendment will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this technical amendment.

V. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: April 22, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 04–10211 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WV065–6034a; FRL–7653–8]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Sulfur Dioxide Attainment Demonstration for the City of Weirton Including the Clay and Butler Magisterial Districts in Hancock County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of West Virginia. This revision contains enforceable emission limitations for the Weirton Steel Corporation, and the Wheeling-Pittsburgh Steel Corporation in Hancock County, West Virginia. The revision provides for, and demonstrates, the attainment of the national ambient air quality standards (NAAQS) for sulfur oxides, measured as sulfur dioxide (SO_2) in the City of Weirton, including the Clay and Butler Magisterial Districts, Hancock County nonattainment area. EPA is approving these revisions to the West Virginia SIP in accordance with the requirements of the Clean Air Act.

DATES: This rule is effective on July 6, 2004, without further notice, unless EPA receives adverse written comment by June 4, 2004. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by WV065–6034 by one of the following methods:

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

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

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

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

Instructions: Direct your comments to Docket ID No.WV065–6034. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through Regulations.gov or e-mail. The Federal Regulations.gov 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 Regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

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

SUPPLEMENTARY INFORMATION:

I. Background

Following the Clean Air Act Amendments (CAA) of 1977, EPA published a list of areas identified by the States as nonattainment, attainment, or unclassifiable for SO_2. The 1990 CAA Amendments provided for designations of areas based on their status immediately before enactment of the 1990 Amendments. For example, any area previously designated as not attaining the primary or secondary NAAQS for SO_2 as of the date of enactment of the 1990 Amendments, was designated nonattainment for SO_2 by operation of law upon enactment, pursuant to section 107(d)(1)(C)(i) of the Act. In addition, any area designated as attainment or unclassifiable (or "cannot be classified") immediately before the enactment of the 1990 Amendments, was also designated as such upon the enactment of the Amendments pursuant to sections 107(d)(1)(C)(ii) and (iii) of the Act.

As described above, EPA is authorized to initiate the redesignation of additional areas or portions of areas as nonattainment for SO_2 pursuant to section 107(d)(3)(D) of the Act on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator may deem appropriate. On December 21, 1993 (58 FR 67334), EPA redesignated the City of Weirton, including the Clay and Butler Magisterial Districts of Hancock County, West Virginia to nonattainment for SO_2 based upon monitored values in the Weirton, West Virginia area. This action required the State to submit a SIP revision for the Weirton area by July 20, 1995. On July 21, 1995, EPA received a SIP revision submittal for the Weirton area including the Clay and Butler Magisterial Districts of Hancock County, West Virginia. However, no applicable model was available at the time to handle the intricate topography of the area. Another major concern was the lack of comprehensive local meteorological data that was representative of such a complex terrain. Limited local meteorological data was obtained from the Browns Island meteorological tower operated by the State. EPA commented on the SIP submittal asking the West Virginia Department of Environmental Protection (WVDEP) to consider using a refined air quality model utilizing a new meteorological tower. A 60-meter meteorological tower and acoustical Sound Detection and Ranging (SODAR) were installed in Weirton, West Virginia as part of a Supplemental Environmental Project (SEP) between Weirton Steel Corporation and EPA.

Additional air quality monitors were added to the area surrounding Weirton Steel based on "hot spot" modeling locations identified by EPA. Modeling

results indicated major contributors of SO_2 in the local area to be sources located within Weirton Steel Corporation and Wheeling-Pittsburgh Steel Corporation. Modeled attainment of the NAAQS required the drafting of a Consent Order (CO) entered into between Weirton Steel Corporation and the WVDEP, and the modification of a permit for Wheeling-Pittsburgh Steel Corporation issued by WVDEP to set enforceable allowable limits on specific units within each of the facilities.

II. Summary of SIP Revision

On December 29, 2003, West Virginia submitted a formal SIP revision for the City of Weirton, including the Clay and Butler Magisterial Districts nonattainment area in Hancock County, West Virginia. The SIP revision consists of an enforceable operating permit for the Wheeling-Pittsburgh Steel Corporation, and an individual CO entered into by and between the State of West Virginia and the Weirton Steel Corporation in Hancock County, West Virginia, establishing SO_2 emission limits for numerous emission points at both facilities. The SIP submittal also contains an air quality dispersion modeling demonstration that indicates that the allowable emission limits will provide for the attainment of the NAAQS for SO_2 in the Weirton area including the Clay and Butler Magisterial Districts. A summary of the essential compliance provisions of the consent order and the operating permit are presented below:

Table 1 summarizes the requirements imposed upon the Weirton Steel Corporation facility to reduce SO_2:

TABLE 1.—WEIRTON STEEL CORPORATION, WEIRTON FACILITY SO_2 REDUCTION MEASURES

SO_2 emissions unit	SO_2 emission limit
Sinter Plant	Shall not be operated by the Company.
High Pressure Boilers 1 and 2	Shall not be operated by the Company.
Low Pressure Boilers LP1, LP2, LP3, LP4, and LP15	Shall not be operated by the Company.
Coal	Shall not be fired at any boiler operated by the Company.
SO_2 emissions from High Pressure Boilers 3, 4 and 5	Shall be limited by restricting the firing of fuel oil to a rate dependent upon the sulfur content of the fuel oil fired as described in Appendix A to the Consent Order. The allowable fuel oil firing rate shall be the 3-hour block average derived from Appendix A expressed in total gallons of fuel oil fired at High Pressure Boilers 3, 4, and 5 over a 3-hour period.
The percentage of sulfur contained in the fuel oil purchased to be fired at the company's high pressure boilers.	Shall not exceed three percent.
Total fuel oil and sulfur content fired at boilers 3, 4 and 5	Shall be limited to the product of gallons per minute (gpm) × (percent Sulfur) being less than or equal to the emission factor of 91.7 as per the curve in Appendix A of the Consent Order.
The BOP Waste Heat Boiler	Shall be pre-heated using steam sparging. Fuel fired at the Waste Heat Boiler shall be limited to Natural Gas, Mixed Gas, or steel making process gas.
Foster Wheeler Boilers #101 and #102	Shall have a combined limit of 109.73 lbs. per hour of SO_2. These boilers shall be limited to firing only blast furnace gas, natural gas, and mixed gas (comprised of approximately 70 percent natural gas and 30 percent air).
Hot Mill Reheat Furnaces, Hydrochloric Acid Regeneration Plant combustion sources, and Annealing Furnaces.	Shall be limited to firing only natural gas and mixed gas (comprised of approximately 70 percent natural gas and 30 percent air).
Blast Furnaces designated #2 and #3	Shall not recommence operation.
Blast Furnace #1 Stoves	Shall be limited to 60.1 lbs. per hour of SO_2.
Blast Furnace #1	Shall be limited to 42.1 lbs. per hour of SO_2.
Blast Furnace #4 Stoves	Shall be limited to 60.1 lbs per hour of SO_2.
Blast Furnace #4 Flare	Shall be limited to 42.1 lbs per hour of SO_2.
Slag Granulator	Shall be limited to 50 lbs per hour of SO_2.

With regard to the Wheeling-Pittsburgh Steel Corporation's revised permit, as specified in Section B, Other Requirements, the permittee shall comply with all the applicable provisions of West Virginia regulations 45CSR4, 45CSR6, 45CSR10, 45CSR13, 45CSR14, and 45CSR30, provided that the permittee shall comply with any more stringent requirements as may be set forth under Section A, Specific Requirements, of the permit.

The specific requirements of Section A of the operating permit issued by the WVDEP to Wheeling-Pittsburgh Steel Corporation (the permittee), are as follows:

A. Specific Requirements

1. Maximum emissions to the atmosphere from the Excess Coke Oven Gas (COG) Flare (Emission Point 1EF) shall not exceed the limits listed in Table 2:

TABLE 2

Hourly emissions (lbs./hr)	Maximum hourly emissions during the desulfurization outage	Annual emissions (tpy)
39.8	*396	294.0

* Annual emissions account for the desulfurization unit being down 672 hours per year for scheduled maintenance and maximum hydrogen sulfide concentration of 479 grains per 100 cu. ft. of COG.

2. In order to maintain compliance with the annual emission limit, the daily flow rate of COG to the excess COG flare (emission point 1EF) shall not exceed 7.1 MM standard cubic feet per

day over a thirty-day rolling average. The permittee shall keep daily records of the flow rate of COG to the flare and correct the measured flow rate to a standard temperature of 68°F. Compliance shall be determined using a thirty-day rolling average.

3. Maximum SO_2 emissions to the atmosphere from boilers # 6 and # 7 (emission point) shall not exceed the limits listed in Table 3:

TABLE 3

	Boiler #6	Boiler #7
Hourly SO_2 Rate (lb/hr)	20.4	20.4
Hourly SO_2 Rate during Desulfurization Outage (lb/hr)	*203.1	*203.1
Annual SO_2 Rate* (TPY) ...	150.7	150.7

*Annual Emission accounts for the desulfurization unit being down 672 hours per year for scheduled maintenance and maximum hydrogen sulfide concentration of 479 grains per 100 cu. ft. of COG.

4. Boilers #5, 6 and 7 shall only combust COG.

5. In order to maintain compliance with the SO_2 emission limits specified in provisions #1 and #3 of the permit, the hydrogen sulfide concentration level in the COG stream from the by-products plant shall not exceed 50 grains of hydrogen sulfide per one hundred (100) cubic feet of COG except as noted in provision # 6 below. Compliance with the allowable hydrogen sulfide concentration level shall be based on three (3) hour averaging periods.

6. In order to maintain compliance with the SO_2 emission limits specified in provisions #1 and #3 of the permit while the desulfurization unit is down for scheduled maintenance, the permittee shall calculate and record the hourly sulfur dioxide emission rate of the flare and boilers #6 and #7 over a 24-hour period using the recorded mean hydrogen sulfide concentration level and the recorded standard flow rate for the respective day. These records shall be kept on site for a period of at least five years.

7. The permittee shall be limited to a maximum of twenty-eight (28) days in any calendar year for planned maintenance outages of the desulfurization unit in the coke-by-products recovery plant. No single outage period shall extend beyond 336 hours. The start of a planned maintenance shall begin at the time of the first hour of a three-hour average concentration that is greater than 50 grains of H_2S/100 cubic feet of COG. The planned maintenance shall be concluded at the time of the first hour of a three-hour average concentration that is less than or equal to 50 grains of H_2S/100 cubic feet of COG.

8. The permittee shall notify the Director in writing thirty (30) days prior to undertaking any planned maintenance outage of the desulfurization unit, which shall include a detailed explanation of each and every maintenance and/or repair activity intended to be undertaken.

9. The permittee shall select the period for the planned maintenance outage that would prevent, to the greatest extent practicable, any violation of the NAAQS for SO_2 using, at a minimum, air quality dispersion modeling to determine what periods represent the most favorable dispersion of excess SO_2 emissions. To ensure maintenance of the 24-hour NAAQS for SO_2, a modeling target for SO_2 concentrations for the high 24-hour value of 265 $\mu g/m^3$ shall be used to provide a margin of 100 $\mu g/m^3$ for other source impacts within the immediate vicinity of the facility.

10. Prior to any planned maintenance outage of the desulfurization unit, the permittee shall prepare and submit an SO_2 mitigation plan to the Director outlining what measures the permittee will employ during the outage to ensure continued attainment of the NAAQS. This plan shall include the employment of all feasible control measures and process changes at the Follansbee facility to reduce SO_2 from the facility, including, but not limited to reduction of the coke production rate at Coke Oven Batteries #1, #2, #3, and #8.

11. No later than thirty (30) days after completing a planned maintenance outage of the desulfurization unit, the permittee shall submit a report identifying the SO_2 impacts associated with the planned outage. The report shall include any deviation of the SO_2 mitigation plan that was submitted for the outage period.

12. Visible emissions from the excess COG flare shall not exceed twenty percent opacity except upon the first eight (8) minutes of starting the thermal oxidizer. After this point, visible emissions from this emission point shall not exceed forty percent opacity for this time period. The permittee shall demonstrate compliance with this condition by taking visual observations using EPA Method 22 once a month. If the permittee observes visible emissions from the flare using Method 22, the permittee shall conduct an additional observation within 24 hours using EPA Method 9 to determine the opacity of the visible emissions being emitted from the flare.

13. The Sinter Plant shall not be operated by the permittee unless the proper permit is obtained from the Director prior to restarting the Sinter Plant.

14. The permittee shall operate and maintain a continuous hydrogen sulfide monitor and recorder for the purpose of monitoring the hydrogen sulfide concentration of the sweetened COG before it is routed to any combustion unit or source utilizing COG. This monitor shall be installed and maintained in accordance with Performance Specification 7 of Appendix B of 40 CFR 60.

15. The permittee shall maintain in accordance with the manufacturer's instructions, flow-measuring devices for the purpose of measuring and recording the amount of COG consumed by the excess COG flare and Boilers #6 and #7. The permittee shall keep daily records of the amount of COG consumed by the above mentioned units. These units shall remain on site for a period of at least 5 years.

16. The permittee shall maintain the automatic re-ignition system in accordance with the manufacturer's specifications.

17. The permittee shall not vent any noncombusted COG into the open atmosphere through the excess COG flare. The permittee shall record the date and time of an event when the flare was not in operation and COG was being emitted to the atmosphere through the excess COG flare. The permittee shall submit a report explaining the event and measures taken to prevent a recurrence of the event. These records shall be maintained on site for a period of at least five years.

18. No later than ninety (90) days after issuance of the permit, the permittee shall continuously maintain a system around the facility to prevent public access to the facility.

19. Compliance with the allowable emission limits of this permit shall be calculated using the appropriate amount of COG combustion by the excess COG flare on a volumetric basis, higher heat value of 568 Btu/cu. ft. for COG, and the following factors: Carbon Monoxide (0.37 lb/MM Btu), Nitrogen oxides (0.068 lb/MM Btu), Particulate Matter (0.012 lb/MM Btu), Particulate Matter 10 microns (0.012 lb/MM Btu), Volatile Organic Compounds (0.14 lb/MM Btu). The permittee shall determine the amount of each pollutant emitted on a monthly basis using the above mentioned information and appropriate engineering calculations. The permittee shall keep a 12-month rolling total for each of the above mentioned pollutants.

20. In the event of unforeseen circumstances beyond the control of the permittee during an approved planned maintenance outage, the permittee may exceed the SO_2 emission limit for the flare as stated in provision # 1 of this permit in order to prevent an anticipated excursion of the NAAQS for SO_2 from occurring in the local area, which includes the city of Weirton, West Virginia. The permittee shall document in the Desulfurization System Outage Report, the unforeseen circumstances, the SO_2 emissions rate calculation, and the modeling results, to document the necessity of the temporary increase in the flare's SO_2 allowable emissions rate.

21. Boiler # 5 (emission point 1D S11) shall not be operated unless the permittee obtains the proper permit from the Director prior to restarting the boiler.

22. The permittee shall fire only natural gas at coke plant boiler # 8 (emission point 1D, S11), unless an applicable permit is obtained from the Director.

23. Sulfur dioxide emissions from pushing Coke Oven Batteries #1, #2, and #3 shall not exceed 10.48 pounds SO_2 per hour (emission point SO5).

24. Sulfur dioxide emissions from pushing at Coke Oven Battery #8 shall not exceed 15.72 pounds per hour of SO_2 (emission point SO6).

25. Compliance with the allowable emission limits established in provisions #23 and #24 of the permit shall be calculated using an emission factor of 0.1078 pounds per tons of coal charged and multiplied by the hourly average tons of coal charged to the batteries each month.

III. Evaluation of the State Submittal

The CAA requires States to submit implementation plans that indicate how each State intends to attain and maintain the NAAQS. The 1977 Amendments established specific requirements for implementation plans in nonattainment areas in part D, sections 171–178. The 1990 Amendments did not change these requirements in any significant way with regard to SO_2 nonattainment areas and existing guidance remains valid. On April 16, 1992 (57 FR 13498), EPA issued "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" describing EPA's preliminary views on how it intends to interpret various provisions of title I, primarily those concerning revisions required for nonattainment areas. In order to approve the SIP revision, each of the part D requirements must be evaluated and the revision must ensure that: (1) The revised allowable emission limitations demonstrate attainment and maintenance of the NAAQS for SO_2 in the nonattainment area, (2) the emission limitations are clearly enforceable, and (3) that all applicable procedural and substantive requirements of 40 CFR part 51 are met.

A. Evaluation of the Part D Requirements as Described in the "General Preamble"

1. Reasonably Available Control Technology (RACT)

West Virginia's SIP revision provides for reasonable available control technology (RACT). The definition for RACT for SO_2 is that control technology which is necessary to attain and maintain the NAAQS. The technology must also be reasonably available considering technological and economic feasibility. Furthermore, RACT must be that technology which will provide for the achievement of the NAAQS within the established statutory time frames. The SIP revision indicates that SO_2 emissions are controlled at the Weirton Steel Corporation and the Wheeling-Pittsburgh Steel Corporation through fuel specifications and operations. The revision establishes allowable SO_2 emission limits and also defines allowable fuel usage for a number of processes. Modeling results indicate that major contributors of SO_2 in the area to be blast furnaces and flares, high-pressure boilers, and Foster-Wheeler boilers at the Weirton Steel facility, along with boilers and coke ovens at the Wheeling-Pittsburgh Steel Corporation. The plan complies with the requirements to implement RACT by providing for immediate attainment of the NAAQS for SO_2 through the emission limits and operating restrictions imposed on specific units within each of the facilities by the consent orders and permits. The SIP revision provides a demonstration that these limits will provide for the attainment of the NAAQS in the nonattainment area. Therefore, West Virginia has ensured that reasonably available control technology, fuel specification and operations modification is required, and that the control technology provides for achievement of the NAAQS.

2. Reasonable Further Progress (RFP)

West Virginia's SIP revision provides for reasonable further progress (RFP). Sulfur dioxide emission reductions that provide for attainment in an area are achieved at a limited, readily-defined number of sources, using control measures that immediately improve air quality. Therefore, RFP for SO_2 nonattainment implementation plans is defined simply as the "adherence to an ambitious compliance plan." The SIP revision provides for RFP due to the immediate effect of the emission limits required by the plan.

3. Emissions Inventory

West Virginia's SIP revision provides an adequate emissions inventory from Weirton Steel Corporation and Wheeling-Pittsburgh Steel Corporation, as well as from all relevant sources of SO_2 in the nonattainment area. The revision contains an updated 2001 inventory.

4. Identification and Quantification

This information is unnecessary because the area has not been identified as a zone for which economic development should be targeted.

5. Permits for New and Modified Major Stationary Sources

The Federal requirements for new source review (NSR) in nonattainment areas are contained in section 172(c)(5). Any new or modified source constructed in the area must comply with a state submitted and federally approved New Source Review Program (NSR). No modifications or installations have been made that detrimentally affect the modeling results. Presently, any major sources wishing to construct or make a major modification within the nonattainment area are required to obtain an NSR permit through SIP-approved State Regulation 45CSR19. Subsequent to redesignation of the area to attainment, any source wishing to construct or modify will be required to obtain a Prevention of Significant Deterioration (PSD) permit through SIP-approved State Regulation 45CSR14. The PSD program would require that a modeling demonstration be performed to ensure continued NAAQS attainment and maintenance. These along with requirements of the minor source permit program covered under State Regulation 45CSR13 would assure the maintenance of the NAAQS.

6. Other Measures

The plan provides for immediate attainment of the NAAQS for SO_2 through the emission limitations, operating requirements, and compliance schedules that are set forth within the permits and consent orders.

7. Compliance With Section110(a)(2)

This submission complies with section 110(a)(2). All of the applicable provisions of section 110(a)(2) are

already met by West Virginia's Federally-approved SIP.

8. Equivalent Techniques

The modeling for this SIP submittal was conducted using EPA's "Guideline on Air Quality Models (Revised)" (GAQM). Two models, AERMOD and CALPUFF are designed to handle complex terrain features. AERMOD was selected as the best performing model for this situation and was chosen as the appropriate model for this SIP demonstration.

9. Contingency Measures

West Virginia's SIP revision provides for adequate contingency measures. The State's plan includes the continuous review of air quality monitoring data in the area of concern, the review of local monitored meteorological data, and the assessment of compliance of local targeted facilities to verify continued attainment of the area. The State will review the annual emissions inventory for the Weirton area at a minimum of once every three years. In the event of a certified violation, West Virginia intends to assess all source compliance with existing rules, regulations and permits, and assess fuel switching at fuel burning units. The supporting documentation (ambient air quality data) indicates that the Weirton, West Virginia area has shown attainment of the NAAQS for SO_2 since the fourth quarter of 1994. At such time as West Virginia submits a redesignation request and maintenance plan for this area, the maintenance plan will also include a detailed contingency plan along with triggering indicators.

B. The Attainment Demonstration

The SIP revision includes a dispersion modeling analysis which was performed to demonstrate compliance with the NAAQS for SO_2. The model used in the compliance analysis was the American Meteorological Society (AMS)/EPA Regulatory Model (AERMOD). The AERMOD was proposed to be included as a preferred model in the "Guideline on Air Quality Models" at the 7th Conference on Air Quality Modeling held on June 28–29, 2000, in Washington, DC. Meteorological data collected on-site at Weirton Steel from June 1, 1997 through May 31, 1999, were processed with the AERMET preprocessor and used for the analysis. (AERMET is the meteorological pre-processor for AERMOD). Since the AERMOD model is not currently an approved model under the GAQM, but has been proposed for inclusion and is undergoing the regulatory process for inclusion, WVDEP made a request to EPA for the use of the AERMOD model for the Weirton SO_2 SIP revision in a letter dated May 25, 2001. The use of this model was approved by EPA in a letter dated July 2, 2001.

The modeling inventory included all sources within the Weirton nonattainment area, and all sources within 100 kilometers of the area with a significant impact within the area. A significant impact was defined by the Federal significance criteria of 1 microgram per cubic meter ($\mu g/m^3$) annually, 5 $\mu g/m^3$ on a 24-hour average, and 25 $\mu g/m^3$ on a 3-hour average. For Weirton Steel, four operating scenarios were evaluated to provide for flexibility with regard to fuel switching capabilities, fuel consumption rates and sulfur content. The four modeling scenarios are:

a. Firing fuel oil containing 1.29% sulfur at HP Boilers 3, 4, and 5 with Foster Wheeler Boilers 101 & 102 firing Blast Furnace Gas.

b. Firing fuel oil containing 1.29% sulfur at HP Boilers 3, 4, and 5 with Foster Wheeler Boilers 101 & 102 off-line and flaring excess Blast Furnace Gas.

c. Firing fuel oil containing 1.81% sulfur at HP Boilers 3 and 5 with Foster Wheeler Boilers 101 & 102 firing Blast Furnace Gas.

d. Firing fuel oil containing 1.81% sulfur at HP Boilers 3 and 5 with Foster Wheeler Boilers 101 & 102 off-line and flaring excess Blast Furnace Gas.

The final dispersion modeling, based upon the SO_2 emission limits of sources amended through Operating Permits in addition to a representative background, demonstrates that the maximum SO_2 impacts do not violate the NAAQS for SO_2. The results of the modeling analyses indicate that no exceedances of the NAAQS for SO_2 are expected in the City of Weirton, including the Clay and Butler Magisterial Districts nonattainment area when the Wheeling-Pittsburgh Steel Corporation and the Weirton Steel Company are operating at the emission rates contained in their respective operating permits and consent orders, and the other significant sources comply with their allowable emission rates. The maximum annual modeled SO_2 was 70.82 $\mu g/m^3$, which includes the background of 5.24 $\mu g/m^3$ as compared to the 80 $\mu g/m^3$ standard. The maximum modeled 24-hour SO_2 value was 360.46 $\mu g/m_3$ which includes the background of 31.44 $\mu g/m^3$ as compared to the 365 $\mu g/m^3$ standard. The maximum modeled 3-hour SO_2 value was 1297.23 $\mu g/m^3$ which includes the background of 81.22 $\mu g/m^3$ as compared to the 1300 $\mu g/m^3$ standard. These modeling results demonstrate attainment with respect to the NAAQS for SO_2.

The modeled impacts with the maximum Weirton Steel scenarios, including background concentrations, are provided in Table 4.

TABLE 4.—PREDICTED MAXIMUM SULFUR DIOXIDE IMPACTS

[Micrograms per cubic meter]

Period	Armed	Background	Total	NAAQS	NAAQS (percent)
3-Hour	1216.01	81.22	1297.23	1300	99.79
24-Hour	329.02	31.44	360.46	365	98.76
Annual	65.58	5.24	70.82	80	88.53

Federal regulations, 40 CFR 51.112, require nonattainment plans to include a demonstration of the adequacy of the plan's control strategy. This demonstration must include the following information: model selection and descriptions; model application and assumptions made during application of selected models; receptor grids; meteorological data; ambient air monitoring data and background concentration, model source input, and modeling results. This information is described in detail in the Technical Support Document (TSD) prepared for this rulemaking.

The SO_2 monitoring network in the Weirton area consists of six monitors, Oak Street, Summit Circle, Maryland Heights, Williams Country Club, McKims Ridge and Skyview. A number of the monitors were added as a result of EPA modeled hot spots. Data collected and quality-assured in

accordance with 40 CFR part 58, and recorded into EPA new ambient air quality data system known as the Air Quality Subsystem (AQS), indicates that there have been no monitored NAAQS violations recorded for a period of time nearing 10 years. These sites have monitored no 24-hour average values above 365 $\mu g/m^3$, no annual average values above 80 $\mu g/m^3$, and no monitored 3-hour average values above 1300 $\mu g/m^3$. Reductions in SO_2 emissions from both the Weirton Steel and Wheeling-Pittsburgh Steel facilities have contributed significantly to these ambient monitored attainment values. Air quality measurements used in this analysis were performed in accordance with appropriate regulations and guidance documents including adherence to EPA quality assurance requirements. Monitoring procedures were determined in accordance with 40 CFR parts 53 and 58.

EPA's review of the entire submittal indicates that West Virginia's SIP revision provides for the attainment of the NAAQS for SO_2 in the City of Weirton, including Clay and Butler Magisterial Districts, Hancock County, and satisfies the requirements of part D of the Clean Air Act. The revision is supported by a modeling analysis which clearly demonstrates the adequacy of emission limits in providing for the attainment and maintenance of the NAAQS for SO_2 in the nonattainment area. The consent order between Weirton Steel Corporation and the permit between West Virginia and Wheeling-Pittsburgh Steel Corporation, at the center of the SIP revision, establish enforceable SO_2 emission limits at these two facilities. The submittal fulfills the procedural and substantive requirements of 40 CFR part 51. Therefore, EPA is approving the West Virginia SIP revision for the City of Weirton, including Clay and Butler Magisterial Districts. Hancock County SO_2 nonattainment area.

IV. Final Action

EPA is approving the SO_2 SIP revision, including the modeled attainment demonstration, submitted by the State of West Virginia on December 29, 2003, for the City of Weirton, including the Clay and Butler Magisterial Districts nonattainment area in Hancock County. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on July 6, 2004, without further notice unless EPA receives adverse comment by June 4, 2004. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

V. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2004.

Filing a petition for reconsideration by the Administrator of this final rule, approving the SO_2 attainment plan for the City of Weirton including the Clay and Butler Magisterial Districts nonattainment area in Hancock County, does not affect the finality of this rule for the purposes of judicial review nor

does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: April 20, 2004.

James W. Newsom,

Acting Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart XX—West Virginia

■ 2. Section 52.2520 is amended by adding paragraph (c)(59) to read as follows:

§ 52.2520 Identification of plan.

* * * * *

(c) * * *

(59) Revisions to the West Virginia Regulations to attain and maintain the National Ambient Air Quality Standards (NAAQS) for sulfur dioxide in the City of Weirton, including Clay and Butler Magisterial Districts, in Hancock County, West Virginia, submitted on December 29, 2003, by the West Virginia Department of Environmental Protection:

(i) Incorporation by reference.

(A) Letter of December 29, 2003, from the West Virginia Department of Environmental Protection, transmitting a revision to the State Implementation Plan (SIP) for attainment and maintenance of the sulfur dioxide NAAQS for the City of Weirton, including the Clay and Butler Magisterial Districts in Hancock County, West Virginia.

(B) The following Companies' Consent Order and Operating Permit:

(*1*) Wheeling-Pittsburgh Steel Corporation, Operating Permit R13–1939A, effective August 19, 2003.

(*2*) Weirton Steel Corporation Consent Order, CO–SIP–C–2003–28, effective August 4, 2003.

(ii) Additional Material.

(A) Remainder of the State submittal pertaining to the revision listed in paragraph (c)(59)(i) of this section.

(B) Letter of February 10, 2004, from the West Virginia Department of Environmental Protection providing clarification to permit R13–1939A, condition B.4. issued to the Wheeling-Pittsburgh Steel Corporation.

■ 3. Section 52.2525 is amended by adding paragraph (b) to read as follows:

§ 52.2525 Control strategy: Sulfur oxides.

* * * * *

(b) EPA approves the attainment demonstration State Implementation Plan for the City of Weirton, including the Clay and Butler Magisterial Districts area in Hancock County, West Virginia, submitted by the West Virginia Department of Environmental Protection on December 29, 2003.

[FR Doc. 04–10095 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0097; FRL–7356–5]

Harpin Protein; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the biochemical harpin protein on all food commodities when applied/used to enhance plant growth, quality and yield, to improve overall plant health, and to aid in pest management. EDEN Bioscience Corporation submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of harpin protein.

DATES: This regulation is effective May 5, 2004. Objections and requests for hearings must be received on or before July 6, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under docket ID number OPP–2004–0097. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket/*. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Diana M. Horne, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8367; e-mail address: *horne.diana@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 and Other Related Information?

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

II. Background and Statutory Findings

In the **Federal Register** of January 28, 2004 (69 FR 4151) (FRL–7339–2), EPA issued a notice pursuant to section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 3F6765) by EDEN Bioscience Corporation, 3830 Monte Villa Parkway, Bothell, WA 98021–6942. This notice included a summary of the petition prepared by the petitioner EDEN Bioscience Corporation. There were no comments received in response to the notice of filing.

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

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

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

III. Toxicological Profile

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

This final rule amends the previously established exemption from the requirement of a tolerance for harpin protein published in the **Federal Register** of May 3, 2000 (65 FR 25660) (FRL–6497–4). Research on other harpin proteins that are similar to this active ingredient indicates that many of these proteins also exhibit activities of commercial value in crop production. Because the existing tolerance exemption codified in 40 CFR 180.1204 does not specify the scope of harpin proteins that are exempt, this final rule clarifies the existing exemption by specifying the criteria a protein must meet in order to be subject to the exemption. Harpin proteins exhibit no adverse effects in Tier I mammalian toxicity studies; therefore, Tier II and III study requirements are waived. Acute oral and dermal toxicity LD_{50} values for products containing harpin protein are greater than 5,000 grams/kilograms (g/kg) in the rat (Toxicity Category IV, least toxic). Inhalation studies in the rat on products containing harpin protein resulted in an LC_{50} of greater than 2 milligrams/liter (mg/L) (Toxicity Category IV). In addition, no adverse effects are observed in eye irritation studies in the rabbit at 100 mg (Toxicity Category IV). There have been no reported incidents of hypersensitivity in individuals exposed to products containing harpin protein during research, production, and/or field testing, and there are no published reports indicating that harpin proteins are toxic. Further, harpin proteins have a non-toxic mode of action and work by activating the treated plant's own growth and defense systems. In order to be exempt from the requirement of a tolerance, a harpin protein must meet the following specification:

1. Consists of protein less than 100 kD in size, that is acidic (pI<7.0), glycine rich (>10%), and contains no more than one cystine residue.

2. The source(s) of genetic material encoding the protein are bacterial plant pathogens not known to be mammalian pathogens.

3. Elicits the hypersensitive response (HR) which is characterized as rapid, localized cell death in plant tissue after infiltration of harpin into the intercellular spaces of plant leaves.

4. Possesses a common secondary structure consisting of α and β units that form an HR domain.

5. Is heat stable (retains HR activity when heated to 65°C for 20 minutes).

6. Is readily degraded by a proteinase representative of environmental conditions (no protein fragments >3.5 kD after 15 minutes degradation with Subtilisin A).

7. Exhibits a rat acute oral toxicity (LD_{50}) of greater than 5,000 mg product/kg body weight.

IV. Aggregate Exposures

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

A. Dietary Exposure

Harpin proteins are common constituents of plant pathogenic bacteria which are often found on fruits and vegetables. Additional dietary exposure to harpin protein resulting from labeled uses is unlikely to occur because of extremely low-use rates and rapid degradation in the field. Furthermore, the lack of demonstrable toxicity in acute studies, and the natural occurrence of harpins in the environment support the establishment of an exemption from the requirement of a tolerance for harpin protein.

1. *Food.* Products containing harpin protein are applied at very low rates of application (grams of active ingredient per acre). Harpin proteins are also rapidly degraded in the environment by common proteinases, ultraviolet (UV) irradiation, and oxidizing agents. No residues of active ingredient are detectable, using available methods, on treated crops even immediately after application. Therefore, the Agency believes that dietary exposure to harpin protein via consumption of treated food or feed will be negligible.

2. *Drinking water exposure.* Because harpin protein is applied at extremely low-use rates and rapidly degrades in the environment, residues are unlikely to occur in ground or surface water. In addition, harpin protein is highly sensitive to small amounts of chlorine or similar oxidizing agents as contained

in many municipal water systems. Therefore, residues of harpin protein are unlikely to occur in drinking water.

B. Other Non-Occupational Exposure

The Agency believes that the potential for non-dietary exposure and attendant risks to the general population, including infants and children, is minimal to non-existent, due to low-use rates, the instability of harpin protein in the environment, and lack of demonstrated toxicity. In addition, with the exception of turf and ornamentals, the proposed use sites are primarily commercial agricultural and horticultural, as opposed to domestic settings. Increased non-dietary exposures to harpin protein via home and garden uses is not considered likely because of the typically low-use rates and lack of persistence in the environment.

1. *Dermal exposure.* Products containing harpin protein are classified as Toxicity Category IV (least toxic) for dermal exposure, and are not expected to pose any risk via the dermal route.

2. *Inhalation exposure.* Acute inhalation tests place products containing harpin protein in Toxicity Category IV (least toxic), thus risk via the inhalation route is expected to be minimal to non-existent.

V. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires the Agency to consider the cumulative effects of exposure to harpin protein and to other substances that have a common mode of toxicity. These considerations include the possible cumulative effects of such residues on infants and children. Because of the lack of demonstrable toxicity of harpin protein in acute toxicity studies, lack of information indicating that any toxic effects, if they existed, would be cumulative with any other compounds, extremely low-use rates, and rapid degradation in the environment, the Agency does not expect any cumulative or incremental effects from exposure to residues of this product when used as directed on the label.

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

Harpin protein's lack of toxicity has been demonstrated by the results of acute toxicity testing in mammals in which harpin protein caused no adverse effects when dosed orally, dermally, and via inhalation at the limit dose for each study. Therefore, EPA concludes that there is a reasonable certainty that no harm to the U.S. population in general, and to infants and children, specifically, will result from aggregate exposure to residues of harpin protein. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. Accordingly, exempting harpin proteins that meet the criteria specified in this preamble is considered safe and poses no risk. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional ten-fold margin of exposure (safety) for infants and children in the case of threshold effects, to account for prenatal and postnatal toxicity and the completeness of the database, unless EPA determines that a different margin of exposure will be safe for infants and children. Margins of exposure (safety) are often referred to as uncertainty factors. Here, based on all the available information and for all the reasons already set forth in this final rule, the Agency finds that there are no threshold effects of concern to infants, children, and adults when harpin protein is used as labeled, and that the provision requiring an additional margin of safety is not necessary to protect infants and children. As a result, EPA has not used a margin of exposure (safety) approach to assess the safety of harpin protein.

VII. Other Considerations

A. Endocrine Disruptors

EPA is required under the FFDCA, as amended by FQPA, to develop a screening program to determine whether certain substances (including all pesticide active and other ingredients) "may have an effect in humans that is similar to an effect produced by naturally occurring estrogen, or other such endocrine effects as the Administrator may designate." Following the recommendations of its Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC), EPA has determined that there is no scientific basis for including, as part of the program, the androgen and thyroid hormone systems in addition to the estrogen hormone system. EPA also adopted EDSTAC's recommendation that the program include evaluations of potential effects in wildlife. For pesticide chemicals, EPA will use FIFRA and, to the extent that effects in wildlife may help determine whether a substance may have an effect in humans, FFDCA authority to require wildlife evaluations. As the science develops and resources allow, screening of additional hormone systems may be added to the Endocrine Disruptor Screening Program (EDSP). When the appropriate screening and/or testing protocols being considered under the Agency's EDSP have been developed, harpin protein may be subjected to additional screening and/or testing to better characterize effects related to endocrine disruption. Based on available data, no endocrine system-related effects have been identified with consumption of harpin protein. To date, there is no evidence to suggest that harpin protein affects the immune system, functions in a manner similar to any known hormone, or that it acts as an endocrine disruptor.

B. Analytical Method(s)

The Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation for the reasons enumerated in this preamble, including harpin protein's demonstrated lack of toxicity, and instability in the environment. Accordingly, the Agency has concluded that an analytical method is not needed for enforcement purposes for harpin protein residues.

C. Codex Maximum Residue Level

There is currently no CODEX Maximum Residue Limit set for food use of this active ingredient.

VIII. Objections and Hearing Requests

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

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

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0097 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 July 6, 2004.

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

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

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

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

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

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VIII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0097, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

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

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

IX. Statutory and Executive Order Reviews

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

by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

X. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: April 23, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention 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 180.1204 is revised to read as follows:

§ 180.1204 Harpin protein; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of individual harpin proteins that meet specified physiochemical and toxicological criteria when used as biochemical pesticides on all food commodities to enhance plant growth, quality and yield, to improve overall plant health, and to aid in pest management. The physiochemical and toxicological criteria identifying harpin proteins are as follows:

(a) Consists of a protein less than 100 kD in size, that is acidic (pI<7.0), glycine rich (>10%), and contains no more than one cystine residue.

(b) The source(s) of genetic material encoding the protein are bacterial plant pathogens not known to be mammalian pathogens.

(c) Elicits the hypersensitive response (HR) which is characterized as rapid, localized cell death in plant tissue after infiltration of harpin into the intercellular spaces of plant leaves.

(d) Possesses a common secondary structure consisting of α and β units that form an HR domain.

(e) Is heat stable (retains HR activity when heated to 65°C for 20 minutes).

(f) Is readily degraded by a proteinase representative of environmental conditions (no protein fragments > 3.5 kD after 15 minutes degradation with Subtilisin A).

(g) Exhibits a rat acute oral toxicity (LD_{50}) of greater than 5,000 mg product/kg body weight.

[FR Doc. 04–10212 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 97

[WT Docket No. 04–140; FCC 04–79]

Amendment of Part 97 of the Commission's Rules Governing the Amateur Radio Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document makes minor amendments to various rule sections to clarify or eliminate duplicative language, or conform them with other rule sections. This action will allow current Amateur Radio Service licensees to contribute more to the advancement of the radio art, reduce the administrative costs that the Commission incurs in regulating this service, streamline our licensing processes, and promote efficient use of spectrum allocated to the Amateur Radio Service.

DATES: Effective June 4, 2004.

FOR FURTHER INFORMATION CONTACT: William T. Cross, *William.Cross@fcc.gov*, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, (202) 418–0680, or TTY (202) 418–7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, WT Docket No. 04–140, FCC 04–79, adopted March 31, 2004, and released April 15, 2004. The full text of this document is available for inspection and copying during normal business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com*. The full text may also be downloaded at *http://www.fcc.gov*. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426, or TTY (202) 418–7365, or at *brian.millin@fcc.gov*.

1. In the Notice of Proposed Rulemaking and Order (NPRM) the Commission proposed to revise operating privileges for amateur radio service licensees as well as to eliminate obsolete and duplicative rules in the Amateur Radio Service. Additionally, on its own motion, the Commission adopted changes to its part 0 and 97 rules to clarify or eliminate duplicative language, or conform them with other rule sections.

I. Regulatory Matters

A. Paperwork Reduction Act

2. The Order does not contain any new or modified information collection.

3. The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). In the NPRM and Order,

the Commission certified that the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined in section 601(3) of the RFA because the rule amendments do not apply to small business entities. Rather, these rules apply to individuals who are interested in radio technique solely with a personal aim and without pecuniary interest.

II. Ordering Clauses

4. Parts 0 and 97 of the Commission's rules *is amended* as specified in rule changes effective June 1, 2004.

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

List of Subjects

47 CFR Part 0

Radio.

47 CFR Part 97

Radio, Volunteers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0 and 97 as follows:

PART 0—COMMISSION ORGANIZATION

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

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

■ 2. Section 0.131 is amended by revising paragraph (n) to read as follows:

§ 0.131 Functions of the Bureau.

* * * * *

(n) Administers the Commission's amateur radio programs (part 97 of this chapter) and the issuing of maritime mobile service identities (MMSIs).

* * * * *

PART 97—AMATEUR RADIO SERVICE

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

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 4. Section 97.3 is amended by revising paragraph (a)(1) and by removing and reserving paragraph (a)(17) to read as follows:

§ 97.3 Definitions.

(a) * * *

(1) *Amateur operator.* A person named in an amateur operator/primary license station grant on the ULS consolidated licensee database to be the control operator of an amateur station.

* * * * *

■ 5. Section 97.109 is amended by revising paragraph (d) and removing paragraph (e) to read as follows:

§ 97.109 Station control.

* * * * *

(d) When a station is being automatically controlled, the control operator need not be at the control point. Only stations specifically designated elsewhere in this part may be automatically controlled. Automatic control must cease upon notification by a District Director that the station is transmitting improperly or causing harmful interference to other stations. Automatic control must not be resumed without prior approval of the District Director.

* * * * *

§ 97.203(h) [Redesignated]

■ 6. Section 97.203(h) is redesignated as Section 97.205(h).

■ 7. Section 97.307 is amended by revising paragraph (d) to read as follows:

§ 97.307 Emission standards.

* * * * *

(d) For transmitters installed after January 1, 2003, the mean power of any spurious emission from a station transmitter or external RF power amplifier transmitting on a frequency below 30 MHz must be at least 43 dB below the mean power of the fundamental emission. For transmitters installed on or before January 1, 2003, the mean power of any spurious emission from a station transmitter or external RF power amplifier transmitting on a frequency below 30 MHz must not exceed 50 mW and must be at least 40 dB below the mean power of the fundamental emission. For a transmitter of mean power less than 5 W installed on or before January 1, 2003, the attenuation must be at least 30 dB. A transmitter built before April 15, 1977, or first marketed before January 1, 1978, is exempt from this requirement.

* * * * *

■ 8. Section 97.505 is amended by revising paragraph (a)(9) to read as follows:

§ 97.505 Element credit.

(a) * * *

(9) An expired FCC-issued Technician Class operator license document granted before February 14, 1991: Element 1.

* * * * *

■ 9. Section 97.507 is amended by revising paragraph (a)(2) to read as follows:

§ 97.507 Preparing an examination.

(a) * * *

(2) Elements 1 and 2: Advanced or General Class operators.

* * * * *

[FR Doc. 04–10203 Filed 5–4–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 040127028–4130–02; I.D 012104B]

RIN 0648–AR69

Sea Turtle Conservation: Additional Exception to Sea Turtle Take Prohibitions

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

ACTION: Final rule.

SUMMARY: NMFS is prohibiting the use of all pound net leaders, set with the inland end of the leader greater than 10 horizontal feet (3 m) from the mean low water line, from May 6 to July 15 each year in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0′ N. lat. and west of 76° 13.0′ W. long., and all waters south of 37° 13.0′ N. lat. to the Chesapeake Bay Bridge Tunnel at the mouth of the Chesapeake Bay, and the James and York Rivers downstream of the first bridge in each tributary. Outside this area, the prohibition of leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers, as established by the June 17, 2002 interim final rule, will apply from May 6 to July 15 each year. This final action also includes a framework mechanism by which NMFS may take additional action as necessary. This action, taken under the Endangered Species Act of 1973 (ESA), is necessary to conserve sea turtles listed as threatened or endangered. NMFS also provides an exception to the prohibition on incidental take of threatened sea turtles

for pound net fishermen in compliance with these regulations.

DATES: Effective May 5, 2004.

FOR FURTHER INFORMATION CONTACT: Carrie Upite (ph. 978–281–9328 x6525, fax 978–281–9394, email *carrie.upite@noaa.gov*), or Barbara Schroeder (ph. 301–713–1401, fax 301–713–0376, email *barbara.schroeder@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Background

Incidental take, defined to include the harassing, harming, wounding, trapping and capturing, of threatened sea turtles is not lawful (50 CFR 223.205). On June 17, 2002, based upon the best available information on sea turtle and pound net interactions at the time, NMFS issued an interim final rule that authorized incidental take of threatened sea turtles for pound net fishermen who complied with NMFS' rule. In the rule, NMFS prohibited the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay and portions of the Virginia tributaries from May 8 to June 30 each year (67 FR 41196). Included in this interim final rule were a year-round requirement for fishermen to report all interactions with sea turtles in their pound net gear to NMFS within 24 hours of returning from a trip, and a year-round requirement for pound net fishing operations to be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. The interim final rule also established a framework mechanism by which NMFS may make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles. Prior to issuance of this rule, takes of threatened sea turtles in pound nets were not authorized, and a fisherman who incidentally took a threatened sea turtle risked criminal penalties and fines.

To better understand the interactions between pound net gear and sea turtles, NMFS conducted pound net monitoring during the spring of 2002 and 2003. This monitoring documented 23 sea turtles either entangled in or impinged on pound net leaders, 18 of which were in leaders with less than 12 inches (30.5 cm) stretched mesh. Nine animals were found entangled in leaders, of which 7 were dead, and 14 animals were found impinged on leaders, of which one was dead. In this situation, impingement refers to a sea turtle being held against the leader by the current, apparently unable to release itself under its own ability. For these purposes, an animal was still considered impinged if it had its head and flipper poking through the mesh. An animal was considered entangled if a body part was tightly wrapped one or more times in the mesh.

The 2002 and 2003 monitoring results represent new information not previously considered in prior assessments of the Virginia pound net fishery, and entanglements in and impingements on these leaders appear to be more of a problem than previously believed. As such, NMFS believes that additional restrictions are warranted to reduce sea turtle entanglement in and impingement on pound net gear.

The documented incidental take of sea turtles in leaders, the ability for sea turtles to continue to become entangled in and impinged on pound net leaders in the future, and the annual high mortality of sea turtles in Virginia during the spring, as evidenced by the high number of dead sea turtles stranding on beaches, are of particular concern because approximately 50 percent of the Chesapeake Bay loggerhead foraging population is composed of the northern subpopulation, a subpopulation that may be declining. In addition, most of the stranded turtles in Virginia are juveniles, a life stage found to be critical to the long term survival of the species. This action is necessary to provide for the conservation of threatened and endangered sea turtles by reducing incidental take in the Virginia pound net fishery during the spring. Details concerning sea turtle and pound net interactions, the potential impact of pound net leaders on sea turtles, and justification for the need for additional pound net leader regulations were provided in the preamble to the proposed rule (69 FR 5810, February 6, 2004).

Approved Measures

To conserve sea turtles, NMFS prohibits the use of all offshore pound net leaders from May 6 to July 15 each year in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0′ N. lat. and west of 76° 13.0′ W. long., and all waters south of 37° 13.0′ N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05′ N. lat., 75° 59′ W. long. to 36° 55′ N. lat., 76° 08′ W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I–64; approximately 36° 59.55′ N. lat., 76° 18.64′ W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55′ N. lat, 76° 30.40′ W. long.). Offshore pound nets are defined as those nets set with the inland end of their leader greater than 10 horizontal feet (3 m) from the mean low water line. Additionally, outside this area, NMFS retains the leader mesh size restriction included in the previous interim final rule on the pound net fishery (67 FR 41196, June 17, 2002), which prohibited the use of all leaders with stretched mesh greater than or equal to 12 inches (30.5 cm) and leaders with stringers, from May 6 to July 15 each year in the Virginia waters of the Chesapeake Bay outside the aforementioned closed area, extending from the Maryland-Virginia State line (approximately 37° 55′ N. lat., 75° 55′ W. long.), the Great Wicomico River downstream of the Jessie Dupont Memorial Highway Bridge (Route 200; approximately 37° 50.84′ N. lat, 76° 22.09′ W. long.), the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44′ N. lat, 76° 25.40′ W. long.), and the Piankatank River downstream of the Route 3 Bridge (approximately 37° 30.62′ N. lat, 76° 25.19′ W. long.), to the COLREGS line at the mouth of the Chesapeake Bay. South of 37° 19.0′ N. lat. and west of 76° 13.0′ W. long., and all waters south of 37° 13.0′ N. lat. to the Chesapeake Bay Bridge Tunnel, the leader restriction applies to those nets set with the inland end of the leader 10 horizontal feet (3 m) or less from the mean low water line. In addition to avoiding applicable penalties for failure to comply with ESA regulations, Virginia pound net fishermen who comply with these restrictions may incidentally take listed sea turtles without being subject to penalties and fines for that take.

This final rule also retains the framework mechanism currently in place (that was included and analyzed in the status quo alternative), by which NMFS may make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles. Under this framework mechanism, if NMFS believes based on, for example, water temperature and the timing of sea turtles' migration, that sea turtles may still be vulnerable to entanglement in pound net leaders after July 15, NMFS may extend the effective dates of this regulation. Should an extension be necessary, NMFS would issue a final rule in the **Federal Register** explicitly stating the duration of the extension. The extension would not last beyond July 30. Additionally, under this framework mechanism, if monitoring of pound net leaders reveals that one sea

turtle is entangled alive in a pound net leader or that one sea turtle is entangled dead and NMFS determines that the entanglement contributed to its death, then NMFS may determine that additional restrictions are necessary to conserve sea turtles and prevent entanglements. Such additional restrictions may include reducing the allowable mesh size for pound net leaders or prohibiting all pound net leaders regardless of mesh size in Virginia waters. Should NMFS determine that an additional restriction is warranted, NMFS would expeditiously issue a final rule that would explicitly state any new gear restriction as well as the applicable time period for the restriction, which may be extended through July 30. The area where additional gear restrictions might apply includes the same area as the initial restriction, namely the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia State line (approximately 38° N. lat.) to the COLREGS line at the mouth of the Chesapeake Bay, and portions of the James River, the York River, Piankatank River, the Rappahannock River, and the Great Wicomico River.

The year-round reporting and monitoring requirements for this fishery established by the 2002 interim final rule also remain in effect.

From 12:01 a.m. local time on May 6 through 11:59 p.m. local time on July 15 each year, fishermen are required to stop fishing with and remove from the water pound net leaders altogether or pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and pound net leaders with stringers, depending upon the location of their pound net site as indicated above.

Comments and Responses

On February 6, 2004, NMFS published a proposed rule that would prohibit the use of all pound net leaders south of 37° 19.0′ N. lat. and west of 76° 13.0′ W. long., and all waters south of 37° 13.0′ N. lat. to the Chesapeake Bay Bridge Tunnel at the mouth of the Chesapeake Bay, and the James and York Rivers downstream of the first bridge in each tributary, and all leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers outside the aforementioned area, extending to the Maryland-Virginia State line and the Rappahannock River downstream of the first bridge, and from the Chesapeake Bay Bridge Tunnel to the COLREGS line at the mouth of the Chesapeake Bay, from May 6 to July 15 each year. Comments on this proposed action were requested through March 8, 2004. Nineteen comment letters from eighteen different individuals or organizations were received during the public comment period for the proposed rule. Four comment letters provided support for the action, while 14 letters expressed their opposition to the proposed regulations. One comment letter was neither in favor nor against the proposed action. Additionally, a petition signed by 1,077 individuals was received requesting that the proposal be withdrawn and terminated. A public hearing was also held in Virginia Beach, VA on February 19, 2004, and 11 individuals provided spoken comments. Three of the 11 individuals also provided written comments. All of the spoken comments were in opposition to the proposed action. NMFS considered these comments on the proposed rule as part of its decision making process. A complete summary of the comments and NMFS' responses, grouped according to general subject matter in no particular order, is provided here.

General Comments

Comment 1: One commenter recommended that the pound net leader prohibitions and restrictions extend throughout the year and that marine sanctuaries be established in Virginia waters.

Response: NMFS considered regulating pound net leaders in Virginia's Chesapeake Bay during the period of May through November, which would encompass the full time period when sea turtle presence and pound net fishing in the Chesapeake Bay overlap. However, few direct observations of sea turtle impingement on and entanglement in pound net leaders exist after early summer. A pound net characterization study by the Virginia Institute of Marine Science (VIMS) documented the entanglement of one dead juvenile loggerhead sea turtle in a pound net leader (approximately 11 inches (27.9 cm)) in October of 2000 (Mansfield *et al.*, 2001), and one dead loggerhead was found entangled in a pound net leader in August 2001 (Mansfield et al., 2002). It is not conclusively known if those animals were dead prior to entanglement or if the interaction with the pound net leader resulted in their death. Additionally, the level of sea turtle strandings is substantially diminished during the summer and fall months which indicates a lower mortality rate. With few direct observations of entanglement in and impingement on pound net leaders and without high levels of strandings, similar to those documented in the spring, there is not a sufficient basis at this time to conclude that pound net leaders are responsible for high levels of sea turtle mortality from August through November. Accordingly, NMFS has determined that it will not impose gear restrictions on the Virginia pound net fishery during the full time period of the fishery from May through November.

National marine sanctuaries are designated and managed by NOAA's National Marine Sanctuary Program. The sanctuary designation process takes several years and is not an option that could be implemented currently. NMFS has forwarded the comment to the National Marine Sanctuary Program for its consideration.

Comment 2: One commenter recommended that pound nets be prohibited in high recreational areas due to potential hazards to human personal safety.

Response: Under the ESA, NMFS' authority to implement restrictions on activities is restricted to those activities that affect a species that NMFS manages (e.g., federally endangered and threatened sea turtles). Available information does not indicate that the level of sea turtle interactions with pound nets in high recreational areas necessitates restrictions to protect sea turtles.

Comment 3: One commenter recommended that formal ESA section 7 consultation be initiated on the Virginia pound net fishery to adequately assess the impacts of this fishery on listed species.

Response: A formal consultation, pursuant to section 7 of the ESA, was previously conducted on the operation of the Virginia pound net fishery, as modified by the implementation of the sea turtle conservation measures enacted in 2002. This Biological Opinion, issued on May 14, 2002, concluded the Virginia pound net fishery as conducted under NMFS' implementation of sea turtle conservation regulations (including the issuance of an interim final rule that restricted the use of pound net leaders in the Virginia Chesapeake Bay from May 8 to June 30, and required year round monitoring and reporting) may adversely affect but is not likely to jeopardize the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. Consultation on this action has been reinitiated due to the previously unanticipated take of sea turtles in less than 12 inches (30.5 cm) stretched mesh during 2003. Additionally, a formal section 7 consultation has also been completed on the proposed issuance of this new regulation, including review of the

operation of the pound net fishery with new sea turtle conservation measures for the Virginia pound net fishery. Due to similarities in the proposed actions and the effects on listed species, the reinitiated 2002 consultation and the new consultation on this final rule have been combined. The Biological Opinion was issued on April 16, 2004, and concluded that the proposed action may adversely affect, but is not likely to jeopardize, the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. The Incidental Take Statement exempted the anticipated annual take of no more than 505 loggerhead, 101 Kemp's ridley, and 1 green sea turtle in all pounds set in the action area. These takes are anticipated to be live, uninjured animals. Additionally, no more than 1 loggerhead, 1 Kemp's ridley, 1 green, or 1 leatherback sea turtle are anticipated to be either entangled or impinged in leaders throughout the action area from July 16 to May 5 each year. NMFS further anticipates that, outside the leader prohibited area, 1 loggerhead, 1 Kemp's ridley, 1 green, or 1 leatherback sea turtle will be entangled in leaders with less than 12 inches (30.5 cm) stretched mesh from May 6 to July 15 each year. For the purposes of the analysis in the Biological Opinion, entanglements and impingements are considered to result in sea turtle mortality. No incidental take of hawksbill sea turtles or shortnose sturgeon is anticipated.

Comment 4: Two commenters stated that the authority and experience to regulate state fisheries rests with the Virginia Marine Resources Commission (VMRC) and not NMFS, and, therefore, characterized this action as inappropriate. One additional commenter believed that NMFS regulatory and decision making processes are being dictated by environmental groups.

Response: NMFS agrees that the authority to regulate state fisheries rests with the respective state agency, in this case, the VMRC. However, VMRC cannot authorize incidental take of threatened sea turtles; only NMFS has the authority to do so. NMFS has the authority and obligation to protect and conserve all sea turtles that occur in U.S. waters that are listed as endangered or threatened under the ESA, regardless of whether they occur in Federal or state waters. This action is taken under the authority of the ESA to conserve sea turtles listed as threatened or endangered.

NMFS bases its decision on the best available data and knowledge of the situation; the decision is not dictated by the opinion of any outside entity, be it an environmental group, industry participant, or other stakeholder.

Comment 5: One commenter noted that recent sea turtle mortalities in Virginia hopper dredging operations have been higher than observed takes in the Virginia pound net fishery, and dredging has been allowed to continue. Two additional commenters felt that there was inequity with how NMFS addresses and regulates potential impacts to sea turtles.

Response: Under section 7 of the ESA, Federal agencies must consult with either NMFS or the U.S. Fish and Wildlife Service (USFWS) to ensure their proposed agency actions do not jeopardize the continued existence of listed species. The Norfolk and Baltimore Districts of the Army Corps of Engineers (ACOE) have previously consulted with NMFS on dredging operations in the Virginia Chesapeake Bay. The impacts of hopper dredging on listed species were previously considered via formal section 7 consultations (NMFS NER 2002, NMFS NER 2003), and Incidental Take Statements were prepared to account for the anticipated take in these operations. From July 2000 to October 2003, 54 sea turtles have been taken by Virginia dredge operations. Some of the incidents involved decomposed turtle flippers and/or carapace parts, but most of these takes were fresh dead turtles. Most of these previous sea turtle takes were exempted in the Incidental Take Statements of the Biological Opinions. Efforts are ongoing to work with the ACOE to further minimize this take and enhance existing monitoring programs. NMFS continues to work with the ACOE to reduce sea turtle takes in dredging operations, as well as to research and attempt to minimize sea turtle mortality from other sources (e.g., fisheries, vessels, debris/water quality).

NMFS attempts to consider all of the impacts to sea turtles cumulatively and to reduce threats from all known sources. NMFS and USFWS are in fact working to minimize the impacts to sea turtles from other activities as well (e.g., nesting habitat degradation, marine debris, dredging, power plant impingement). Nevertheless, fishing activities have been recognized as one of the most significant threats to sea turtle survival (Magnuson et al., 1990, Turtle Expert Working Group 2000). To respond to these threats, NMFS is comprehensively evaluating the impacts of fishing gear types on sea turtles throughout the U.S. Atlantic Ocean and Gulf of Mexico, as part of the Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries (Strategy) (NMFS 2001). Based on the information developed for the Strategy, NMFS may impose restrictions on or modifications to other activities that put sea turtles at risk.

Comment 6: Eight commenters felt that leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers result in the most sea turtle mortalities, and specifically recommended the status quo option. One of the commenters noted that decreasing the allowable mesh size to less than 8 inches (20.3 cm) stretched mesh would not help sea turtles and solve the stranding problem, but, because the problem is with the sea turtles, it would only hurt the fishermen.

Response: Based on historical observations of pound net leaders (Bellmund *et al.*, 1987) and for the reasons discussed in the preamble to the 2002 rule, NMFS recognizes that the frequency of sea turtle takes in leaders with stretched mesh 12 inches (30.5 cm) and greater and leaders with stringers may be higher than in smaller mesh leaders. However, during 2002 and 2003, NMFS documented sea turtle interactions with mesh leaders ranging from 14 inches (35.6 cm) stretched mesh down to 8 inches (20.3 cm) stretched mesh. All but one of these takes were in the leader prohibited area, as defined in this final rule. Therefore, NMFS has determined to prohibit all leaders in this area to prevent takes in the area with previous high sea turtle/pound net interactions.

The justification for the further leader mesh size restriction included in the proposed rule was based upon the occurrence of sea turtle takes in 8 inch (20.3 cm) and greater stretched mesh leaders. However, based upon additional analysis of impingement to entanglement ratios by NMFS, it appears that restricting mesh size to less than 8 inches (20.3 cm) stretched mesh would not necessarily provide additional conservation benefit to sea turtles, over that provided by restricting mesh size to less than 12 inches. In addition to mesh size, the frequency of sea turtle takes appears to be a function of where the pound nets are set, with pound nets set in certain areas having a higher potential for takes for a variety of possible reasons, such as depth of water, current velocity, and proximity to certain environmental characteristics or optimal foraging grounds. For instance, it is possible that takes may continue to occur on 7.5–inch (19.1–cm) stretched mesh leaders if set in certain geographical areas. Additional analyses,

and perhaps data collection, will be completed that may provide insights into the relationship between mesh size and sea turtle interactions. At this time, the mesh size threshold that would prevent sea turtle entanglements has not been determined for mesh size below 12 inches (30.5 cm). As such, NMFS is retaining the mesh size restriction included in the 2002 interim final rule, which is the restriction of leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers, in areas outside the leader prohibited area. It should also be noted that during the public comment period, it was recognized that an 8–inch (20.3–cm) stretched mesh leader may in fact be slightly smaller than 8 inches (20.3 cm), after it is coated and hung in the water. For example, NMFS observers measured nets to the nearest 0.125 inches (0.318 cm), so a sea turtle entanglement recorded in an 8–inch (20.3–cm) stretched mesh leader may have in fact been in a leader with 7.95–inches (20.2–cm) stretched mesh. Whenever NMFS mentions that sea turtles have been taken in 8 inch (20.3 cm) stretched mesh leaders, it refers to nets that may have been slightly smaller or larger (within 0.125 inches (0.318 cm)) than 8 inches (20.3 cm).

Comment 7: One commenter continued to be concerned with the potential take in leaders with less than 8 inches (20.3 cm) stretched mesh, particularly as a result of impingement.

Response: NMFS has only documented sea turtles in leaders with 8 inches (20.3 cm) and greater stretched mesh and in leaders with stringers. Given that gillnets with less than 8 inches (20.3 cm) stretched mesh have been found to entangle sea turtles (Gearhart, 2002), NMFS recognizes the possibility that entanglements in leader stretched mesh smaller than 8 inches (20.3 cm) could occur. There are differences between gillnet gear and pound net leaders (e.g., monofilament vs. multifilament material; drift, set, and runaround vs. fixed stationary gear; gilling vs. herding fishing method), which likely factor into the potential for sea turtle interactions and should be considered when conducting any mesh size comparison. NMFS does not expect sea turtle impingements on pound net leaders to occur outside the leader prohibited area, because of the lack of observed inpingements on pound net leaders outside of this area. Sea turtles may continue to be entangled in leaders with less than 12 inches (30.5 cm) stretched mesh outside the leader prohibited area. Further, given that only one turtle was found entangled outside the leader prohibited area in two years of monitoring, NMFS has chosen to keep the restriction to leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh. However, NMFS will continue monitoring pound nets for sea turtle interactions and the framework mechanism included in this final rule will enable the enactment of additional management measures if determined necessary.

Comments on Validity of Scientific Information

Comment 8: Sixteen commenters felt that the limited observer data do not support the conclusion that the pound net fishery is a major source of mortality, especially as the spring strandings have been much higher than the observed interactions in pound net gear. Three commenters believed sea turtles will not biologically benefit with the proposed measures given the limited take data. One commenter additionally felt that this regulation, and its supporting justification, establishes a bad precedent for managing Virginia fisheries.

Response: In 2002 and 2003, 23 sea turtles were found either entangled in or impinged on pound net leaders, while in May, June and the first half of July of 2002 and 2003, approximately 563 sea turtles were found stranded on Virginia beaches. NMFS acknowledges that other factors likely contribute to spring sea turtle mortality in Virginia, and NMFS does not assume that all sea turtle strandings are the result of pound net interactions. Sea turtle mortality sources are difficult to detect from evaluating the stranded animal. Few sea turtles strand with evidence of fishery interactions, but the lack of gear on a carcass is not necessarily indicative of a lack of fishery interaction. NMFS has observed other fisheries and investigated other potential causes, such as dredge operations, for the annual spring sea turtle mortality event and determined that natural or non-fishing related anthropogenic causes are not consistent with the nature and timing of most of the strandings (67 FR 15160, March 29, 2002, 69 FR 5810, February 6, 2004). For instance, during the approximate time period of the proposed measures (May 16 to July 31, 2003), a preliminary count of 26 of 375 turtles were found on Virginia beaches with carapace/plastron damage or propeller-like wounds. It is unknown how many of these injuries were pre or post-mortem. Unlike for pound net leaders, the level of sea turtle interactions with other potential mortality sources (e.g., other fisheries) has not yet been conclusively determined as few takes have been documented. As noted above, NMFS has data showing that pound net leaders result in sea turtle entanglement and impingement. NMFS believes that it is likely that pound nets contribute to, but do not cause all of, the high sea turtle strandings documented each spring on Virginia beaches. Under the ESA, NMFS is responsible for protecting sea turtles from various mortality sources.

There are several caveats, ones more likely to result in underestimates, associated with the pound net monitoring studies that should be noted when evaluating the number of animals found in the gear. The sea turtles observed in leaders were found at depths ranging from the surface to approximately 6 feet (1.8 m) under the surface. The ability to observe a turtle below the surface depends on a number of variables, including water clarity, sea state, and weather conditions. Generally, turtles entangled a few feet below the surface cannot be observed due to the poor water clarity in the Chesapeake Bay. In several instances in 2002 and 2003, due to tide state and water clarity, even the top line of the leader was unable to be viewed. Additionally, NMFS' sampling effort was confined to two boats in 2002 and one vessel during 2003, and each net could not be sampled during every tidal cycle, every hour, or even every day. Some impingements, and some entanglements, were undoubtedly missed as a small fraction of the fishing effort was observed. Due to funding and staff constraints, NMFS observers did not monitor pound nets after early June in 2002 and 2003, and did not monitor during the high spring stranding period in 2003. As such, some sea turtle entanglements and/or impingements could have been missed later in the season. Given these caveats, even if pound nets caused every sea turtle mortality in the Virginia Chesapeake Bay, it is not expected that the number of observed sea turtle interactions would equal the number of strandings. It should also be noted that a revised analysis by NMFS found that nets were observed a total of 838 times in 2002 and 2003, not 1463 times as noted in the draft EA. This modification is a factor of discounting the non-active nets and the nets that were not able to be completely observed due to shallow water depth and lack of boat access.

NMFS considers the monitoring information collected in 2002 and 2003 to be noteworthy, given that entanglements were not previously anticipated on leaders with less than 12 inches (30.5 cm) stretched mesh and impingements on leaders were observed, a phenomenon not previously

believed to occur with such frequency. NMFS believes that this data represent new information on the interactions between sea turtles and pound net leaders and should be used to further reduce takes in this fishery.

Sea turtles will benefit from this action, as pound net leaders entangle and impinge these animals and this action will reduce these interactions. The exact population benefit cannot be determined, but as sea turtle populations found in the Virginia Chesapeake Bay have not yet recovered, diligence must be used to reduce mortality sources. Loggerheads and Kemp's ridleys have been found interacting with pound net gear and are the most common species found in the Chesapeake Bay. Most loggerheads in U.S. waters come from one of five genetically distinct nesting subpopulations. The largest loggerhead subpopulation occurs from 29° N. lat. on the east coast of Florida to Sarasota on the west coast and shows recent increases in numbers of nesting females based upon an analysis of annual surveys of all nesting beaches. However, a more recent analysis limited to nesting data from the Index Nesting Beach Survey program from 1989 to 2002, a period encompassing index surveys that are more consistent and more accurate than surveys in previous years, has shown no detectable trend (B. Witherington, Florida Fish and Wildlife Conservation Commission, pers. comm., 2002). The northern subpopulation that nests from northeast Florida through North Carolina is much smaller, and nesting numbers are stable or declining. Genetic studies indicate that approximately one-half of the juvenile loggerheads inhabiting Chesapeake Bay during the spring and summer are from the smaller, northern subpopulation (TEWG, 2000; Bass *et al.*, 1998; Norrgard, 1995).

Kemp's ridleys are considered to be one of the world's most endangered sea turtle species. The population has been drastically reduced from historical nesting numbers, but the Turtle Expert Working Group (1998, 2000) indicated that the Kemp's ridley population appears to be in the early stage of a recovery trajectory. Nesting data, estimated number of adults, and percentage of first time nesters have all increased from lows experienced in the 1970's and 1980's. From 1985 to 1999, the number of nests observed at Rancho Nuevo and nearby beaches has increased at a mean rate of 11.3 percent per year, allowing cautious optimism that the population is on its way to recovery. Given the vulnerability of these populations to chronic impacts from human-related activities, the high level of spring sea turtle mortality in Virginia must be reduced to help ensure that these populations of loggerheads and Kemp's ridleys recover.

Additionally, most of the turtles found in Virginia waters, as well as found stranded during the spring, are of the juvenile life stage (Mansfield *et al.*, 2001, Musick *et al.*, 2000, Musick and Limpus, 1997). Studies have concluded that sea turtles must have high annual survival as juveniles and adults to ensure that sufficient numbers of animals survive to reproductive maturity to maintain stable populations (Crouse *et al.*, 1987; Crowder *et al.*, 1994; Crouse, 1999). Given their long maturation period, relatively small decreases in annual survival rates of both juvenile and adult loggerhead sea turtles may destabilize the population, thereby potentially reducing the likelihood of survival and recovery of the population. As such, the historical high level of mortality in Virginia plus the increase in mortality documented during the last several years may negatively affect recovery. Any action that helps reduce sea turtle mortality will biologically benefit these species.

Regardless of whether NMFS issued this final regulation, if NMFS identifies additional sea turtle mortality sources, NMFS would consider additional management actions pursuant to its obligations under the ESA. Therefore, this final rule, or the justification for it, does not set any precedent.

Comment 9: Two commenters expressed their concern with closing a portion of the fishery without a complete understanding of the problem and recommended more research, particularly with respect to impingements.

Response: NMFS is committed to undertaking additional research to not only continue studying the interactions between pound nets and sea turtles, but also to continue monitoring and investigating sea turtle mortality in Virginia during the spring. If any scientific research results or future study plans are available that would provide more information, NMFS would welcome receiving or discussing those studies. However, given the results of the pound net monitoring studies in 2002 and 2003, it is necessary to act on the results at this time to minimize additional sea turtle entanglements and impingements in the future. The data show that sea turtles are entangled in and impinged on leader mesh sizes smaller than what are currently restricted and most of these interactions have occurred in a specific geographical area (i.e., in the leader prohibited area). Note that at this time NMFS chose to retain the leader mesh size restriction as included in the previous action on this fishery (in areas outside the leader prohibited area) in order to complete additional analyses, and perhaps data collection, on the conservation benefit of different mesh size thresholds. NMFS is committed to continuing to explore the issue as well as working with the industry to develop a gear modification solution that would minimize sea turtle takes and retain an acceptable level of target catch.

Comment 10: Two commenters disagreed that most impingements lead to mortality, given the normal diving behavior of sea turtles, the variable strength of the tidal currents, and the lack of observation time for the impinged animals.

Response: NMFS observers documented 14 sea turtles, 13 of these alive, impinged on pound net leaders by the current, during monitoring surveys in 2002 and 2003. When an animal was found impinged on the leader, it was immediately released from the net by the observer. Impinged sea turtles were not observed on the net for any length of time, due to the need to release an air-breathing endangered or threatened species from fishing gear as soon as the animal is found, and the uncertainty surrounding how long the animal had already been impinged and how potentially compromised it was. If an animal was impinged on a leader by the current with its flippers inactive, based on other observations of impinged sea turtles, NMFS believes that without any human intervention the turtle could either swim away alive when slack tide occurred, become entangled in the leader mesh when trying to free itself, or drift away dead if it drowned prior to slack tide. In 2002 and 2003, six of the live impingements occurred near the surface, but seven turtles were found underwater, unable to reach the surface to breathe, with an average of 3 hours until slack tide. It is likely that if a turtle could not breathe from the position where it was impinged on the net, it would have a low likelihood of survival if it remained on the net for longer than approximately one hour.

While a public comment noted that sea turtles in Virginia have been found to remain submerged for durations of 40 minutes under normal conditions, it is unlikely that struggling, physiologically stressed sea turtles in fishing gear could do the same, as forcibly submerged turtles rapidly consume their oxygen stores (Lutcavage and Lutz, 1997). In forcibly submerged loggerhead turtles, blood oxygen was depleted to negligible levels in less than 30 minutes (Lutz and

Bentley, 1985 in Lutcavage and Lutz, 1997). The rapidity and extent of internal changes are likely functions of the intensity of underwater struggling and the length of submergence. For instance, oxygen stores were depleted within 15 minutes in tethered green sea turtles diving to escape (Wood *et al.*, 1984 in Lutcavage and Lutz, 1997). Given that some forcibly submerged sea turtles on pound net leaders have been observed struggling, it is unlikely that the submergence duration of impinged animals would be the same as for non-impinged sea turtles. Besides the one specimen of an unknown species of sea turtle found in June 2003, the turtles observed impinged in 2002 and 2003 were not observed moving vertically on the net, given that in most cases, at least one of their flippers were rendered inactive as they were held against the net. The unidentified sea turtle found in June 2003, that either slipped deeper down the net or escaped before the observer could evaluate it further, had both of its front flippers active. Four impinged sea turtles had their head and/or flipper through the leader mesh, but because the part was not wrapped multiple times in the net, it was not considered entangled. Often the impinged turtles were documented as held against the nets by very slight, almost slack, currents. It is unknown how long those animals were impinged on the net before being observed. It could be that those animals were held against the net for more than approximately an hour and when observed impinged with the slight current, they were already in a compromised state. If a sea turtle remains alive after an impingement and swims freely, it could become impinged on or entangled in another nearby pound net leader. This animal would likely already be in a compromised state, which would further augment the impacts of forced submergence.

Comment 11: Five commenters noted the difference between nearshore and offshore nets along the Eastern shore of Virginia, with respect to the different current strength, water depth and observed turtle takes. Two of these commenters felt that the potential for impingements could not be extrapolated to the entire fishery or to nets in shallower waters with weaker currents.

Response: NMFS observed sea turtles impinged on nets with what appeared to be varying current strengths. NMFS agrees that additional research is necessary on the current strength needed to impinge a sea turtle, and recognizes that there appear to be differences between nearshore and offshore nets with respect to impingement potential and sea turtle interactions. It was NMFS' previous assumption that all net locations in the leader prohibited area experienced similar conditions, namely relatively high currents regardless of water depth, given that impingements have been documented in those nets set in the Western Bay and along the Eastern shore and NMFS' observations documented swift moving currents in all of those net locations. Information from the public comments suggested that the differences between nearshore and offshore nets are noteworthy, and the difference in impingement potential must be considered. Based on these comments, NMFS re-analyzed the 2002 and 2003 monitoring records and the data do support that there is a statistically significant difference between observed sea turtle takes in nearshore and offshore nets. In 2002 and 2003, offshore nets accounted for all of the observed impingements (n=14) and 8 of the 9 observed entanglements. One dead loggerhead was documented in a nearshore 8 inch (20.3 cm) stretched mesh leader in June 2003. During 2002 and 2003, there were 345 surveys of nearshore nets and 480 surveys of offshore nets. Thirteen surveys did not have a nearshore or offshore designation. Based upon the observations of nearshore nets, it does appear that they pose a significantly lower risk to sea turtles and as such, NMFS has modified the leader prohibited area in this final rule to exclude nearshore nets. Nearshore nets are defined to include those nets with the inland end of their leader 10 horizontal feet (3 m) or less from the mean low water line, and offshore nets include all other nets set in various water depths. The revised leader prohibited area includes all areas where sea turtles were documented impinged on pound net leaders.

Generally, areas close to shore are often shallower and have less current than those areas further from shore, but exceptions may occur because environmental conditions can vary locally. Distance from shore is likely a proxy for other factors (e.g., water depth, current speed) influencing sea turtle interaction rates. For this action, distance from the mean low water line was used as a common characteristic of those nets considered to be nearshore. NMFS will be collecting more data on current strengths in the Virginia Chesapeake Bay, and until additional information may indicate otherwise, NMFS considers distance from shore to be suitable to separate nearshore and offshore nets.

Comment 12: Three commenters disagreed with NMFS' statement that there are unreported sub-surface sea turtle mortalities in pound net leaders, because the previous side scan sonar surveys did not detect any sea turtle takes.

Response: In 2001, 7 days of side scan sonar surveys were completed from May 24 through August 3 (with no surveys completed from June 24 to July 22 due to weather), for a total of 825 images for the 55 active pound net leaders surveyed (Mansfield *et al.*, 2002a). In 2002, 9 days of surveys were conducted from May 22 to June 27, for a total of 1,848 images for the 61 active pound net leaders surveyed (Mansfield et al., 2002b). In 2001 and 2002, surveys were conducted almost equally in the Western Bay and along the Eastern shore. No sub-surface acoustical signatures were noted during these surveys. The use of side scan sonar as a means to detect sub-surface sea turtle entanglements may have potential, but additional research on sub-surface interactions is needed. Mansfield *et al.* (2002a, 2002b) state that a number of factors may influence the use of side scan sonar, including weather, sea conditions, water turbidity, the size and decomposition state of the animal, and the orientation of the turtle in the net. NMFS recognizes that survey scheduling is limited by weather and sea conditions, but considers that side scan survey results may continue to be affected by water turbidity, the size and decomposition state of the animal, and the orientation of the turtle in the net. These issues must be addressed in future surveys before conclusively determining that sea turtles are not found in pound net leaders sub-surface. NMFS conducted forward searching sonar testing in April 2003 to further explore the issue, but due to technical difficulties (e.g., narrow band width, time needed to familiarize staff with equipment and image interpretation, scheduling), testing had to be curtailed while visual monitoring was conducted. Additional sonar testing is anticipated to be conducted in the spring of 2004.

However, because sea turtles can be present throughout the water column, it is possible that subsurface entanglements and impingements occur. Data indicate that while the spring water column temperatures are stratified and sea turtles may prefer warmer surface waters, sea turtles may also be found at depth. Sea turtles generally inhabit water temperatures greater than 11° C (Epperly *et al.*, 1995), and loggerheads and Kemp's ridleys in Virginia waters forage on benthic species. As sea turtles use the

Chesapeake Bay as developmental foraging grounds (Byles, 1988, Lutcavage and Musick, 1985, Musick and Limpus, 1997), they will be periodically near the bottom if they are foraging and may come in contact with pound net leaders at depth. Musick et al. (1984) found that crustaceans aggregate on large epibiotic loads that grow on the pound net stakes and horseshoe crabs (a preferred prey for loggerheads) become concentrated at the bottom of the net. Additionally, Mansfield and Musick (2003) found that seven sea turtles (six loggerheads and one Kemp's ridley) tracked in the Virginia Chesapeake Bay from May 22 to July 17, 2002, dove to maximum depths ranging from approximately 13.1 ft (4 m) to 41 ft (12.5 m). Further, Byles (1988) and Mansfield and Musick (2003, 2004) found that sea turtles in the lower Chesapeake Bay commonly make dives of over 40 minutes during the day. While the percentage of time spent at each depth range needs to be clarified, it is improbable that turtles, during a 40 minute period, are never found at depths deeper than the depth at which sea turtles were observed entangled and impinged (e.g., approximately 6 feet (1.8 m)). This information suggests that sea turtles will be found through the water column, even though they may prefer warmer surface waters. While side scan sonar survey results have not documented the sub-surface entanglement of sea turtles in two years of surveys, NMFS believes these results should be treated cautiously, recognizing the potential limitations of this technique and known sea turtle behavior patterns.

Comment 13: One commenter disagreed with NMFS' statement that the mesh size characteristics are generally consistent from the top to bottom of the leader.

Response: It is possible that different nets in different areas of the Chesapeake Bay are set with different mesh sizes from top to bottom. The statement in the proposed rule was that pound net leader characteristics are generally consistent from top to bottom. NMFS conducted pound net leader observations during 2002 and 2003 for a total of 126 individual active nets observed, and documented different mesh sizes in the top and bottom of the leader in only one or two nets, but notes that nets were not routinely monitored from top to bottom. In 2002 and 2003 combined, there were approximately 26 nets that did change mesh sizes from the shallower end to the deeper end of the leader (moving horizontally along the leader), but that is not what was referred to in NMFS' original statement. Additionally, NMFS discussed this issue with four pound net fishermen and this subset of fishermen indicated that they used one mesh size in their leaders.

Comment 14: One commenter disagreed with NMFS' statement that pound net leaders in the Virginia Chesapeake Bay are one mile (1,609 m) long.

Response: The Economic and Social Environment section (Section 4.3) of the draft EA stated that "...fish swimming along the shore are turned towards the pound by the leader (sometimes a mile long), guided into the heart, and then into the pound..." The purpose of this paragraph was to provide background information on the configuration of pound net gear, and it is NMFS' understanding that in certain areas pound net leaders can be one mile (1,609 m) long (Dumont and Sundstron, 1961). Based upon field observations in Virginia however, NMFS agrees with the comment that pound net leaders in Virginia do not reach one mile (1,609 m) long. In fact, Section 28.2–307 of the Code of Virginia restricts the total length of a single fixed fishing device to 1,200 feet (365.8 m) or less. The reference to the leader length of one mile (1,609 m) was deleted in the final EA.

Comment 15: One commenter noted that pound net operations are critical sources of food for birds, protected under the Migratory Bird Treaty Act, in the Virginia Chesapeake Bay, and NMFS failed to consider this biological benefit in its analysis. Further, this commenter felt that pound net operations are beneficial for sea turtles, as important sources of food from the discards of the pound nets.

Response: NMFS recognizes that a variety of birds feed on the catch and discards from the pound net fishery. That potential benefit to avian species was analyzed in the final EA. However, birds have also been documented entangled, dead and alive, in the leaders and have been documented entangled and entrapped in the pounds and hearts, both dead and alive. Monitoring efforts in 2002 and 2003 documented several dead birds entangled in leaders, hearts, or pounds with varying mesh sizes, including 12 pelicans, 10 cormorants, 6 gulls, 2 gannets, 2 common loons, 1 royal tern, and 130 birds of unidentified species. Since individual nets were surveyed multiple times, and since it is difficult to identify decomposing birds, some birds may have been counted multiple times. Regardless, the avian mortality documented during 2002 and 2003 does not represent total mortality to these species, as surveys documented only a portion of total fishing effort. Birds foraging in Chesapeake Bay may exploit pound nets for prey but they are not dependent on this source of forage. NMFS believes that the risk of mortality, disruption of normal feeding behaviors, and other unknown ecological effects to avian species resulting from pound nets outweighs any perceived benefit of concentrating prey resources.

Sea turtles have been found alive and uninjured in the pounds of pound net gear, and are assumed to be foraging on the entrapped species. Tagging data collected by VIMS suggest that some sea turtles exhibit strong site fidelity to certain pound nets (Mansfield and Musick, in press). Turtles may also feed on the discards of pound net gear outside the pound, but the harm or benefit of this foraging resource are unknown. Turtles' proximity to the gear may in fact increase the potential for interactions with the leaders. NMFS believes the negative impact from interactions with the leaders outweighs any potential benefit from the concentration of prey items or availability of discards. It is also unknown what impact pound nets have on the behavior and development of sea turtles in the Chesapeake Bay.

Comments Related to Stranding Levels

Comment 16: Thirteen commenters stated that the proposed pound net restrictions will not solve the high spring sea turtle stranding problem in Virginia waters, and NMFS should continue to explore other sources of sea turtle mortality (e.g., vessel impacts, habitat degradation, water quality, lack of prey items, other fisheries). One of the commenters recommended that the menhaden fishery be regulated so there would be more food and better water quality for marine species, sea turtles included. Observer coverage on other spring fisheries in Virginia, as well as continued observer coverage on the pound net fishery, was recommended by four of the commenters.

Response: As discussed in Comment 8, NMFS does not believe that pound nets are the sole source of spring turtle mortalities in Virginia. NMFS does believe that pound nets play a role in the annual spring stranding event. Prohibiting a gear type known to entangle and impinge sea turtles in an area with documented takes will protect sea turtles from potential mortality associated with these pound net leaders, and reduce the strandings that occur from this gear type.

Since 2001, several fisheries have been observed in Virginia with few documented sea turtle takes. However, NMFS recognizes that variations in fishery-turtle interactions may occur between years, and is committed to

continued monitoring of fisheries in and around Virginia. The NMFS 2004 monitoring program is anticipated to include observer coverage of the gillnet fisheries in offshore and nearshore Virginia and Chesapeake Bay waters; alternative platform observer coverage of the large mesh gillnet black drum fishery; observer coverage of the trawl and scallop dredge fisheries in offshore Virginia waters; investigations into sea turtle interactions with the whelk and crab pot fisheries; and pound net monitoring. NMFS is also working to place observers on board the menhaden purse seine fishery in the Chesapeake Bay. NMFS will also be providing funding for professional necropsies and associated lab costs on fresh dead sea turtles in Virginia to get a better picture of the health of a subset of stranded sea turtles, and working with Virginia organizations to institute an educational campaign aimed at reducing sea turtle interactions with recreational fishermen and boaters. NMFS will continue to closely monitor sea turtle stranding levels and to evaluate interactions with other mortality sources not previously considered that may contribute to sea turtle strandings.

NMFS recognizes that water quality and habitat degradation from many sources can influence sea turtle distribution, prey availability, foraging ability, reproduction, and survival. Sea turtles are not very easily directly affected by changes in water quality or increased suspended sediments, but if these alterations make habitat less suitable for turtles and hinder their capability to forage, eventually they might tend to leave or avoid these less desirable areas (Ruben and Morreale, 1999). The Chesapeake Bay watershed is highly developed and may contribute to impaired water quality via stormwater runoff or point sources. However, due to the volume of water in the mainstem Chesapeake Bay, the impacts of pollutants may be slightly reduced compared to certain tributaries. In a characterization of the chemical contaminant effects on living resources in the Chesapeake Bay's tidal rivers, the mainstem Bay was not characterized due to the historically low levels of chemical contamination, but the James River was characterized as an area with potential adverse chemical contaminant effects to living resources (Chesapeake Bay Program Office 1999). NMFS, USFWS, and the Environmental Protection Agency (EPA) are currently engaged in ESA section 7 consultations on EPA's water quality standards and aquatic life criteria. Through those consultations, the effects of EPA's water quality standards will be evaluated with respect to potential impacts to listed species.

NMFS recognizes that the blue crab population in the Chesapeake Bay has declined from previous levels (Seney, 2003). A diet analysis of stranded loggerhead and Kemp's ridley sea turtles in Virginia found that the diet of loggerheads appears to have shifted to a fish dominated diet in the mid–1990s and in 2001 to 2002, from horseshoe crab dominance during the early to mid–1980s and blue crab dominance in the late 1980s and early 1990s (Seney, 2003). Menhaden, croaker, seatrout, striped bass and bluefish were the fish species most frequently found in the recent loggerhead samples, with all of these fish species being commercially important in Virginia's gillnet and pound net fisheries (Mansfield *et al.*, 2001, 2002a in Seney, 2003). Seney (2003) stated the fish species composition and the fact that few turtles had consumed both fish and scavenging mud snails suggests that the turtles examined were feeding on primarily live and fresh dead fish from nets. It remains uncertain whether these results are biased because sampling was conducted on only stranded animals and it could be that more fish was found in the stomachs of stranded loggerheads because some were interacting with fishing gear, which contributed to their demise. Based upon these results however, it does appear that loggerheads are shifting their diet and the decline of the horseshoe and blue crab populations may be increasing loggerheads' interaction rate with fishing gear. The future ramifications of this are unclear and it warrants further research. A small subset of Kemp's ridleys was sampled and data suggest that blue crabs and spider crabs were key components of the Virginia Kemp's ridley diet from 1987 to 2002. However, based on the body condition of the majority of stranded turtles, sea turtles in the Chesapeake Bay do not appear to be compromised by a lack of food. The decline of the horseshoe and blue crab populations may result in a diet shift to different species (e.g., different species of crab) or potential move to a different foraging area.

Again, it should be stressed that NMFS believes that high spring strandings may be a result of an accumulation of factors, most notably fishery interactions, but pound net leaders are known to take sea turtles and NMFS believes that interactions with pound net leaders likely contribute to the overall strandings.

Comment 17: Twelve commenters noted that the number of active pound nets (large mesh and stringer leaders in particular) have decreased since the 1980s while the number of strandings have increased in recent years.

Response: NMFS agrees that there are currently fewer pound net leaders, in particular those utilizing large mesh and stringer leaders, in the Virginia Chesapeake Bay in comparison to the 1980s. It is unclear whether the reduction in pound nets has been consistent throughout the Virginia Chesapeake Bay, or whether the number of pound nets in one area has decreased significantly and the number in another area has remained relatively the same or potentially increased. The number of pound net licenses issued in Virginia has remained the same since 1994, due to a limited entry program, and one license is assigned to each pound net. So while the number of pound nets has apparently decreased since the 1980s, the number of licenses issued (n=161) has been approximately the same since 1994. This suggests that the number of pound nets in the Virginia Chesapeake Bay has been approximately the same since 1994, but NMFS recognizes that the number of active nets in any given season may vary among years. Also, NMFS notes that pound net landings from 1990 to 1999 have increased at an annual rate of 8.33 percent, while the annual revenues from pound net landings have increased by 17.31 percent (Kirkley *et al.*, 2001).

Regardless, NMFS disagrees with the conclusion that some turtle strandings cannot be attributed to pound net leaders because strandings have increased while the number of leaders have decreased. NMFS recognizes that the increase in documented sea turtle mortalities could be a function of the increase and improvement in the level of stranding effort, coverage, and reporting that has occurred, especially along the Eastern shore, and perhaps a function of the apparent increase in abundance of the southern population of loggerheads, which make up approximately 50 percent of the loggerheads found in the Virginia Chesapeake Bay. Pound net leaders (regardless of how many are in the Chesapeake Bay) still entangle and impinge sea turtles and the ESA requires NMFS to use the best available scientific information to protect the species. There have been documented sea turtle entanglements in leaders that were determined to have caused mortality by drowning. Impingements represent a take under the ESA that may lead to mortality.

Comment 18: Four commenters acknowledged that elevated strandings abate by the end of June or early July

and the pound net fishery operates throughout the turtle residency period in the Chesapeake Bay. They noted that if pound nets were the problem, one would expect strandings to remain at elevated levels throughout the season. One of the commenters noted that there have been no documented takes after June 15, 2003, to the present.

Response: From 1995 to 2002, the average monthly sea turtle strandings for Virginia (oceanside and Chesapeake Bay combined) were the highest in June (117), followed by May (39), July (28), August (26), October (18), and September (17). Strandings do continue throughout the sea turtle residency period, but not at the elevated levels seen in the spring. As noted in Comment 1, to NMFS' knowledge, there have been 2 observed turtles in pound net leaders after the spring, but there also has been very limited observer coverage during that time. It is possible that entanglements and impingements are occurring in pound net leaders after the spring, and contributing to stranding levels, but there are no notable observations to suggest that, or that the frequency of takes is the same as in the spring. It is also possible that sea turtles are more vulnerable to pound net entanglement and impingement in the spring, as they are moving into the Chesapeake Bay, migrating through a concentration of pound nets set near the mouth of the Chesapeake Bay. NMFS acknowledges that additional information would be beneficial to adequately assess the risk of entanglement/impingements in pound net leaders after the spring, and to determine why sea turtles may not be interacting as frequently with leaders during this time. The only directed study on temporal entanglements dates back to the 1980s, and the sampling area was concentrated in the western Chesapeake Bay. Bellmund *et al.*, (1987) stated that entanglements in pound net leaders began in mid-May, increased in early June, and reached a plateau in late June. In 1984, surveys were conducted through September, and no entanglements were observed after late June. Bellmund *et al.* (1987) further stated that these data suggest pound nets pose mortality threats to sea turtles in the Chesapeake Bay for a relatively short period of the year even though most sea turtles reside in the Chesapeake Bay from May through October. Additionally, from 1981 to 1984, 14 loggerheads and 2 Kemp's ridleys were monitored via radio tracking (Byles, 1988). Three of the animals became entangled in leaders; the other animals tracked in the summer and fall were able to forage around the nets with little apparent entanglement threat (Byles, 1988, Musick *et al.*, 1994, Mansfield *et al.*, 2002b).

NMFS acknowledges that there are few documented sea turtle interactions with pound net leaders after mid-June. However, there also have not been any directed monitoring efforts during this time; NMFS monitoring in 2003 ended on June 11 due to funding and logistical constraints. Monitoring was not conducted during the peak of the 2003 stranding period and it is possible that many more sea turtles would have been observed entangled in or impinged on leaders during that time. As stated in the responses to Comments 8 and 16, NMFS does not believe pound nets cause all of the strandings in Virginia, and as noted in the proposed rule, a cause and effect relationship between pound net interactions and high spring strandings cannot be statistically derived based on the available data, even though a concentration of strandings has been consistently found in the vicinity of pound nets and a number of dead floating sea turtles were documented around pound nets in recent years. The facts remain that turtles have been observed entangled in and impinged on pound net leaders during the spring.

Comment 19: Two commenters noted that the proposed rule failed to identify what action NMFS would take if the final rule is implemented as proposed and high strandings continue in the spring.

Response: Monitoring of potential mortality sources will continue to occur this spring, and the information gathered from these monitoring initiatives would inform what action NMFS would take if strandings continue. It is possible that additional mortality sources may be identified and appropriate actions taken. NMFS believes this final rule will result in reduced sea turtle mortality associated with pound net gear in the Chesapeake Bay. The final rule includes the framework mechanism that enables NMFS to make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles.

Comment 20: Two commenters felt that healthy sea turtles can forage around the pound nets without being entangled or impinged, and the animals observed in pound net gear, and found stranded on Virginia's beaches, are sick, diseased (like some of those found in Florida), cold stunned, and tired. One additional commenter felt that strandings are a result of natural selection, and that NMFS should not interfere with lack of recovery of those animals with weak genes.

Response: The ESA's prohibition against take applies to all endangered or threatened animals. A capture in fishing gear is still a take, regardless of the animal's condition and whether it is weak, sick, or in any other way compromised. Unless the take is authorized pursuant to a regulation, a permit, or in the Incidental Take Statement of a Biological Opinion, the person who incidentally takes a listed animal is subject to criminal penalties and fines. The condition of sea turtles is therefore not relevant to NMFS' determination to permit an additional exception to the take prohibitions.

In any event, NMFS has no information to suggest that the animals found entangled or impinged on leaders during the spring of 2002 and 2003 were unhealthy before their capture. The animals observed by NMFS as entangled and impinged have visually appeared healthy (e.g., not emaciated, not externally compromised). Granted, the live turtles and the dead turtles not necropsied may have had other problems besides those that are able to be visually observed. Necropsies were performed on 4 of the 7 dead entangled turtles found in pound net leaders in 2002 and 2003. One additional Kemp's ridley sea turtle is anticipated to be necropsied (found in May 2003); NMFS is waiting for the necropsy results from this animal. The other two dead animals were left in situ to monitor their status. Necropsy results from 2 of the 7 dead entangled turtles showed that the turtles had adequate fat stores, full stomach and/or intestines, and no evidence of disease. A necropsy by the Armed Forces Institute of Pathology on one of the dead Kemp's ridleys recovered from a leader found that "the animal was active and in good nutritional condition at the time of death" and concluded that entrapment in fishing gear was the cause of death. One of the 4 necropsy reports only stated that the turtle was female with nematodes and digested tissue in its digestive tract.

Most of the turtles stranded in Virginia have been moderately to severely decomposed (e.g., 85 percent in 2003). The ability to conduct necropsies is limited by the condition of the stranded animals, and severely decomposed turtles are not usually necropsied. The majority of the stranded turtles that were examined by necropsy in the spring of previous years had relatively good fat stores and full stomachs/digestive tracts, suggesting that they were in good health prior to their death. NMFS has no evidence to

suggest that sea turtles found in the Chesapeake Bay during the spring are weakened from their seasonal migration. There is also no evidence of widespread disease in these stranded animals. As referred to in a public comment, a Florida epizootic occurred from October 2000 through March 2001, although a few cases a year have been seen since then. The epizootic appears to have been limited to south Florida. The hallmark symptom was a varying degree of paralysis which affected voluntarily movements and certain reflexes. Forty-nine alive stranded loggerheads were confirmed to have been caused by the epizootic. However, a living animal was necessary to make the diagnosis. Many of the dead loggerheads found during that period may have also died from the same disease, but it was not possible to determine their cause of death. The animals that have stranded in Virginia have not exhibited the same symptoms as those found in the Florida stranding event that was associated with an epizootic, nor has the epizootic continued in any significant way beyond early 2001. In the early 1990s, four live stranded animals in Virginia exhibited signs of a central nervous system disturbance, later determined to be a bacterial encephalitis (George et al., 1995). These animals were dull and listless when undisturbed, but when handled, they moved their flippers spastically and showed a hyperflexion of the neck. At this time, NMFS has no data indicating that the sea turtles found in Virginia pound nets have a central nervous system problem. As mentioned, NMFS is providing funding to conduct necropsies and lab analyses on fresh dead sea turtles this spring, which will hopefully provide additional information on the health of some of these stranded animals.

It is unlikely that the spring stranded animals in Virginia were cold stunned. The average water temperature on May 6 at the NOAA National Ocean Service Kiptopeke, Virginia station was 16.1 C from 1999 to 2002, 16.6 C on May 7, and 17.2 C on May 8. Average water temperatures in 2003 were 14.3 C, 15.1 C, and 17.1 C on May 6, 7, and 8, respectively, not notably different from the most recent 4–year average. Water temperatures generally increase gradually over the spring and summer, and in 2003, most of the sea turtle strandings occurred during the last two weeks of June, when water temperatures were warmer. For example, on June 22, the average water temperature at the Kiptopeke station was 21° C. Mansfield *et al.*, (2001) and Mansfield and Musick (2003) state that analyses by VIMS have estimated that sea turtles migrate into the Chesapeake Bay when water temperatures warm to approximately 16 to 18° C. However, sea turtles do frequent waters as cool as 11° C (Epperly *et al.*, 1995). Cold stunning typically occurs during the time of the year when water temperatures are decreasing, not increasing, and is well documented in other areas. Sea turtles, the majority of them Kemp's ridleys, wash ashore cold stunned each fall/winter along the beaches of Cape Cod Bay, Massachusetts, beginning with the first sustained storm front after the Cape Cod Bay water temperatures have dropped to or below 10° C. From the available data on cold stunning and sea turtle preferences for water temperature, it is unlikely that the sea turtles found stranded and in pound net gear in Virginia during May and June are cold stunned.

Determining the cause of death in stranded sea turtles is difficult, given the level of decomposition of most stranded turtles and the lack of evidence, due in part to sea turtles' anatomy (e.g., hard carapace, scaly skin). However, the circumstances surrounding the spring strandings in Virginia are consistent with fishery interactions as a likely cause of mortality and, therefore, strandings. These circumstances include relatively healthy turtles prior to the time of their death, a large number of strandings in a short time period, no external wounds on the majority of the turtles, no common characteristic among stranded turtles that would suggest disease as the main cause of death, and turtles with finfish in their stomachs (which suggests interactions with fishing gear (Bellmund *et al.*, 1987) or bycatch discarded from vessels (Shoop and Ruckdeschel, 1982)).

As to whether these turtle mortalities may be the result of natural selection, anthropogenic impacts have impeded sea turtle recovery, significantly contributing to their endangered and threatened status. Anthropogenic mortality sources are considered to far outweigh natural mortality sources. There is no evidence to support the notion that turtles interacting with pound nets (or other fisheries gear) are genetically weakened and predisposed to incidental capture. As direct and indirect impacts to sea turtles continue through, for example, habitat destruction, marine debris and pollution, and incidental take in fisheries, dredging, and power plant operations, it remains necessary to attempt to recover and rehabilitate those sea turtles that may be able to be saved. Sea turtle populations have not yet recovered, and as such, NMFS has a statutory obligation to manage and protect these species. Reduction of mortality from anthropogenic sources is necessary to achieve recovery of these species.

Comments Related to Economic and Social Impact Assessment:

Comment 21: Eleven comments were received recommending that NMFS work with the industry on this issue and develop and test pound net leader modifications.

Response: On September 3, 2003, VMRC convened a meeting with NMFS, representatives from the pound net industry, VIMS, the Virginia Marine Science Museum, and the Virginia Department of Game and Inland Fisheries, to discuss the 2002 and 2003 pound net leader monitoring results, high spring sea turtle strandings, and potential measures to reduce sea turtle interactions with pound net gear. At this meeting, NMFS expressed its desire to work with the industry to develop gear modification solutions and requested ideas on potential leader configurations.

NMFS has an effort underway, in conjunction with industry participants, to develop and test an alternative leader design along the Eastern shore during the spring of 2004. This alternative leader design is the non-preferred alternative 5 considered in the EA, but was not able to be fully analyzed with respect to benefits to sea turtles because of the lack of data. After monitoring and analyzing the results of this study, it will be determined if the modification is effective at reducing sea turtle capture, while retaining an acceptable level of target catch, or if additional research is necessary.

Additionally, NMFS has partnered with the National Fish and Wildlife Foundation to establish a fishing gear mini-grant program for sea turtles that is aimed at working with industry (and other interested public stakeholders) to promote research, development, and testing for alternative leader designs in the Virginia pound net fishery. Proposals were due on April 15 and funding decisions are expected to be made by July 15, 2004.

While research is ongoing and NMFS is committed to pursuing a gear modification solution for this fishery, it remains necessary to implement additional restrictions on the Virginia pound net fishery at this time due to the documented takes in leaders in compliance with the 2002 interim final rule and continuing levels of sea turtle mortality in Virginia waters.

Comment 22: Thirteen commenters expressed their concern with the high

economic impacts to fishermen from this proposed action, and one of these commenters believed that the economic impacts were underestimated and that economic burden from the proposed action would prohibit fishermen from fishing pound nets year round. Four of the 13 commenters recommended compensation to the fishermen that do not fish this season.

Response: NMFS used the best available information to estimate the economic costs to the pound net fishery. The overall economic impact may be considered underestimated since indirect economic impacts were not assessed. For example, processing plants or fish houses may be affected indirectly by the management measures imposed on this fishery.

NMFS only estimated the direct economic impacts, which are the impacts on the harvester. In the economic analysis of direct impacts, averages are reported, and an average may not reflect an individual's actual position. That is, what an individual actually earned in revenues may be less or more than the reported average. Also note the reported coefficient of variation (CV) for the anticipated revenue loss of $40,474 under the proposed rule was 1.08 percent (See Table 5.1.2.6 in the EA). The CV is equal to the standard deviation divided by the mean (i.e., 1.08 percent = [$43,712/$40,474]). That is, given a standard deviation of $43,712, some harvesters may have earned as much as $127,024 (=mean+2*standard deviation=$40,474+2*($43,712)) in the same area and during the same time period. It is the average revenue per harvester NMFS reports along with the statistical variation (reported in a CV).

Industry losses were overestimated. The total number of harvesters in the lower portion of the Virginia Chesapeake Bay was biased up by two to three harvesters. That is, these two or three harvesters can modify their leader mesh size versus remove their leaders. This results in industry losses being overestimated.

In summary, total economic impacts may be underestimated since indirect economic impacts were not included. Direct impacts on the individual were not over or underestimated, as averages were reported. Direct industry impacts were overestimated. This response refers to the economic impacts associated with the proposed rule, as the proposed rule is what was commented upon. However, with this final rule, the economic impacts to the pound net fishery are reduced as compared to the proposed rule. The economic impacts of this final rule are smaller than those evaluated for the proposed rule. Fewer nets are affected due to the smaller closure area and leader mesh size outside the leader prohibited area is not further restricted. With this final rule, annual revenues per harvester would be reduced by 14.7 percent to 29.4 percent, depending on how many nets the harvesters set. Industry revenues would be reduced by 7.3 percent (=$0.19M/$2.6M). Without authorization from Congress, NMFS cannot provide compensation to industry. For details on how the reductions in revenues were calculated, refer to Sections 5.1.2 and 5.8.2 in the EA. Virginia's 2002 landings data indicated 31 harvesters (Table 5.1.2.3 in EA) landed fish from May 6 to July 15, and there were 53 harvesters that fished year round. Excluding the May 6 to July 15 time period in 2002, 16 harvesters fished in the lower bay and earned revenues of $48,126 (CV=1.22). This implies there were six harvesters in the lower bay that did not fish from May 6 to July 15 in 2002. Therefore, some harvesters fishing pound nets do survive from an economic perspective by harvesting outside the proposed rule time period. However, NMFS does not have any information as to whether these six harvesters have alternative supplementary sources of income.

Comment 23: Six commenters expressed concern with the delay in publishing the proposed regulations, especially as the industry begins planning for the next fishing season early in the calendar year.

Response: NMFS has been working to alleviate the impacts of the Virginia pound net fishery on sea turtles as expeditiously as possible, in order to give the fishermen advance notification and ensure measures are in place before the historical period of high strandings. NMFS recognizes that the industry begins planning for the next fishing season in approximately December or January and is sensitive to fishermen's time constraints required to outfit their gear with mesh in compliance with required measures. NMFS issued the proposed rule as soon as possible after taking the necessary time to acquire and analyze the available data, explore the management alternatives, and prepare and review the necessary documents. Similarly, NMFS issued this final rule as soon as possible after thoroughly reviewing and considering public comments and determining if modifications to the proposed rule were necessary.

Comment 24: One commenter felt that the timeframe of the restrictions was too long and that fishing would be inappropriately curtailed when water temperatures were too cold for sea turtles.

Response: NMFS believes that, given the available information, the time period for the pound net restrictions is appropriate. From 1994 to 2003, the average date of the first reported stranding in Virginia was May 13. However, sea turtle mortality would have occurred before the animals stranded on Virginia beaches. In order for the proposed pound net restrictions to reduce sea turtle interactions with pound net leaders, the proposed measures should go into effect at least 1 week prior to the stranding commencement date, or on May 6 each year. Implementing protective measures by May 6 would ensure they are in place at the time when sea turtles are expected to be in the Chesapeake Bay and are becoming vulnerable to mortality sources.

Based on historical Sea Turtle Stranding and Salvage Network (STSSN) stranding data, typically the peak of Virginia strandings has been from mid-May to mid-June. However, the stranding data show that the peak can occur earlier and later. For instance, in 2003, the stranding peak occurred during the last two weeks of June and strandings remained consistent through the second week of July (e.g., 48 sea turtles stranded from July 1–15, 2003). The 2003 stranding peak was 10–15 days later than in 2001 and 2002 (Swingle and Barco, 2003). Given that sea turtle presence in the Chesapeake Bay is dependent upon water temperature, which makes the stranding peak somewhat variable, it is important to ensure sea turtles are protected during the period of apparent vulnerability (as indicated by elevated strandings). While there is some concern that entanglements could continue until the end of July or throughout the sea turtle residency period in the Chesapeake Bay, based upon the available data on sea turtle entanglements, impingements, and stranding patterns, the greatest potential for sea turtles to interact with pound net leaders occurs during May and June, and extends into the first half of July. In some years the peak period of high strandings may be shorter than the time period addressed by this final rule, but historically, high sea turtle strandings have been documented throughout the proposed time period of the leader restrictions. Implementation of the gear restrictions from May 6 to July 15 will account for stranding peak variability among years and is expected to minimize the occurrence of sea turtle takes in the pound net fishery in the

spring and, thus, reduce the strandings that occur from this gear type.

While monitoring surface water temperature and implementing restrictions based on reaching a pre-designated water temperature may account for seasonal variability, enacting regulations based upon real time water temperature is impractical due to the amount of time required for the agency to implement and for fishermen to comply with the regulations, and the potential variability of water temperature within different locations in the Chesapeake Bay and within the water column. NMFS has considered historical surface water temperatures (not real time monitoring) in establishing previous area closures. Real time monitoring of water temperature as a trigger for regulations is not practical for this situation, nor is it appropriate given the predictable time period of annual spring strandings in Virginia. Further, NMFS believes that a consistent effective date better enables industry to plan its fishing activities, as fishermen would know in advance specifically when the restrictions would apply.

Changes From the Proposed Rule

Based upon public comments received, NMFS has determined that several modifications to the measures included in the proposed rule are warranted. Specifically, the area in the southern portion of the Chesapeake Bay where all pound net leaders are prohibited has been reduced, and the nearshore boundary to which the prohibition applies has been moved from the beach to offshore, excluding those nets set with the inland end of the leader 10 horizontal feet (3 m) or less from the mean low water line. This modification was deemed appropriate given public comments noting that there is a difference between the nearshore and offshore nets, and that this difference may impact sea turtle interaction rates, in particular the occurrence of impingements. As noted in the response to Comment 11, NMFS had originally considered the environmental conditions in the locations where the offshore and nearshore nets are set to be similar, based upon reports from NMFS observers and general understanding of the currents in the Chesapeake Bay (e.g., strong along the Eastern shore near the mouth of the Chesapeake Bay). Given the public comments indicating that the currents and take conditions are different between offshore and nearshore nets, NMFS considered those potential differences when reanalyzing the take information. The data support this modification, in that in 2002 and 2003, offshore nets accounted for all of the observed impingements (n=14) and eight of the nine observed entanglements. One dead sea turtle was observed entangled in a nearshore 8–inch (20.3–cm) stretched mesh leader along the Eastern shore. The difference in takes between the offshore and nearshore nets is statistically significant with a chi-square value of 3.841 and $p<0.01$. In the lower Chesapeake Bay (encompassing the proposed leader prohibited area), approximately 60 percent (13 of 22) of the active pound nets surveyed in 2003 were nearshore nets. In 2002 and 2003, there were 345 surveys of nearshore nets and 480 surveys of offshore nets throughout the Virginia Chesapeake Bay, and 13 surveys did not specify the location. NMFS recognizes that the best available information suggests that the boundary of the leader prohibited area should be modified to account for this distinction between the effects of offshore and nearshore nets on listed sea turtles.

Additionally, NMFS has determined that this final rule should not change the restricted leader mesh size outside the leader prohibited area from 12 inches (30.5 cm) to 8 inches (20.3 cm) stretched mesh. Based upon additional analysis on impingement to entanglement ratios by NMFS, it appears that restricting mesh size to less than 8 inches (20.3 cm) stretched mesh would not necessarily provide the anticipated conservation benefit to sea turtles. In addition to mesh size, the frequency of sea turtle takes may be a function of where the pound nets are set, with pound nets set in certain areas having a higher potential of takes for a variety of reasons, such as depth of water, current velocity, and proximity to certain environmental characteristics or optimal foraging grounds. Additional analyses, and perhaps data collection, is planned to be completed that may provide insights into the relationship between mesh size and sea turtle interactions. At this time, the mesh size threshold that would prevent sea turtle entanglements cannot be determined for mesh sizes below 12 inches (30.5 cm). Hence, at this time NMFS is not making an additional modification to leader mesh size and is retaining the mesh size restriction included in the 2002 interim final rule, specifically the restriction of leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh (as well as leaders with stringers), outside the leader prohibited area. While some takes may still occur in less than 12 inches (30.5 cm) stretched mesh, retaining this mesh size restriction should still provide a conservation benefit to sea turtles (Bellmund *et al.*, 1987).

This final rule also includes the contains the framework mechanism that was a component of the 2002 interim final rule, and of the status quo alternative included and analyzed in the EA. This mechanism enables NMFS to make changes to the restrictions based upon new information, and extend the effective date of the restrictions until July 30 on an expedited basis. This final rule does not reduce the allowable leader stretched mesh size to less than 8 inches (20.3 cm) as proposed, for reasons identified previously. NMFS intends to continue to monitor fisheries active in the Virginia Chesapeake Bay and ocean waters, including pound net leaders with a stretched mesh size measuring less than 12 inches (30.5 cm) outside the leader prohibited area. Retaining this framework mechanism is necessary to respond to any new information on the interactions between sea turtles and pound nets and ensure that sea turtles can be protected from additional take should monitoring document the entanglement of a live or dead sea turtle outside the leader prohibited area. The framework mechanism was excluded from the proposed rule due to difficulties experienced with enacting regulations on a real time basis. NMFS recognizes that delays have been experienced with the framework mechanism, as observed in 2003. To alleviate some of the temporal delays associated with the issuance of a framework measure, NMFS will prepare portions of the required documents ahead of time, in the event that a mid-season framework action is necessary.

In the proposed rule, NMFS stated that the purpose of the action was to prevent sea turtle entanglement in and impingement on pound net gear. NMFS continues to believe that sea turtles will be protected by this final rule, and that sea turtle entanglements in and impingements on pound net leaders will be reduced. However, this discussion of the final rule has noted that the goal of the action is to minimize or reduce sea turtle interactions with pound net gear, because sea turtle entanglements, and possibly impingements, may still occur in leaders outside the leader prohibited area. As noted previously, all documented sea turtle interactions, except one entanglement in an 8–inch (20.3–cm) stretched mesh leader, have occurred inside the leader prohibited area. It is believed that the measures in the final rule will be protective of sea turtles and reduce takes in this fishery, given that leaders are prohibited in the

area with most of the documented sea turtle takes. Given this information, with the recognition that NMFS is continuing to collect information on sea turtle and pound net interactions, the purpose of this action is to reduce future sea turtle entanglements in and impingements on pound net gear.

This final rule corrects an item related to year-round reporting that was inadvertently deleted in the proposed rule. The preamble to the proposed rule noted that all Virginia pound net fishermen would still be required to report all sea turtle interactions (e.g., dead or alive; entangled, impinged, or floated into their net) in any part of their pound net gear (e.g., pound, heart, or leader) to NMFS within 24 hours of returning from the trip in which the take was documented. However, the proposed regulatory text relating to the reporting of captured dead or injured sea turtles was inadvertently deleted and must be reinserted.

NMFS has also included in this final rule geographical boundaries for the leader mesh size restrictions in the Great Wicomico River and the Piankatank River, based upon a public comment requesting that the geographical areas in those Western Chesapeake Bay tributaries be better defined. This modification is for clarification purposes only and does not change the biological, economic, or social analysis included in the EA.

The final rule clarifies that this action adds a new exception to prohibitions on the take of threatened sea turtles, something that was not explicitly noted in the title of the proposed rule. The prohibitions against taking in 50 CFR 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of 50 CFR 223.206(d). By adding the prohibitions and restrictions on leaders in the Virginia Chesapeake Bay to 50 CFR 223.206(d), this final rule adds a new exception and modifies the previous pound net related exception to the prohibitions on take of threatened sea turtles. NMFS has changed the title of this final rule to more accurately reflect what this rule entails, including the exception to the prohibitions on take.

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The AA finds good cause under 5 U.S.C. 553(d)(3) to waive the 30–day delay in effective date of this final rule. Such a delay would be contrary to the public interest because sea turtles are anticipated to occur in Virginia waters in May, during the 30–day delay period. Sea turtles are found to occur in water temperatures of 11° C and warmer. Analysis conducted by the NMFS Southeast Fisheries Science Center found that in week 17 (April 23 to April 29), week 18 (April 30 to May 6), and week 19 (May 7 to May 13), approximately 80 percent, 85 percent, and 90 percent, respectively, of the area encompassing the mouth of the Chesapeake Bay (from the COLREGS line to the 20–m (65.6–ft) depth contour) contained sea surface temperatures of 11° C and warmer (NOAA Fisheries, unpub. data, 2003). Data from 1993 to 2002 were included in the analysis. This indicates that water temperatures around the mouth of the Chesapeake Bay are well within sea turtles' preferred temperature range in late April and early May. There is no information to suggest that the water temperatures this year would be notably different than in previous years. As such, sea turtles are likely to be present in the Virginia Chesapeake Bay during the 30–day delay period, and at this time, these turtles would likely be subject to entanglement and impingement in pound net leaders and potential subsequent mortality.

NMFS has prepared a final regulatory flexibility analysis that describes the economic impact this final rule would have on small entities. A summary of the analysis follows:

The fishery affected by this final rule is the Virginia pound net fishery in the Chesapeake Bay. The final rule prohibits all offshore pound net leaders in a portion of the southern Chesapeake Bay, and retains the prohibition of leaders with stretched mesh greater than or equal to 12 inches (30.5 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay, from May 6 to July 15 each year. Non-preferred alternative 1 would prohibit all pound net leaders in a portion of the southern Chesapeake Bay, and prohibit leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay, from May 6 to June 30. Non-preferred alternative 2 would prohibit pound net leaders with 8 inches (20.3 cm) and greater stretched mesh, as well as leaders with stringers, in the Virginia Chesapeake Bay from May 6 to July 15. Non-preferred alternative 3 is similar to the non-preferred alternative 1, except that the pound and heart, in addition to the leader, must also be removed in a portion of the southern Chesapeake Bay, and the time frame of the restrictions would be from May 6 to July 15 each year. Non-preferred alternative 4 would prohibit all pound net leaders from May 6 to July 15 in the Virginia Chesapeake Bay. In addition to the 8 inches (20.3 cm) and greater mesh size restrictions in a portion of the Virginia Chesapeake Bay, non-preferred alternative 5 would modify the pound net leader configuration in a portion of the southern Chesapeake Bay so that the mesh height would be restricted to one-third the depth of the water, the mesh would be required to be less than 8 inches (20.3 cm) and held with ropes 3/8 inches (0.95 cm) or greater in diameter strung vertically a minimum of every 2 feet (61 cm) and attached to a top line. Non-preferred alternative 6 includes the measures in the proposed rule, namely a prohibition of all pound net leaders in a portion of the southern Chesapeake Bay, and a prohibition of leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay, from May 6 to July 15.

According to the 2002 VMRC data, there are 31 harvesters actively fishing pound nets from May 6 to July 15, with 10 harvesters located in the lower portion of the Virginia Chesapeake Bay and 21 harvesters located in the upper portion of the Virginia Chesapeake Bay. These 31 harvesters fish approximately 40 pound nets in the upper portion of the Virginia Chesapeake Bay (=21 harvesters x 1.9 pound nets/harvester) and 30 pound nets in the lower portion of the Virginia Chesapeake Bay (=10 harvesters x 3.0 pound nets/harvester). Based on 2000 to 2002 data, annual landings per harvester were 280,996 pounds (127,457 kg) in the upper portion of the Virginia Chesapeake Bay and 257,491 pounds (116,795 kg) in the lower portion of the Virginia Chesapeake Bay. Annual average revenues per harvester were $64,483 (CV=0.73) and $105,298 (CV=0.91) in the upper and lower region, respectively. From May 6 to July 15, landings per harvester were 96,946 pounds (43,973 kg) in the upper region and 95,380 pounds (43,263 kg) in the lower region. Estimated revenues per harvester were $18,102 (CV=0.88) and $40,474 (CV=1.08) in the upper and lower region, respectively.

Of the 31 harvesters, 33 percent of the harvesters (=[0 located in the upper region +10 located in the lower region]/31 total harvesters) fishing from May 6 to July 15 would be affected by this action. Approximately 12 pound nets in total would be affected by this action.

all found in the lower portion of the Virginia Chesapeake Bay.

In the upper bay region, five of the seven alternatives, not counting the "no action" alternative, are the same. This final rule does not impose additional requirements on those leaders found in the upper bay region, so the revenue reductions would be zero. The non-preferred alternatives 1, 2, 3, 5, and 6 would require the leader mesh to be less than 8 inches (20.3 cm). In the upper portion of the Virginia Chesapeake Bay, two potential responses to the leader mesh size restrictions would be either choosing to not fish or switching to a smaller leader mesh size during the restricted period. If harvesters choose not to fish, their revenues decrease by 15.1 percent to 17.1 percent (depending on the time frame of the restrictions), since they incur revenue losses and the cost of removing their gear from the water. If a harvester switches to a smaller mesh leader, his or her revenues would be reduced by 8.4 percent. For purposes of this analysis, we assumed the harvesters will modify their gear since they want to minimize their economic loss. Therefore, in the upper bay region, annual revenues may be reduced by a low of 8.4 percent per harvester under non-preferred alternatives 1, 2, 3, 5, and 6, and 4 harvesters would be affected. Under non-preferred alternative 4, all leaders must be removed from the Virginia Chesapeake Bay. This alternative would impact all 21 harvesters in the upper region, and annual revenues per harvester would be reduced by 33.5 percent.

In the lower portion of the Virginia Chesapeake Bay where all offshore leaders are prohibited under the final rule, management actions vary between alternatives. Under all of the alternatives, all 10 harvesters would be impacted. With this final rule, annual revenues per harvester would be reduced by 14.7 percent to 29.4 percent, depending on how many nets the harvesters set. The economic impact under non-preferred alternative 1 would be more compared to the final action (34.5 percent reduction in annual revenues versus a maximum of 29.4 percent), because more nets would be impacted. The impact under the non-preferred alternative 3 would be greater than this final rule (50.3 percent reduction in annual revenues versus a maximum of 29.4 percent), because additional labor costs would be incurred to remove the heart and pound in addition to the leader and more nets would be affected. The impacts of non-preferred alternative 4 and non-preferred alternative 6 are the same, and annual revenues per harvester would be reduced by 43.2 percent. Reductions in annual revenues per harvester would be less under non-preferred alternatives 2 and 5 in comparison to the final rule, since these non-preferred alternatives would allow harvesters to modify their gear and continue to fish. In the lower bay area, the non-preferred alternative 2 would reduce annual revenues per harvester by 8.6 percent to 12.1 percent, depending on how many nets they set. Under non-preferred alternative 5, annual revenues per harvester would be reduced by 12.1 percent. The status quo would not have economic consequences, at least in the short term.

Annual industry revenues are $2.6 million for the pound net fishery. Under the final rule, industry revenues would be reduced by 7.3 percent (=$0.19M/$2.6M). Under non-preferred alternatives 1, 2, 3, 5, and 6, industry revenues would be reduced by 14.8 percent, 4.9 percent, 21.2 percent, 5.8 percent, and 18.3 percent, respectively. With the preceding five alternatives, 14 of 31 harvesters would be affected by the management actions. Under non-preferred alternative 4, all harvesters would be affected and forgone industry revenues would be reduced by 34.9 percent. Again, these numbers assume fishermen would switch to a smaller mesh leader and continue to fish in those areas with leader mesh size restrictions, instead of removing their leaders entirely. Non-preferred alternatives 2 and 5, although less costly to the industry, were not chosen as the preferred alternative because they cannot be evaluated for benefit to conservation of sea turtles. At this point in time, we are unable to determine whether leader mesh sizes less than 8 inches (20.3 cm) have a different catch rate than leaders with mesh between 8 and 12 inches (20.3 and 30.5 cm). As such, looking strictly at a mesh size restriction, non-preferred alternative 2 would not necessarily afford adequate protection for sea turtles in the lower Chesapeake Bay area where observed sea turtle interactions have been the highest. Non-preferred alternative 5 was rejected because it consisted of a gear modification that is currently untested as a means to reduce sea turtle interactions.

This action does not contain new reporting or record keeping requirements.

This final rule does not duplicate, overlap or conflict with other Federal rules.

Thirteen comments were received and addressed (see *Comments Related to Economic and Social Impact Assessment*) on the initial regulatory flexibility analysis.

A formal consultation pursuant to section 7 of the ESA was conducted on this action. The Biological Opinion on this action concluded that the operation of the Virginia pound net fishery with NMFS' sea turtle conservation measures may adversely affect but is not likely to jeopardize the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. An incidental take statement was issued for this action. Copies of this Biological Opinion are available by contacting (978) 281–9328 or FAX (978) 281–9394.

This final rule contains policies with federalism implications that were sufficient to warrant preparation of a federalism assessment under Executive Order 13132. Accordingly, the Acting Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the Governor of Virginia on March 3, 2004. No comments on the federalism implications of the proposed action were received in response to the March 2004 letter.

Dated: April 29, 2004.

Rebecca Lent,

Deputy Assisstant Administrator for Regulatory Programs, National Marine Fisheries Service.

List of Subjects

50 CFR Part 222

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements.

50 CFR Part 223

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 50 CFR parts 222 and 223 are amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

■ 1. The authority citation for 50 CFR part 222 continues to read as follows:

Authority: 16 U.S.C. 1631 *et seq.*

■ 2. In § 222.102, the definition of "Pound net leader" is revised to read as follows:

§ 222.102 Definitions.

* * * * *

Pound net leader means a long straight net that directs the fish offshore towards the pound, an enclosure that captures the fish. Some pound net

leaders are all mesh, while others have stringers and mesh. Stringers are vertical lines in a pound net leader that are spaced a certain distance apart and are not crossed by horizontal lines to form mesh. An offshore pound net leader refers to a leader with the inland end set greater than 10 horizontal feet (3 m) from the mean low water line. A nearshore pound net leader refers to a leader with the inland end set 10 horizontal feet (3 m) or less from the mean low water line.

* * * * *

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

■ 2. In § 223.205, paragraph (b)(15) is revised to read as follows:

§ 223.205 Sea turtles.

* * * * *

(b) * * *

(15) Fail to comply with the restrictions set forth in § 223.206(d)(10) regarding pound net leaders; or

* * * * *

■ 3. In § 223.206, paragraph (d)(2)(iv) is removed; (d) introductory text and (d)(2) paragraph heading are revised; and paragraph (d)(10) is added to read as follows:

§ 223.206 Exemptions to prohibitions relating to sea turtles.

* * * * *

(d) *Exception for incidental taking.* The prohibitions against taking in § 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle (i.e., a take not directed towards such member) during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of paragraphs (d)(1) through (d)(10) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (a)(2) of this section.

* * * * *

(2) *Gear requirements for trawlers*—* * *

* * * * *

(10) *Restrictions applicable to pound nets in Virginia*—(i) Area closed to use of pound net leaders. During the time period of May 6 through July 15 each year, any offshore pound net leader, as defined in the definition for pound net leader in § 222.102, in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0′ N. lat. and west of 76° 13.0′ W. long., and all waters south of 37° 13.0′ N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05′ N. lat., 75° 59′ W. long. to 36° 55′ N. lat., 76° 08′ W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I–64; approximately 36° 59.55′ N. lat., 76° 18.64′ W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55′ N. lat, 76° 30.40′ W. long.) must be removed from the water so that no part of the leader contacts the water. All pound net leaders must be removed from the waters described in this subparagraph prior to May 6 and may not be reset until July 16.

(ii) *Area with pound net leader mesh size restrictions.* During the time period of May 6 to July 15 each year, any pound net leader in the Virginia waters of the Chesapeake Bay outside the area described in (i), extending to the Maryland-Virginia State line (approximately 37° 55′ N. lat., 75° 55′ W. long.), the Great Wicomico River downstream of the Jessie Dupont Memorial Highway Bridge (Route 200; approximately 37° 50.84′ N. lat, 76° 22.09′ W. long.), the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44′ N. lat, 76° 25.40′ W. long.), and the Piankatank River downstream of the Route 3 Bridge (approximately 37° 30.62′ N. lat, 76° 25.19′ W. long.) to the COLREGS line at the mouth of the Chesapeake Bay, must have only mesh size less than 12 inches (30.5 cm) stretched mesh and may not employ stringers. South of 37° 19.0 N. lat. and west of 76° 13.0′ W. long., and all waters south of 37° 13.0′ N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05′ N. lat., 75° 59′ W. long. to 36° 55′ N. lat., 76° 08′ W. long.), the leader restriction applies to nearshore pound nets, as defined in the definition for pound net leader in § 222.102. Any pound net leader with stretched mesh measuring 12 inches (30.5 cm) or greater or any pound net leader with stringers must be removed from the waters described in this paragraph (d) prior to May 6 and may not be reset until July 16.

(iii) *Reporting requirement.* At any time during the year, if a sea turtle is taken live and uninjured in a pound net operation, the operator of the vessel must report the incident to the NMFS Northeast Regional Office, (978) 281–9328 or fax (978) 281–9394, within 24 hours of returning from the trip in which the incidental take was discovered. The report shall include a description of the sea turtles condition at the time of release and the measures taken as required in paragraph (d)(1) of this section. At any time during the year, if a sea turtle is taken in a pound net operation, and is determined to be injured, or if a turtle is captured dead, the operator of the vessel shall immediately notify NMFS Northeast Regional Office and the appropriate rehabilitation or stranding network, as determined by NMFS Northeast Regional Office.

(iv) *Monitoring.* Owners or operators of pound net fishing operations must allow access to the pound net gear so it may be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws. Information collected by observers may be used for law enforcement purposes.

(v) *Expedited modification of restrictions and effective dates.* From May 6 to July 15 of each year, if NMFS receives information that one sea turtle is entangled alive or that one sea turtle is entangled dead, and NMFS determines that the entanglement contributed to its death, in pound net leaders that are in compliance with the restrictions described in paragraph (d)(10)(ii) of this section, NMFS may issue a final rule modifying the restrictions on pound net leaders as necessary to protect threatened sea turtles. Such modifications may include, but are not limited to, reducing the maximum allowable mesh size of pound net leaders and prohibiting the use of pound net leaders regardless of mesh size. In addition, if information indicates that a significant level of sea turtle entanglements, impingements or strandings will likely continue beyond July 15, NMFS may issue a final rule extending the effective date of the restrictions, including any additional restrictions imposed under this subparagraph, for an additional 15 days, but not beyond July 30, to protect threatened sea turtles.

[FR Doc. 04–10207 Filed 5–4–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 660

[Docket No. 031216314–3314–01; I.D. 042604D]

RIN 0648–AR54

Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Annual Specifications and Management Measures; Inseason Adjustments; Pacific Halibut Fisheries; Corrections

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

ACTION: Inseason adjustments to management measures, announcement of incidental halibut retention allowance, and a request for comments.

SUMMARY: NMFS announces inseason adjustments to the Pacific Coast limited entry groundfish fishery and to the recreational groundfish fishery. NMFS also announces regulations for the retention of Pacific halibut landed incidentally in the limited entry longline primary sablefish fishery north of Pt. Chehalis, WA (46°53′18″ N. lat.) and changes to the primary sablefish fishery tier limits. This document also contains notification of a voluntary closed area (also called an "area to be avoided") off Washington for commercial fixed gear sablefish fishermen and salmon trollers. Finally, this document contains a correction to the language in the limited entry trawl trip limit tables. These actions, which are authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP), will allow fisheries access to more abundant groundfish stocks while protecting overfished and depleted stocks.

DATES: Changes to management measures are effective 0001 hours (local time) on May 1, 2004, until the 2005–2006 specifications and management measures are effective, unless modified, superseded, or rescinded through a publication in the **Federal Register**. Comments on this rule will be accepted through June 1, 2004.

ADDRESSES: You may submit comments, identified by *docket number and/or RIN number*, by any of the following methods:

- *GroundfishInseason#2.nwr@noaa.gov*. Include [*docket number and/or RIN number*] in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: 206–526–6736
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070; or Rod McInnis, Acting Administrator, Southwest Region, NMFS, 501 West Ocean Blvd, Suite 4200, Long Beach, CA 90802–4213.

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen (Northwest Region, NMFS), phone: 206–526–6150; fax: 206–526–6736; and e-mail: *carrie.nordeen@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

This **Federal Register** document is available on the Government Printing Office's website at: *www.gpoaccess.gov/fr/index.html*.

Background information and documents are available at the NMFS Northwest Region website at: *www.nwr.noaa.gov/1sustfsh/gdfsh01.htm* and at the Pacific Fishery Management Council's website at: *www.pcouncil.org*.

Background

The Pacific Coast Groundfish FMP and its implementing regulations at 50 CFR part 660, subpart G, regulate fishing for over 80 species of groundfish off the coasts of Washington, Oregon, and California. Groundfish specifications and management measures are developed by the Pacific Fishery Management Council (Pacific Council), and are implemented by NMFS. The specifications and management measures for the 2004 fishing year (January 1–December 31, 2004) were initially published in the **Federal Register** as an emergency rule for January 1–February 29, 2004 (69 FR 1322, January 8, 2004) and as a proposed rule for March 1–December 31, 2004 (69 FR 1380, January 8, 2004). The emergency rule was amended at 69 FR 4084, January 28, 2004. The final rule for March 1–December 31, 2004 was published in the **Federal Register** on March 9, 2004 (69 FR 11064) and amended at 69 FR 23440, April 29, 2004.

The Northern Pacific Halibut Act of 1982 (16 U.S.C. 773–773k) (Halibut Act) and its implementing regulations at 50 CFR part 300, subpart E, regulate fishing for Pacific Halibut in U.S. Convention waters. The Halibut Act also authorizes the Pacific Council to develop regulations governing the Pacific halibut catch in waters off of Washington, Oregon, and California that are in addition to, but not in conflict with, regulations of the International Pacific Halibut Commission (IPHC). Accordingly, the Pacific Council has developed, and NMFS has approved, a catch sharing plan (CSP) to allocate the total allowable catch (TAC) of Pacific halibut between treaty Indian and non-Indian harvesters, and among non-Indian commercial and sport fisheries in IPHC statistical Area 2A (off Washington, Oregon, and California). The CSP, as implemented at 50 CFR part 300, provides for retention of halibut landed incidentally in the limited entry, longline primary sablefish fishery north of Pt. Chehalis, WA (46°53′18″ N. lat.) in years when the Area 2A TAC is above 900,000 lb (408.2 mt). Because the Area 2A TAC is above 900,000 lb (408.2 mt) in 2004, NMFS is establishing an allowance for incidental halibut retention in the primary sablefish fishery in 2004.

The following changes to current groundfish management measures were recommended by the Pacific Council, in consultation with Pacific Coast Treaty Tribes and the States of Washington, Oregon, and California, at its April 4–9, 2004, meeting in Sacramento, CA. Inseason adjustments to management measures are in response to several factors influencing projected catch of groundfish during 2004. These factors include (1) inseason adjustments to the Pacific Coast commercial and recreational groundfish fisheries published at 69 FR 23440, April 29, 2004,(2) projected catch in the limited entry trawl and fixed gear fisheries based on new observer data and bycatch model adjustments, (3) projected catch in the recreational fisheries off Washington, Oregon, and California based on 2003 catch, and (4) a reduction in limited entry trawl fleet effort due to the trawl buyback program. Pacific Coast groundfish landings will be monitored throughout the year, and further adjustments to trip limits or management measures will be made as necessary to allow achievement of or avoid exceeding the 2004 optimum yields (OYs).

Limited Entry Trawl Fishery

The trawl bycatch model, used to calculate total catch, discard, and incidental catch rates of groundfish species in the limited entry trawl fisheries, was updated during the winter of 2004. Major changes to the model included a revision of the trawl participation and catch database as well as changes to the incidental catch rates

of overfished groundfish species. The trawl participation and catch database is used as an indicator of past limited entry trawl permit participation and landed catch. This database tracks a weighted average (based on activity during the last several years) of landed catch per limited entry trawl permit, bimonthly period, subarea, and depth. Because this database is one of the basic foundations of the trawl bycatch model, the model operates under the assumption that past performance is a reasonable proxy for what level of effort may occur in the future. The trawl bycatch model was updated to reflect changes in fleet structure as a result of the limited entry trawl permit and vessel buyback program conducted in late 2003. However, because buyback related fleet structure changes are continuing to occur, higher levels of uncertainty are associated with the trawl bycatch model's predictions of projected catch during 2004 than in previous years.

The incidental catch rates of overfished groundfish species used in the trawl bycatch model were updated by stratifying them by depth, subarea, and cumulative limit period. This is a change from the previous trawl bycatch model that only stratified incidental catch rates by depth and subarea. In early 2004, new West Coast Groundfish Observer Program (Observer Program) data were available and incorporated in the trawl bycatch model. With two years of data being used in the model, the Pacific Council sought the guidance of the Scientific and Statistical Committee's (SSC) about how to treat each year of data. Because more recent information is more likely to be representative of fishing behavior and catch data in the upcoming year, the SSC recommended a weighting scheme for observer data wherein the most recent data are weighted more heavily than older data. Therefore, NMFS weighted the 2003 observer data at two-thirds and the 2002 observer data at one third, then combined that weighted data from the two years to derive incidental catch rates for overfished species.

Following the 2004 updates to the trawl bycatch model, catch projections generated by the model were compared to landings data reported in the Pacific Coast Fisheries Information Network (PacFIN). The landed catch of DTS (Dover sole, thornyheads, sablefish) species was predicted to be higher than that reported in PacFIN and the landed catch of Petrale sole and "other flatfish" species were predicted to be lower than that reported in PacFIN. Therefore, model predictions were scaled to account for these differences based on PacFIN landed catch estimates from January through February 2004 and landed catch estimates during the same period in 2003.

In order to provide additional fishing opportunity for the northern limited entry trawl fleet, which has been severely restricted to reduce the incidental catch of canary rockfish, the size of the trawl rockfish conservation area (the area closed to fishing for groundfish with trawl gear) or RCA, between the U.S. border with Canada and 40°10′ N. lat., is being decreased for the remainder of 2004. The western boundary of the trawl RCA is being moved from specific latitude and longitude coordinates approximating the 200–fm (366–m) depth contour to specific latitude and longitude coordinates approximating the 150–fm (274–m) depth contour. As a result, in the area between the U.S. border with Canada and 40°10′ N. lat. the trawl RCA will be located between specific latitude and longitude coordinates approximating the 150–fm (274–m) and 60–fm (110–m) depth contours during May–June and between specific latitude and longitude coordinates approximating the 150–fm (274–m) and 75–fm (137–m) depth contours during July–December. Reducing the size of the trawl RCA for the remainder of the year is possible because new observer data indicate that the catch of overfished species, specifically darkblotched rockfish, is lower than predicted in this area. Additionally, canary rockfish are most commonly found in waters 50 fm (91 m) to 150 fm (274 m) in depth. Therefore, this reduction in the size of the trawl RCA is not predicted to result in increased catch of canary rockfish nor is it predicted to cause any overfished groundfish species OY to be exceeded.

Because of updated trawl bycatch model results, incorporating new observer data and following the trawl buyback, and landed catch data through the end of February 2004, limited entry trawl trip limits for certain deepwater, slope species can be increased for the remainder of the year. Therefore, in the area between the U.S. border with Canada and 40°10′ N. lat., the limited entry trawl trip limit for minor slope rockfish will be increased from 4,000 lb (18,144 kg) per two months to 8,000 lb (3,629 kg) per two months for May through December. In the area between 40°10′ N. lat. and the U.S. border with Mexico, the limited entry trawl large footrope limit for chilipepper rockfish will be increased from 2,000 lb (907 kg) per two months to 12,000 lb (5,443 kg) per two months during May through August and to 8,000 lb (3,629 kg) per two months during September through December. Increases to trip limits for chilipepper in 2004 are possible, in part, due to the increase in the bocaccio OY (≤ 20 mt in 2003 to 250 mt in 2004). The low bocaccio OY in 2003 limited the allowable harvest of chilipepper rockfish, as chilipepper rockfish and bocaccio rockfish are known to co-occur. However, this inseason action's trip limit increases for chilipepper are not predicted to exceed the bocaccio rockfish OY. Additionally, in the area between 40°10′ N. lat. and 38°00′ N. lat., limited entry trawl limits for minor slope rockfish and splitnose rockfish will each be increased from 7,000 lb (3,175 kg) per two months to 50,000 lb (22,680 kg) per two months during May through December. Trip limits had been set at a precautionary level at the beginning of 2004, pending the release of new observer data. Because the new observer data indicate that the incidental catch of overfished species, specifically darkblotched rockfish, is lower than expected, target limits may be increased. In the area between 38°00′ N. lat. and the U.S. border with Mexico, limited entry trawl limits for minor slope rockfish and splitnose rockfish will each be increased from 40,000 lb (18,144 kg) per two months to 50,000 lb (22,680 kg) per two months during May through December. A limiting factor to increasing minor slope rockfish and splitnose rockfish trip limits in this area is the catch of blackgill rockfish. However, the allowable harvest of blackgill rockfish can support the Pacific Council's recommended trip limit increase of 40,000 lb (18,144 kg) per two months to 50,000 lb (22,680 kg) per two months during May through December.

In summary, a reduction in the size of the trawl RCA and increased trip limits for deepwater, slope species are possible because the trawl bycatch model, updated with new observer data and the results of the trawl buyback program, found the incidental catch of overfished species to be lower than previously estimated in the areas affected by these inseason adjustments. The incidental catch of overfished species will continue to be minimized by the trawl RCA in areas and during seasons when the incidental catch of overfished species is high, as well as conservative trip limits for target species known to co-occur with overfished species.

Limited Entry Fixed Gear Fishery

NMFS began modeling discard rates of sablefish and incidental catch rates of overfished species in the primary sablefish fishery in late 2003 and early 2004. The approach for modeling discard and incidental catch in the 2004

sablefish fishery is to use fleetwide, season-long estimates of discard and incidental catch and apply those rates to the allowable harvest in the primary sablefish fishery. Using this method and incorporating observer data from 2001 through 2003, the discard of sablefish and the incidental catch of overfished species projected for the primary sablefish fishery in 2004 is lower than previously assumed. In the past, the assumed discard mortality of sablefish was eight percent. Based on new observer data, the discard mortality of sablefish in the primary sablefish fishery is now predicted to be approximately 3.5 percent. This means that the updated discard mortality of sablefish is now less than half the amount that was used to develop sablefish tier limits in September 2003. By incorporating the new sablefish discard rate into the fixed gear bycatch model, sablefish tier limits can be increased to help achieve, but not exceed, the sablefish OY. Therefore, the Pacific Council recommended that the 2004 sablefish tier limits be increased. The revised tier limits for the 2004 primary sablefish fishery are increased by approximately 12 – 13 percent and they are as follows: Tier 1 – 69,600 lb (31,570 kg), Tier 2 – 31,600 lb (14,334 kg), and Tier 3 – 18,100 lb (8,210 kg).

In keeping with trip limit increases for deepwater, slope species in the limited entry trawl fishery, the Pacific Council also recommended increasing the minor slope rockfish and splitnose rockfish trip limits for the limited entry fixed gear fishery. Therefore, in the area between 40°10′ N. lat. and 38°00′ N. lat., limited entry fixed gear limits for minor slope rockfish and splitnose rockfish will each be increased from 7,000 lb (3,175 kg) per two months to 50,000 lb (22,680 kg) per two months during May through December. Similarly, in the area between 38°00′ N. lat. and the U.S. border with Mexico, limited entry fixed gear limits for minor slope rockfish and splitnose rockfish will each be increased from 40,000 lb (18,138 kg) per two months to 50,000 lb (22,680 kg) per two months during May through December. Much like the trip limit increases in the limited entry trawl fishery, increasing tier limits in the primary sablefish fishery and trip limits for deepwater, slope species in the limited entry fixed gear fishery will provide access to healthy groundfish stocks while protecting depleted and overfished groundfish species. The non-trawl RCA will continue to protect overfished species in areas and during seasons when the incidental catch of overfished species is high.

Retention of Incidental Halibut Catch in the Primary Sablefish Fishery North of Pt. Chehalis, WA

The Pacific halibut CSP and implementing regulations at 50 CFR 300.63(a)(3) provide for retention of halibut landed incidentally in the limited entry, longline primary sablefish fishery north of Pt. Chehalis, WA (46°53′18″ N. lat.) in years when the Area 2A TAC is above 900,000 lb (408.2 mt). The 2004 Area 2A TAC is 1,480,000 lb (671.3 mt).

According to IPHC and Federal regulations, Pacific halibut may not be taken by gear other than hook-and-line gear. Only vessels registered for use with sablefish-endorsed limited entry permits may participate in the primary fixed gear sablefish fishery specified for halibut retention in the CSP. Vessels must also carry IPHC commercial halibut licenses in order to retain and land halibut. Incidental halibut retention in the primary sablefish fishery is only available to vessels operating north of Pt. Chehalis, WA (46°53′18″ N. lat.). Under Pacific halibut regulations at 50 CFR 300.63, halibut taken and retained in the primary sablefish fishery may not be possessed or landed south of Pt. Chehalis, WA (46°53′18′ N. lat.).

Similar to 2003, halibut caught incidentally in the primary sablefish fishery may be retained by appropriately licensed longline vessels. In 2004, the amount of incidental halibut retained in the primary sablefish fishery is capped at 70,000 lb (31.8 mt), to ensure that the fishery is maintained as an incidental and not a directed fishery. Beginning May 1, 2004, and continuing until the halibut quota (70,000 lbs or 31.8 mt) is taken: longliners participating in the primary sablefish fishery north of Pt. Chehalis, WA (46°53′18′ N. lat.) with appropriate IPHC licenses may retain incidental halibut landings up to 100 lbs (45 kg) (dressed weight) of halibut for every 1,000 lbs (454 kg) (dressed weight) of sablefish landed and up to two additional halibut in excess of the 100 lb (45 kg) per 1,000 lb (454 kg) ratio per landing. Halibut may not be on board a vessel that has any gear other than longline gear on board (e.g., pot or trawl gear).

Voluntary "C-shaped" Closure off Washington for the Sablefish and Salmon Troll Fisheries

In 2004, the Washington Department of Fish and Wildlife recommended and NMFS implemented a "C-shaped" Yelloweye Rockfish Conservation Area (YRCA) to protect yelloweye rockfish, an overfished species (see 50 CFR 660.304 (d)). For 2004, the "C-shaped" YRCA is a mandatory closed area for recreational groundfish and Pacific halibut fishing. To further protect yelloweye rockfish, the Pacific Council has recommended that the "C-shaped" YRCA in the North Coast subarea (Washington Marine Area 3) also be designated as an area to be avoided (a voluntary closure) by commercial fixed gear (longline) sablefish fishermen and salmon trollers to protect yelloweye rockfish. Much of the YRCA is already closed to commercial groundfish hook-and-line access, including the fixed gear sablefish fishery, by the non-trawl RCA, which extends from the Washington shoreline to specific latitude and longitude coordinates that approximate the 100–fm (183–m) depth contour.

Recreational Groundfish Fishery

At the Pacific Council's April 4–9, 2004, meeting in Sacramento, CA, the projected catch in the Pacific Coast recreational fisheries was updated for 2004. The states of Washington and Oregon updated their projected catch for 2004 with recreational catch data from 2003. Because 2003 was a year of unusually high effort and catch in California's recreational fisheries, the California Department of Fish and Game (CDFG) did not think it would be accurate to use 2003 catch data as a basis for projecting catch in 2004. In an effort to reduce the catch of overfished rockfish species, specifically canary rockfish and lingcod, California's recreational fisheries were closed for the first six months of 2003 (January–June). When California's recreational fishery opened in July 2003, the closure earlier in the year is thought to have resulted in a "derby" style fishery with above average effort and catch reported by MRFSS (Marine Recreational Fishery Statistical Survey) Wave Four (July–August) data. In comparison to Wave Four data, MRFSS Wave Five data (September–October) were more reflective of historical effort and catch during California's recreational fisheries and was not affected by the "derby" fishery. Therefore, in order to model projected catch for their 2004 recreational fishery, CDFG created an adjusted 2003 dataset. This adjusted 2003 dataset used the effort estimates from MRFSS' Wave Five data to adjust catches for all waves in 2003. Because this adjusted 2003 dataset accounted for the "derby" response to the closure during January–June 2003 and added projected catches for closed periods during 2003, it provides a better estimate of catch in 2004 than an unadjusted 2003 dataset.

When modeling projected catch in 2004 recreational fisheries, limiting the catch of canary rockfish continues to be the most constraining factor influencing management measures for the recreational fisheries in 2004. After receiving updates from the states of Washington, Oregon, and California on their projected recreational catch during 2004 at the April meeting, the Pacific Council initially recommended maintaining a harvest allowance for canary rockfish based on the 2004 management measures adopted in September 2003. At that time, the Pacific Council recommended management measures that were not projected to fully utilize the allowable harvest of canary rockfish, instead opting to reserve a portion of the allowable harvest, in part, to accommodate a potential increase in the incidental catch rate of canary rockfish if it were documented by the Observer Program. Because the new observer data do not show a substantial increase in the incidental catch rate of canary rockfish, the Pacific Council recommended management measures that are projected to use some of previously reserved portion of the canary rockfish allowable harvest. The Pacific Council did not recommend changes to recreational management measures for Washington or Oregon. However, to ensure that recreational catch of canary rockfish, stays within state harvest allowances, Washington and Oregon will continue to monitor inseason catch and will prohibit recreational groundfish fisheries seaward of specific latitude and longitude coordinates approximating the 30–fm (55–m) depth contour if catch is expected to exceed state harvest allowances. Because canary rockfish are not commonly found in waters less than 50 fm (91 m) in depth, implementing a 30–fm (55–m) closure would reduce the catch of canary rockfish to near zero.

In an effort to keep projected recreational catch of overfished groundfish species, particularly canary rockfish and lingcod, within California's harvest allowance, the Pacific Council recommended several inseason adjustments for all federally managed groundfish species in the recreational fishery. Additionally, the Pacific Council recommended that California take state regulatory action to make conforming inseason adjustments to the management measures for the following state managed species: greenlings of the genus *Hexagrammos*, ocean whitefish, and California sheephead. Inseason adjustments to the recreational fishery off California are described in the following text: In the area between 42°00′ N. lat. and 40°10′ N. lat., recreational fishing for groundfish is prohibited seaward of specific latitude and longitude coordinates approximating the 30–fm (55–m) depth contour during May through December. The retention of black rockfish in this same area is prohibited during May and September through December. In the area between 40°10′ N. lat. and 36°00′ N. lat., recreational fishing for groundfish is prohibited during May through July and November through December and it is prohibited seaward of the 20–fm (37–m) depth contour during September and October. In the area between 36°00′ N. lat. and 34°27′ N. lat., recreational fishing for groundfish is prohibited during July and it is prohibited seaward of the 20–fm (37–m) depth contour during September through December. Additionally, in the area between 34°27′ N. lat. and the U.S. border with Mexico, recreational fishing for groundfish is prohibited seaward of specific latitude and longitude coordinates approximating the 30–fm (55–m) depth contour during September and October. These inseason adjustments, combined with adjustments to management measures published at 69 FR 23440, April 29, 2004, are predicted to keep 2004 harvest within the OYs for all overfished groundfish species, specifically canary rockfish and lingcod.

This inseason action also contains a new provision for ocean "boat limits" in the recreational fishery coastwide. The provision allows each fisher aboard a vessel off the coast of Washington, Oregon, and California to continue to use angling gear until the combined daily limits of groundfish for all licensed and juvenile anglers aboard has been attained. The purpose of this provision is to make Federal regulations consistent with the regulations of the above states. Washington has had a boat limit provision in place for a number of years, but Oregon and California have recently adopted such limits. The specific requirements are different in each state, but the intent is similar.

Anglers should be aware that additional state restrictions may apply, in addition to the Federal regulation. Therefore, anglers should consult the specific regulations of their state for the exact language.

Corrections

This action corrects language in the trip limit tables, Table 3 (North) and Table 3 (South), describing restrictions on multiple types of trawl gear on board. Previous language in the trip limit tables read, "A vessel may have more than one type of limited entry bottom trawl gear on board, but the most restrictive trip limit associated with the gear on board applies for that trip and will count toward the cumulative trip limit for that gear. A vessel may not have limited entry bottom trawl gear on board if that vessel also has trawl gear on board that is permitted for use within a RCA, including limited entry midwater trawl gear, regardless of whether the vessel is intending to fish within a RCA on that fishing trip. See IV.A.(14)(iv) for details." This language is more restrictive than the language from Section IV.A.(14)(iv), which allows midwater gear to be onboard a vessel that also has large or small footrope gear on board as long as that vessel does not fish in a closed area. Language in Section IV.A.(14)(iv) reflects the intended language as described in the response to Comment 22 from the final rule for the 2003 groundfish specifications and management measures (68 FR 11182, March 7, 2003). Therefore, the corrected language in the trip limit tables will be consistent with Section IV.A.(14)(iv) and read, "A vessel may have more than one type of limited entry bottom trawl gear on board, but the most restrictive trip limit associated with the gear on board applies for that trip and will count toward the cumulative trip limit for that gear. A vessel that is trawling within the RCA (or other closed area) with trawl gear authorized for use within the RCA (or other closed area) may not have any other type of trawl gear on board. See IV.A.(14)(iv) for details."

This inseason action also corrects the titles of some sections of the recreational regulations for the waters off California by removing the term "boat limits" from some sections formerly entitled "bag limits, boat limits, hook limits" because boat limits are no longer included in those sections.

NMFS Actions

For the reasons stated herein, NMFS concurs with the Pacific Council's recommendations and hereby announces the following changes to the 2004 specifications and management measures (69 FR 11064, March 9, 2004, as amended at 69 FR 23440, April 29, 2004) to read as follows:

1. On pages 11108–11114, in section IV., under B. Limited Entry Fishery, at the end of paragraph (1), Table 3 (North), Table 3 (South), Table 4 (North), and Table 4 (South) are revised to read as follows:

B. Limited Entry Fishery

(1) * * *

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Table 3 (North). 2004 Trip Limits and Gear Requirements[1/] for Limited Entry Trawl Gear North of 40°10' N. Latitude[2/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table 040904

	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area[10/] (RCA): North of 40°10' N. lat.	75 fm - modified 200 fm [11/]	60 fm - 200 fm	60 fm - 150 fm	75 fm - 150 fm		

Small footrope or midwater trawl gear is required shoreward of the RCA; all trawl gear (large footrope, midwater trawl, and small footrope gear) is permitted seaward of the RCA.

A vessel may have more than one type of limited entry bottom trawl gear on board, but the most restrictive trip limit associated with the gear on board applies for that trip and will count toward the cumulative trip limit for that gear. A vessel that is trawling within the RCA (or other closed area) with trawl gear authorized for use within the RCA (or other closed area) may not have any other type of trawl gear on board. **See IV.A.(14)(iv) for details.**

1	**Minor slope rockfish[3/]**	4,000 lb/ 2 months		8,000 lb/ 2 months		
2	**Pacific ocean perch**	3,000 lb/ 2 months				
3	**DTS complex**	Providing only large footrope or midwater trawl gear is used to land any groundfish species during the entire limit period, then large footrope trawl trip limits apply. If small footrope gear[7/] is used at any time in any area (North or South of 40°10' N. lat., shoreward or seaward of RCA) during the entire limit period, then small footrope trawl limits apply.				
4	Sablefish					
5	large footrope or midwater trawl gear	9,300 lb/ 2 months		8,700 lb/ 2 months		6,200 lb/ 2 months
6	small footrope gear[7/]	2,000 lb/ 2 months		5,000 lb/ 2 months		2,000 lb/ 2 months
7	Longspine thornyhead					
8	large footrope or midwater trawl gear	15,000 lb/ 2 months		10,000 lb/ 2 months		
9	small footrope gear[7/]	1,000 lb/ 2 months				
10	Shortspine thornyhead					
11	large footrope or midwater trawl gear	3,150 lb/ 2 months		2,100 lb/ 2 months		
12	small footrope gear[7/]	1,000 lb/ 2 months				
13	Dover sole					
14	large footrope or midwater trawl gear	67,500 lb/ 2 months		21,000 lb/ 2 months (providing large footrope, small footrope, and/or midwater trawl gear is used)		45,000 lb/ 2 months
15	small footrope gear[7/]	10,000 lb/ 2 months				10,000 lb/ 2 months
16	**Flatfish**	Providing only large footrope or midwater trawl gear is used to land any groundfish species during the entire limit period, then large footrope trawl trip limits apply. If small footrope gear[7/] is used at any time in any area (North or South of 40o10' N. lat., shoreward or seaward of RCA) during the entire limit period, then small footrope trawl limits apply.				
17	All other flatfish, Petrale sole, & Rex sole					
18	large footrope or midwater trawl gear for All other flatfish[4/] & Rex sole	100,000 lb/ 2 months				
19	large footrope or midwater trawl gear for Petrale sole	Not limited	100,000 lb/ 2 months			Not limited
20	small footrope gear[7/]	30,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.		60,000 lb/ 2 months, no more than 25,000 lb/ 2 months of which may be petrale sole.		30,000 lb/ 2 months, no more than 10,000 lb/ 2 months of which may be petrale sole.
21	Arrowtooth flounder					
22	large footrope or midwater trawl gear	Not limited	150,000 lb/ 2 months			Not limited
23	small footrope gear[7/]	4,000 lb/ 2 months	6,000 lb/ 2 months			4,000 lb/ 2 months

Table 3 (North). Continued

24	**Whiting**[5/]	Before the primary whiting season: 20,000 lb/trip – During the primary season: mid-water trawl permitted in the RCA. See IV.B.(3)(b) for season and trip limit details. – After the primary whiting season: 10,000 lb/trip		
25	**Minor shelf rockfish**[3/] **& Widow rockfish**			
26	large footrope trawl	CLOSED[6/]		
27	midwater trawl for Widow rockfish	Before the primary whiting season: CLOSED[6/] – During primary whiting season: In trips of at least 10,000 lb of whiting, combined widow and yellowtail limit of 500 lb/ trip, cumulative widow limit of 1,500 lb/ month. Mid-water trawl permitted in the RCA. See IV.B.(3)(b) for primary whiting season and trip limit details. – After the primary whiting season: CLOSED[6/]		CLOSED[6/]
28	midwater for Minor shelf rockfish or small footrope trawl[7/] for minor shelf & widow	300 lb/ month	1,000 lb/ month, no more than 200 lb/ month of which may be yelloweye rockfish	300 lb/ month
29	**Canary rockfish**			
30	large footrope trawl	CLOSED[6/]		
31	midwater or small footrope trawl[7/]	100 lb/ month	300 lb/ month	100 lb/ month
32	**Yellowtail**			
33	large footrope trawl	CLOSED[6/]		
34	midwater trawl	Before the primary whiting season: CLOSED[6/] – During primary whiting season: In trips of at least 10,000 lb of whiting: combined widow and yellowtail limit of 500 lb/ trip, cumulative yellowtail limit of 2,000 lb/ month. Mid-water trawl permitted in the RCA. See IV.B.(3)(b) for primary whiting season and trip limit details. – After the primary whiting season: CLOSED[6/]		CLOSED[6/]
35	small footrope trawl[7/]	In landings without flatfish, 1,000 lb/ month. As flatfish bycatch, per trip limit is the sum of 33% (by weight) of all flatfish except arrowtooth flounder, plus 10% (by weight) of arrowtooth flounder. Total yellowtail landings not to exceed 10,000 lb/ 2 months, no more than 1,000 lb/ month of which may be landed without flatfish.		
36	**Minor nearshore rockfish**			
37	large footrope trawl	CLOSED[6/]		
38	midwater or small footrope trawl[7/]	300 lb/ month		
39	**Lingcod**[8/]			
40	large footrope trawl	CLOSED[6/]		
41	midwater or small footrope trawl[7/]	800 lb/ 2 months	1,000 lb/ 2 months	800 lb/ 2 months
42	**Other Fish**[9/]	Not limited		

1/ Gear requirements and prohibitions are explained above. See IV. A.(14).

2/ "North" means 40°10' N. lat. to the U.S.-Canada border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.

3/ Bocaccio and chilipepper are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish.

4/ "Other" flatfish means all flatfish at 50 CFR 660.302 except those in this Table 3 with species specific management measures, including trip limits.

5/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B.(3).

6/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).

7/ Small footrope trawl means a bottom trawl net with a footrope no larger than 8 inches (20 cm) in diameter.

8/ The minimum size limit for lingcod is 24 inches (61 cm) total length.

9/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.

10/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at IV. A.(17)(f), that may vary seasonally.

11/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 3 (South). 2004 Trip Limits and Gear Requirements[1/] for Limited Entry Trawl Gear South of 40°10' N. Latitude[2/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table 040904

	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area[10/] (RCA):						
40°10' - 34°27' N. lat.	75 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)		100 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)		75 fm - 150 fm (additional closure between the shoreline and 10 fm around the Farallon Islands)	
South of 34°27' N. lat.	75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands		100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands		75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands	

Small footrope or midwater trawl gear is required shoreward of the RCA; all trawl gear (large footrope, midwater trawl, and small footrope gear) is permitted seaward of the RCA.

A vessel may have more than one type of limited entry bottom trawl gear on board, but the most restrictive trip limit associated with the gear on board applies for that trip and will count toward the cumulative trip limit for that gear. A vessel that is trawling within the RCA (or other closed area) with trawl gear authorized for use within the RCA (or other closed area) may not have any other type of trawl gear on board. **See IV.A.(14)(iv) for details.**

1	**Minor slope rockfish[3/]**					
2	40°10' - 38° N. lat.	7,000 lb/ 2 months	50,000 lb/ 2 months			
3	South of 38° N. lat.	40,000 lb/ 2 months				
4	**Splitnose**					
5	40°10' - 38° N. lat.	7,000 lb/ 2 months	50,000 lb/ 2 months			
6	South of 38° N. lat.	40,000 lb/ 2 months				
7	**DTS complex**	If fishing North of 40°10' N. lat. at any time during the cumulative limit period, differential trip limits based on footrope size and crossover provisions will apply during the entire limit period. See Table 3 (North) and Section A. (12) for more details				
8	Sablefish	11,250 lb/ 2 months	7,500 lb/ 2 months			
9	Longspine thornyhead	15,000 lb / 2 months	10,000 lb / 2 months			
10	Shortspine thornyhead	3,000 lb/ 2 months	2,000 lb/ 2 months			
11	Dover sole	39,000 lb/ 2 months	26,000 lb/ 2 months			
12	**Flatfish**	If fishing North of 40°10' N. lat. at any time during the cumulative limit period, differential trip limits based on footrope size and crossover provisions will apply during the entire limit period. See Table 3 (North) and Section A. (12) for more details				
13	All other flatfish[4/] & Rex sole	100,000 lb/ 2 months	All other flatfish plus petrale & rex sole: 100,000 lb/ 2 months, no more than 20,000 lb/ 2 months of which may be petrale sole			100,000 lb/ 2 months
14	Petrale sole	No limit				No limit
15	Arrowtooth flounder	No limit	10,000 lb/ 2 months			No limit
16	**Whiting[5/]**	Before the primary whiting season: 20,000 lb/trip -- During the primary whiting season: mid-water trawl permitted in the RCA. See IV.B.(3)(b) for season and trip limit details. -- After the primary whiting season: 10,000 lb/trip				
17	**Minor shelf rockfish, Widow, and Chilipepper rockfish[3/]**	Providing only large footrope trawl gear is used to land any groundfish species during the entire limit period, then large footrope limit applies.				
18	large footrope trawl for Minor shelf rockfish	300 lb/ month				
19	large footrope trawl for Chilipepper rockfish	2,000 lb/ 2 months	12,000 lb/ 2 months	8,000 lb/ 2 months		
20	large footrope or midwater trawl for Widow rockfish	CLOSED[6/]				
21	midwater for Minor shelf or Chilipepper rockfish or small footrope trawl[7/] for minor shelf, widow & chilipepper	300 lb/ month				
22	**Bocaccio**	Providing only large footrope trawl gear is used to land any groundfish species during the entire limit period, then large footrope limit applies.				
23	large footrope trawl	100 lb/month				
24	midwater or small footrope trawl[7/]	CLOSED[6/]				

Table 3 (South). Continued

25	**Canary rockfish**			
26	large footrope trawl	CLOSED[6/]		
27	midwater or small footrope trawl[7/]	100 lb/ month	300 lb/ month	100 lb/ month
28	**Cowcod**	CLOSED[6/]		
29	**Minor nearshore rockfish**			
30	large footrope trawl	CLOSED[6/]		
31	midwater or small footrope trawl[7/]	300 lb/ month		
32	**Lingcod[8/]**			
33	large footrope trawl	CLOSED[6/]		
34	midwater or small footrope trawl[7/]	800 lb/ 2 months	1,000 lb/ 2 months	800 lb/ 2 months
35	**Other Fish[9/]**	Not limited		

1/ Gear requirements and prohibitions are explained above. See IV. A.(14).

2/ "South" means 40°10' N. lat. to the U.S.-Mexico border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.

3/ Yellowtail is included in the trip limits for minor shelf rockfish and POP is included in the trip limits for minor slope rockfish.

4/ "Other" flatfish means all flatfish at 50 CFR 660.302 except those in this Table 3 with species specific management measures, including trip limits.

5/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B.(3

6/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).

7/ Small footrope trawl means a bottom trawl net with a footrope no larger than 8 inches (20 cm) in diameter.

8/ The minimum size limit for lingcod is 24 inches (61 cm) total length.

9/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.

10/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat./long. coordinates set out at IV. A.(17)(f), that may vary seasonally.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 4 (North). 2004 Trip Limits for Limited Entry Fixed Gear North of 40°10' N. Latitude[1/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table 040904

	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area[8/] (RCA):						
North of 46°16' N. lat.	shoreline - 100 fm					
46°16' N. lat. - 40°10' N. lat.	30 fm - 100 fm					
1 Minor slope rockfish[4/]	4,000 lb/ 2 months					
2 Pacific ocean perch	1,800 lb/ 2 months					
3 Sablefish	300 lb/ day, or 1 landing per week of up to 900 lb, not to exceed 3,600 lb/ 2 months					
4 Longspine thornyhead	10,000 lb/ 2 months					
5 Shortspine thornyhead	2,100 lb/ 2 months					
6 Dover sole	5,000 lb/ month					
7 Arrowtooth flounder						
8 Petrale sole						
9 Rex sole						
10 All other flatfish[2/]						
11 Whiting[3/]	10,000 lb/ trip					
12 Minor shelf rockfish, widow, and yellowtail rockfish[4/]	200 lb/ month					
13 Canary rockfish	CLOSED[5/]					
14 Yelloweye rockfish	CLOSED[5/]					
15 Minor nearshore rockfish	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish[6/]					
16 Lingcod[7/]	CLOSED[5/]		400 lb/ month			CLOSED[5/]
17 Other fish[9/]	Not limited					

1/ "North" means 40°10' N. lat. to the U.S.-Canada border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.

2/ "Other flatfish" means all flatfish at 50 CFR 660.302 except those in this Table 4 with species specific management measures, including trip limits.

3/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B (3).

4/ Bocaccio and chilipepper are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish.

5/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).

6/ For black rockfish north of Cape Alava (48°09'30" N. lat.), and between Destruction Island (47°40'00" N. lat.) and Leadbetter Point (46°38'10" N. lat.), there is an additional limit of 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.

7/ The minimum size limit for lingcod is 24 inches (61 cm) total length.

8/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat./long. coordinates set out at IV. A.(17)(f), that may vary seasonally.

9/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 4 (South). 2004 Trip Limits for Limited Entry Fixed Gear South of 40°10' N. Latitude[1/]

Other Limits and Requirements Apply -- Read Sections IV. A. and B. NMFS Actions before using this table 040904

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area[7/] (RCA):						
	40°10' - 34°27' N. lat.	30 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)		20 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)		30 fm - 150 fm (also applies around islands, there is an additional closure between the shoreline and 10 fm around the Farallon Islands)	
	South of 34°27' N. lat.	60 fm - 150 fm (also applies around islands)					
1	**Minor slope rockfish[4/]**						
2	40°10' - 38° N. lat.	7,000 lb/ 2 months		50,000 lb/ 2 months			
3	South of 38° N. lat.	40,000 lb/ 2 months					
4	**Splitnose**						
5	40°10' - 38° N. lat.	7,000 lb/ 2 months		50,000 lb/ 2 months			
6	South of 38° N. lat.	40,000 lb/ 2 months					
7	**Sablefish**						
8	40°10' - 36° N. lat.	300 lb/ day, or 1 landing per week of up to 900 lb, not to exceed 3,600 lb/ 2 months					
9	South of 36° N. lat.	350 lb/ day, or 1 landing per week of up to 1,050 lb					
10	**Longspine thornyhead**	10,000 lb/ 2 months					
11	**Shortspine thornyhead**	2,000 lb/ 2 months					
12	**Dover sole**	5,000 lb/ month When fishing for Pacific sanddabs, vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to 1 lb (0.45 kg) of weight per line are not subject to the RCAs.					
13	**Arrowtooth flounder**						
14	**Petrale sole**						
15	**Rex sole**						
16	**All other flatfish[2/]**						
17	**Whiting[3/]**	10,000 lb/ trip					
18	**Minor shelf rockfish, widow, and yellowtail rockfish[4/]**						
19	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED[5/]	200 lb/ 2 months		300 lb/ 2 months	
20	South of 34°27' N. lat.	CLOSED[5/]	2,000 lb/ 2 months				
21	**Chilipepper rockfish**	2,000 lb/ 2 months, this opportunity only available seaward of the nontrawl RCA					
22	**Canary rockfish**	CLOSED[5/]					
23	**Yelloweye rockfish**	CLOSED[5/]					
24	**Cowcod**	CLOSED[5/]					
25	**Bocaccio**						
26	40°10' - 34°27' N. lat.	200 lb/ 2 months	CLOSED[5/]	100 lb/ 2 months		200 lb/ 2 months	
27	South of 34°27' N. lat.	CLOSED[5/]	300 lb/ 2 months				
28	**Minor nearshore rockfish**						
29	Shallow nearshore						
30	40°10' - 34°27' N. lat.	300 lb/ 2 months	CLOSED[5/]	500 lb/ 2 months	600 lb/ 2 months	500 lb/ 2 months	300 lb/ 2 months
31	South of 34°27' N. lat.	CLOSED[5/]	300 lb/ 2 months				
32	Deeper nearshore						
33	40°10' - 34°27' N. lat.	500 lb/ 2 months	CLOSED[5/]	500 lb/ 2 months		400 lb/month	500 lb/ 2 months
34	South of 34°27' N. lat.	CLOSED[5/]	500 lb/ 2 months	600 lb/ 2 months			400 lb/ 2 months
35	California scorpionfish	CLOSED[5/]	300 lb/ 2 months		400 lb/ 2 months		300 lb/ 2 months

Table 4 (South). Continued

36	Lingcod[6/]	CLOSED[5/]	400 lb/ month, when nearshore open	CLOSED[5/]
37	Other fish[8/]	Not limited		

1/ "South" means 40°10' N. lat. to the U.S.-Mexico border. 40°10' N. lat. is about 20 nm south of Cape Mendocino, CA.
2/ "Other flatfish" means all flatfish at 50 CFR 660.302 except those in this Table 4 with species specific management measures, including trip limits.
3/ The whiting "per trip" limit in the Eureka area shoreward of 100 fm is 10,000 lb/ trip all year. Outside Eureka area, the 20,000 lb/ trip limit applies. See IV. B.(3).
4/ POP is included in the trip limits for minor slope rockfish.
5/ Closed means that it is prohibited to take and retain, possess, or land the designated species in the time or area indicated. See IV. A.(7).
6/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
7/ The "Rockfish Conservation Area" is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at IV. A.(17)(f) that may vary seasonally.
8/ Other fish are defined at 50 CFR 660.302, as those groundfish species or species groups for which there is no trip limit, size limit, quota, or harvest guideline.
To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

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2. On page 11114, in section IV., under B. Limited Entry Fishery, in column 1, revise paragraph (2)(b)(i) and add paragraph (2)(b)(i)(A) to read as follows:

B. Limited Entry Fishery

(2) * * *
(b) * * *

(i) *Primary season.* The primary season begins at 12 noon l.t. on April 1, 2004, and ends at 12 noon l.t. on October 31, 2004. There are no pre-season or post-season closures. During the primary season, each vessel with at least one limited entry permit with a sablefish endorsement that is registered for use with that vessel may land up to the cumulative trip limit for each of the sablefish-endorsed limited entry permits registered for use with that vessel, for the tier(s) to which the permit(s) are assigned. For 2004, the following limits are in effect: Tier 1, 69,600 lb (31,570 kg); Tier 2, 31,600 lb (14,334 kg); Tier 3, 18,100 lb (8,210 kg). All limits are in round weight. If a vessel is registered for use with a sablefish-endorsed limited entry permit, all sablefish taken after April 1, 2004, count against the cumulative limits associated with the permit(s) registered for use with that vessel.

(A) *Incidental halibut retention north of Pt. Chehalis, WA (46°53′18″ N. lat).* Vessels authorized to participate in the primary sablefish fishery, licensed by the International Pacific Halibut Commission for commercial fishing in Area 2A (waters off Washington, Oregon, California), and fishing with longline gear north of Pt. Chehalis, WA (46°53′18″ N. lat.) may land up to the following cumulative limits: 100 lb (45 kg) dressed weight of halibut per 1,000 lb (454 kg) dressed weight of sablefish, plus up to two additional halibut per fishing trip in excess of this ratio. "Dressed" halibut in this area means halibut landed eviscerated with their heads on. Halibut taken and retained in the primary sablefish fishery north of Pt. Chehalis may only be landed north of Pt. Chehalis and may not be possessed or landed south of Pt. Chehalis.

(B) [Reserved]

* * * * *

3. In section IV., paragraph D. Recreational Fishery, is revised to read as follows:

* * * * *

D. Recreational Fishery

Federal recreational groundfish regulations are not intended to supersede any more restrictive State recreational groundfish regulations relating to federally-managed groundfish. Off the coast of Washington, Oregon, and California, boat limits apply, whereby each fisher aboard a vessel may continue to use angling gear until the combined daily limits of groundfish for all licensed and juvenile anglers aboard has been attained (additional state restrictions on boat limits may apply).

* * * * *

4. In section IV., under D. Recreational Fishery, paragraph (3) is revised to read as follows:

* * * * *

(3) *California.* Seaward of California (north and south of 40°10′ N. lat.), California law provides that, in times and areas when the recreational fishery is open, there is a 20–fish bag limit for all species of finfish, within which no more than 10 fish of any one species may be taken or possessed by any one person. Retention of cowcod, yelloweye rockfish, and canary rockfish is prohibited in the recreational fishery seaward of California all year in all areas. California state law may provide similar regulations for the following state-managed species: ocean whitefish, California sheephead, and all greenlings of the genus Hexogrammos except kelp greenling. Kelp greenling is the only federally-managed greenling.

* * * * *

5. In section IV., under D. Recreational Fishery, paragraphs (3)(a)(i) and (ii) are redesignated paragraphs (3)(a)(ii) and (iii), respectively, and a new paragraph (3)(a)(i) is added to read as follows:

* * * * *

(3) *California.* * * *
(a) *North of 40°10′ N. lat.* * * *
(i) *Closed Areas/Recreational Rockfish Conservation Areas.* The recreational Rockfish Conservation Areas, or recreational RCAs, are areas that are closed to recreational fishing for groundfish. Between 42° N. lat. (Oregon/California border) and 40°10′ N. lat., recreational fishing for all groundfish is prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour along the mainland coast and along islands and offshore seamounts during May 1 through December 31. Coordinates for the boundary line approximating the 30–fm (55–m) depth contour are listed in section IV.A.(17)(f).

* * * * *

6. In section IV., under D. Recreational Fishery, in the newly redesignated paragraph (3)(a)(ii), subparagraphs (B) and (B)(2) are revised to read as follows:

* * * * *

(ii) *RCG Complex.* * * *
(B) *Bag limits, hook limits.* * * *

(2) From May 1 through December 31, the bag limit is 10–RCG Complex fish per day (not including canary rockfish, yelloweye rockfish and cowcod, which are prohibited), of which up to 10 may be rockfish, no more than 2 of which may be bocaccio. Retention of black rockfish is prohibited from May 1 through 31 and from September 1 through December 31. Also within the 10–RCG Complex fish per day limit, no more than 2 fish per day may be greenling (kelp, and under state law, other greenlings) and no more than 3 fish per day may be cabezon. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

* * * * *

7. In section IV., under D. Recreational Fishery, in the newly redesignated paragraph (3)(a)(iii), subparagraph (B) is revised to read as follows:

* * * * *

(iii) *Lingcod.* * * *

(B) *Bag limits, hook limits.* * * *

* * * * *

8. In section IV., under D. Recreational Fishery, paragraph (3)(b)(i)(B)(1) is revised, paragraph (3)(b)(i)(B)(2) is redesignated paragraph (3)(b)(i)(B)(3) and revised and a new paragraph (3)(b)(i)(B)(2) is added to read as follows:

* * * * *

(3) *California.* * * *

(b) *South of 40°10′ N. lat.* * * *

(i) *Closed Areas.* * * *

(B) *Recreational Rockfish Conservation Areas.* * * *

(1) Between 40°10′ N. lat. and 36° N. lat., recreational fishing for all groundfish, except sanddabs, is prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour along the mainland coast and along islands and offshore seamounts during January 1 through February 29; is prohibited seaward of the 20–fm (37–m) depth contour during August 1 through October 31; and is closed entirely during March 1 through July 31 and during November 1 through December 31 (i.e., prohibited seaward of the shoreline). Coordinates for the boundary line approximating the 30–fm (55–m) depth contour are listed in section IV.A.(17)(f). Under state law, recreational fishing for rockfish, lingcod, and associated species limited to cabezon, greenlings of the genus *Hexagrammos*, California scorpionfish, California sheephead, and ocean whitefish are prohibited between the shoreline and the 10–fm (18–m) depth contour around the Farallon Islands. For

a definition of the Farallon Islands, see paragraph IV.A.(17)(f). Recreational fishing for certain groundfish species is also prohibited in waters of the Cordell Banks, located at 38°02′ N. lat. and 123°25′ W. long., and within a 5 nautical mile radius around this point. This portion of the Cordell Banks is closed to fishing for rockfish, lingcod, cabezon, kelp greenlings and California scorpionfish. (Note: California state regulations also prohibit the retention of other greenlings of the genus *Hexagrammos*, California sheephead and ocean whitefish.) For a definition of Cordell Banks, see paragraph IV.A.(17)(f).

(2) Between 36° N. lat. and 34°27′ N. lat., recreational fishing for all groundfish, except sanddabs, is prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour along the mainland coast and along islands and offshore seamounts during January 1 through February 29; is prohibited seaward of the 20–fm (37–m) depth contour during May 1 through June 30 and during August 1 through December 31; and is closed entirely during March 1 through April 30 and during July 1 through July 31 (i.e., prohibited seaward of the shoreline). Coordinates for the boundary line approximating the 30–fm (55–m) depth contour are listed in section IV.A.(17)(f).

(3) South of 34°27′ N. lat., recreational fishing for all groundfish, except sanddabs, is prohibited seaward of a boundary line approximating the 60–fm (110–m) depth contour along the mainland coast and along islands and offshore seamounts during March 1 through August 31 and during November 1 through December 31; is prohibited seaward of the 30–fm (55–m) depth contour during September 1 though October 31; and is closed entirely during January 1 through February 29 (i.e., prohibited seaward of the shoreline), except in the CCAs where fishing is prohibited seaward of the 20–fm (37–m) depth contour in paragraph (A) of this section. Coordinates for the boundary line approximating the 60–fm (110–m) depth contour are listed in section IV.A.(17)(f).

* * * * *

9. In section IV., under D. Recreational Fishery, paragraph (3)(b)(ii)(B) is revised to read as follows:

* * * * *

(ii) *RCG Complex.* * * *

(B) *Bag limits, hook limits.* * * *

* * * * *

10. In section IV., under D. Recreational Fishery, paragraph (3)(b)(iii)(B) is revised to read as follows:

* * * * *

(iii) *California scorpionfish.* * * *

(B) *Bag limits, hook limits.* * * *

* * * * *

11. In section IV., under D. Recreational Fishery, paragraph (3)(b)(iv)(B) is revised to read as follows:

* * * * *

(iv) *Lingcod.* * * *

(B) *Bag limits, hook limits.* * * *

* * * * *

Classification

These actions are authorized by the Pacific Coast groundfish FMP, the Halibut Act, and their implementing regulations and are based on the most recent data available. The aggregate data upon which these actions are based are available for public inspection at the Office of the Administrator, Northwest Region, NMFS, (see **ADDRESSES**) during business hours.

The Assistant Administrator for Fisheries NOAA, NMFS, finds good cause to waive the requirement to provide prior notice and opportunity for public comment on this action pursuant to 5 U.S.C. 553(b)(B), because providing prior notice and opportunity for comment would be impracticable and unnecessary. Providing prior notice and comment on the inseason adjustments would be impracticable because the data upon which these recommendations were based were provided to the Pacific Council and the Pacific Council made its recommendations at its April 4–9, 2004, meeting in Sacramento, CA. As described below, there is not sufficient time after that meeting to draft this notice and undergo proposed and final rulemaking before the beginning of the next cumulative limit period, May 1, 2004, when these actions need to be in effect. Many of the previously scheduled management measures for the May–June period are more liberal than the adjustments contained in this inseason action. Therefore, for the actions to be implemented in this notice, prior notice and opportunity for comment would be impracticable because affording prior notice and opportunity for public comment would take too long, thus impeding the Agencys function of managing fisheries to approach without exceeding the OYs for federally managed species.

Adjustments to management measures in this inseason action include changes to the management measures for the recreational groundfish fisheries and the limited entry groundfish fisheries. Changes to management measures for California's recreational fishery implemented with this inseason action are more conservative than previously scheduled regulations. These more conservative management measures must be implemented in a timely manner to protect overfished groundfish species, such as canary rockfish and lingcod, by keeping the mortality of these species within the levels projected for the recreational fishery off California in 2004. The area and season closures described in this inseason action prohibit recreational fishing for groundfish off California in areas and during seasons when the recreational fishery is most likely to encounter canary rockfish and lingcod. When modeling projected catch in the recreational fishery off California, it was apparent that changes to California's recreational management measures must be in effect by May 1, 2004, in order to keep the harvest of these overfished species within their OYs and allow for continued rebuilding of their stocks. Delaying these changes to management measures could lead to early closures of the fishery causing unnecessary economic hardships on coastal communities and contradicting a primary objective of the FMP, which is to provide for year-round harvest opportunities. Additional harvest opportunities for the limited entry groundfish fisheries also need to be implemented in a timely manner and prior to the start of the next cumulative limit period, May 1, 2004. These harvest opportunities provide much needed revenue for both the trawl and fixed gear fleets by providing access to healthy, deepwater groundfish stocks with minimal impacts on overfished species. Delays in implementing these additional harvest opportunities may prevent the limited entry fleets from being able to harvest the entire OYs for deepwater, slope species.

It is also impracticable to provide prior notice and opportunity for comment for implementing boat limits in the recreational groundfish fishery coastwide because these actions serve to ensure consistency between state and Federal regulations. The States of Washington, Oregon, and California have already implemented boat limits in their recreational regulations, therefore, implementing this adjustment in a timely fashion is important to minimize conflicting regulations. Additionally, limits are combined daily limits of groundfish for all licensed anglers aboard a vessel. It is not predicted that there will be a net change in the harvest of groundfish resulting from boat limits or cumulative individual bag limits. It is unnecessary to provide prior notice and

opportunity for comment on the corrections contained in this inseason action because the corrections have no substantive effect on the public.

For these reasons, good cause also exists to waive the 30 day delay in effectiveness requirement under 5 U.S.C. 553 (d)(3).These actions are taken under the authority of 50 CFR 300.63(a)(3)and 660.323(b)(1) and are exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 773–773k; 1801 *et seq.*

Dated: April 29, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–10206 Filed 4–30–04; 4:38 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 040429135–4135–01; I.D. 042204G]

RIN 0648–AS03

Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; 2004 Management Measures

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

ACTION: Final rule; annual management measures for the ocean salmon fishery; request for comments.

SUMMARY: NMFS establishes fishery management measures for the 2004 ocean salmon fisheries off Washington, Oregon, and California and the 2005 salmon seasons opening earlier than May 1, 2005. Specific fishery management measures vary by fishery and by area. The measures establish fishing areas, seasons, quotas, legal gear, recreational fishing days and catch limits, possession and landing restrictions, and minimum lengths for salmon taken in the U.S. exclusive economic zone (EEZ)(3–200 nm) off Washington, Oregon, and California. The management measures are intended to prevent overfishing and to apportion the ocean harvest equitably among treaty Indian, non-treaty commercial, and recreational fisheries. The measures are also intended to allow a portion of the salmon runs to escape the ocean fisheries in order to provide for spawning escapement and to provide for inside fisheries (fisheries occurring in state internal waters).

DATES: Effective from 0001 hours Pacific Daylight Time, May 1, 2004, until the effective date of the 2005 management measures, as published in the **Federal Register**. Comments must be received by May 20, 2004.

ADDRESSES: Comments on the management measures and the related environmental assessment (EA) may be sent to D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way N.E., Seattle, WA 98115–0070, fax: 206–526–6376; or to Rod McInnis, Acting Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213, fax: 562–980–4018. Comments can also be submitted via e-mail at the *2004oceansalmonregs.nwr@noaa.gov* address, or through the internet at the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments, and include [docket number and/or RIN number] in the subject line of the message.

Copies of the EA and other documents cited in this document are available from Dr. Donald O. McIsaac, Executive Director, Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384, and are posted on its website (*www.pcouncil.org*).

Send comments regarding the reporting burden estimate or any other aspect of the collection-of-information requirements in these management measures, including suggestions for reducing the burden, to one of the NMFS addresses and to David Rostker, Office of Management and Budget (OMB), by e-mail at *David_Rostker@omb.eop.gov*, or by facsimile (fax) at (202) 395–7285

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206–526–6140, or Svein Fougner at 562–980–4040.

SUPPLEMENTARY INFORMATION:

Background

The ocean salmon fisheries in the EEZ off Washington, Oregon, and California are managed under a "framework" fishery management plan entitled the Pacific Coast Salmon Plan (Salmon FMP). Regulations at 50 CFR part 660, subpart H, provide the mechanism for making preseason and inseason adjustments to the management measures, within limits set by the Salmon FMP, by notification in the **Federal Register**.

These management measures for the 2004 and pre-May 2005 ocean salmon fisheries were recommended by the Pacific Fishery Management Council (Council) at its April 5 to 9, 2004, meeting.

Schedule Used to Establish 2004 Management Measures

The Council announced its annual preseason management process for the 2004 ocean salmon fisheries in the **Federal Register** on January 6, 2004 (69 FR 629). This notice announced the availability of Council documents as well as the dates and locations of Council meetings and public hearings comprising the Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures. The agendas for the March and April Council meetings were published in subsequent **Federal Register** documents prior to the actual meetings.

In accordance with the Salmon FMP, the Council's Salmon Technical Team (STT) and staff economist prepared a series of reports for the Council, its advisors, and the public. The first of the reports was prepared in February when the scientific information first necessary for crafting management measures for the 2004 and pre-May 2005 ocean salmon fishery became available. The first report, "Review of 2003 Ocean Salmon Fisheries" (REVIEW), summarizes biological and socio-economic data for the 2003 ocean salmon fisheries and assesses how well the Council's 2003 management objectives were met. The second report, "Preseason Report I Stock Abundance Analysis for 2004 Ocean Salmon Fisheries" (PRE I), provides the 2004 salmon stock abundance projections and analyzes the impacts on the stocks and Council management goals if the 2003 regulations and regulatory procedures were applied to the projected 2004 stock abundances. The completion of PRE I is the initial step in the evaluating the full suite of preseason options.

The Council met in Tacoma, WA from March 8 to 12, 2004, to develop 2004 management options for proposal to the public. The Council proposed three options of commercial and recreational fisheries management for analysis and public comment. These options consisted of various combinations of management measures designed to protect weak stocks of coho and chinook salmon and to provide for ocean harvests of more abundant stocks. After the March Council meeting, the Council's STT and staff economist prepared a third report, "Preseason

Report II Analysis of Proposed Regulatory Options for 2004 Ocean Salmon Fisheries," which analyzes the effects of the proposed 2004 management options. This report was made available to the Council, its advisors, and the public.

Public hearings, sponsored by the Council, to receive testimony on the proposed options were held on: March 29, 2004, in Westport, WA and Coos Bay, OR; and March 30, 2004, in Fort Bragg, CA. The States of Washington, Oregon, and California sponsored meetings in various forums that also collected public testimony, which was then presented to the Council by each state's Council representative. The Council also received public testimony at both the March and April meetings and received written comments at the Council office.

The Council met from April 5 to 9, 2004, in Sacramento, CA, to adopt its final 2004 recommendations. Following the April Council meeting, the Council's STT and staff economist prepared a fourth report, "Preseason Report III Analysis of Council-Adopted Management Measures for 2004 Ocean Salmon Fisheries," which analyzes the environmental and socio-economic effects of the Council's final recommendations. This report was also made available to the Council, its advisors, and the public. After the Council took final action on the annual ocean salmon specifications in April, it published the recommended management measures in its newsletter and also posted them on the Council website (*www.pcouncil.org*).

Resource Status

Since 1989, NMFS has listed under the Endangered Species Act (ESA) 16 evolutionarily significant units (ESUs) of salmon on the West Coast. As the listing have occurred, NMFS has conducted formal ESA section 7 consultations, issued biological opinions, and made determinations under section 4(d) of the ESA that consider the impacts to listed salmonid species resulting from proposed implementation of the Salmon FMP, or in some cases, from proposed implementation of the annual management measures. Associated with the biological opinions are incidental take statements that specify the level of take exempted from the section 9 prohibitions of the ESA. Some of the biological opinions have concluded that implementation of the Salmon FMP is not likely to jeopardize the continued existence of certain listed ESUs and have provided incidental take statements. Other biological opinions have found that implementation of the Salmon FMP is likely to jeopardize certain listed ESUs and have identified reasonable and prudent alternatives (consultation standards) that would avoid the likelihood of jeopardizing the continued existence of the ESU under consideration. In a March 5, 2004, letter to the Council, NMFS provided the Council with ESA consultation standards and guidance for the management of stocks listed under the ESA in preparation for the 2004 management season in order to ensure that the Council recommendations comply with the ESA.

Estimates of the 2003 spawning escapements for key stocks managed under the Salmon FMP and preseason estimates of 2004 ocean abundance are provided in the Council's REVIEW and PRE I documents. The primary resource and management concerns are for salmon stocks listed under the ESA.

Snake River wild fall chinook are listed under the ESA as a threatened species. Direct information on the stock's ocean distribution and on fishery impacts is not available. Fishery impacts on Snake River fall chinook are evaluated using the Lyons Ferry Hatchery stock as an indicator. The Lyons Ferry stock is widely distributed and harvested by ocean fisheries from southern California to Alaska. NMFS' ESA consultation standard requires that Council fisheries be managed to ensure that the Adult Equivalent (AEQ) exploitation rate on age–3 and age–4 adults for the combined Southeast Alaska, Canadian, and Council fisheries is not greater than 70 percent of that observed during the 1988–1993 base period. The Council's 2004 recommended fisheries, combined with expected impacts in Southeast Alaska and Canada fisheries, have an estimated age 3/4 AEQ exploitation rate that is 70 percent of that observed during the 1988–1993 base period. In the last few years Snake River wild fall chinook have not been a limiting factor in formulating Council fisheries, primarily because of low anticipated Canadian impacts. However, with some West Coast chinook stocks increasing in abundance, Canadian catch restrictions, especially in troll fisheries, have eased. The 2003 Canadian fisheries caught twice as many chinook as was anticipated preseason. In 2004, the major Canadian troll fisheries are anticipated to land their Total Allowable Catch as allowed under the Pacific Salmon Treaty. As a result, the Canadian portion of the Snake River fall chinook age 3/4 AEQ exploitation rate is predicted to increase substantially. This increase in impact on Snake River fall chinook was a major constraint on fisheries north of Cape Falcon, OR.

This is the fifth year that NMFS provided guidance to the Council related to the Puget Sound chinook ESU. NMFS' guidance for Puget Sound chinook stocks is expressed in terms of total or southern U.S. fishery exploitation rate ceilings or of terminal escapement objectives. Under the current management structure, Council fisheries are included as part of the suite of fisheries that comprise the fishing regime negotiated each year by the co-managers under *U.S.* v. *Washington*, Civ. N. 70–9213 (W.D. Wash.) to meet management objectives for Puget Sound and Washington Coastal salmon stocks. Because these management objectives and the management planning structure address fisheries wherever they occur, Council and Puget Sound fisheries are interconnected. Therefore, in adopting its regulations, the Council must recommend fisheries in the ocean that satisfy the requirement that the combined fisheries not appreciably reduce the likelihood of survival and recovery of the ESU. NMFS estimated that the exploitation rates from Council-managed fisheries on Puget Sound chinook populations will range from zero to 3 percent. Management actions taken to meet exploitation rate targets will, therefore, occur primarily in the Puget Sound fisheries, but the nature of the existing process is such that ocean fishery impacts must be accounted for as part of an overall review.

In May 2003, NMFS exempted fishery activities conducted in accordance with a Resource Management Plan (RMP) submitted under Limit 6 of the 4(d) rule (65 FR 42422, 66 FR 31603) from ESA section 9 take prohibitions. This RMP will expire on May 1 of this year. NMFS is currently evaluating another RMP provided by the Washington Department of Fish and Wildlife and the Puget Sound Treaty tribes for the 2004–2009 fishing years. NMFS has concluded, preliminarily, that the RMP poses no jeopardy to the Puget Sound chinook ESU. NMFS' preliminary conclusions regarding the proposed RMP have been released and are currently available for public review. A biological opinion was issued on April 29, 2004, that covers the effects of the 2004 Council area fisheries on Puget Sound chinook salmon. The biological opinion concludes that the ocean salmon fishery is not likely to jeopardize the Puget Sound chinook ESU.

Sacramento River winter chinook are listed as endangered under the ESA. The Council's recommended management measures meet NMFS'

requirements for the stock established through the ESA section 7 consultation process.

Although management concerns for ESA listed stocks were a primary consideration in preseason planning, the conservation objectives of other stocks also constrained fishing in certain areas. The forecast September 1, 2003 (preseason) ocean abundance of Klamath River fall chinook salmon is 72,100 age–3 fish, 134,500 age–4 fish, and 9,700 age–5 fish. The forecast abundance requires certain reductions in 2004 commercial fishing opportunity south of Cape Falcon, OR, relative to the 2003 seasons, in order to achieve the conservation objective of 35,000 natural Klamath River fall chinook adult spawners.

The Canadian Department of Fisheries and Oceans forecast that the abundance of Interior Fraser (Thompson River) coho in Canada for 2004 to be in the low status category. As a result, U.S. fisheries under the Southern Coho Management Plan, adopted by the Pacific Salmon Commission in February 2002, were constrained to an exploitation rate no greater than 10 percent. The development of coho fisheries north of Cape Falcon, OR was greatly influenced by the need to meet this obligation of the Pacific Salmon Treaty.

Management Measures for 2004 Fisheries

The Council recommended ocean harvest levels and management measures for 2004 fisheries are designed to apportion the burden of protecting the weak stocks identified and discussed in PRE I equitably among ocean fisheries and to allow maximum harvest of natural and hatchery runs surplus to inside fishery and spawning needs. NMFS finds the Council's recommendations responsive to the goals of the Salmon FMP, the requirements of the resource, and the socio-economic factors affecting resource users. The recommendations are consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act and U.S. obligations to Indian tribes with Federally recognized fishing rights, and U.S. international obligations regarding Pacific salmon. Accordingly, NMFS has adopted them.

North of Cape Falcon the 2004 management measures have a substantially lower chinook quota and slightly lower coho quota relative to the 2003 season. The total allowable catch for 2004 is 89,000 chinook and 270,000 coho; these fisheries are restricted to protect depressed Lower Columbia River wild coho, Washington coastal coho, Puget Sound coho, Oregon Coastal Natural (OCN) coho, Interior Fraser coho, and Snake River fall chinook. Washington coastal and Puget Sound chinook generally migrate to the far north and are affected insignificantly by ocean harvests from Cape Falcon, OR to the U.S.-Canada border. North of Cape Alava, WA, the Council recommends a provision prohibiting retention of chum salmon during August and September to protect ESA listed Hood Canal summer chum. The Council has recommended such a prohibition for the last three years.

South of Cape Falcon, OR the retention of coho is prohibited, except for a recreational selective fishery off Oregon with a 75,000–fish quota of marked hatchery coho. This year's selective fishery includes the southern coastal area of Oregon, which has not had any directed coho fishery since 1993. The Council's recommendations are below the 15–percent exploitation rate permitted under Amendment 13 to protect OCN coho stocks, with an expected 14.7–percent OCN coho exploitation rate. The expected ocean exploitation rate for Rogue/Klamath coho is 8.6 percent, and is also below its exploitation rate limit of 13 percent. Chinook fisheries off Oregon and California are constrained to meet the conservation objective of Klamath River fall chinook and the ESA consultation standards for Sacramento River winter chinook.

The 2004 management measures have a new definition that describes ocean "boat limits" in the recreational fishery. The provision allows each fisher aboard a vessel off the coast of Washington, Oregon, and California to continue to use angling gear until the combined daily limits of salmon for all licensed and juvenile anglers aboard has been attained. The purpose of this provision is to make Federal regulations consistent with the regulations of the above states. Washington has had a boat limit provision in place for a number of years, but Oregon and California have recently adopted such limits. The specific requirements are different in each state, but the intent is similar. Anglers should be aware that additional state restrictions may apply, in addition to the Federal regulation. Therefore, anglers should consult the specific regulations of their state for the exact language.

Treaty Indian Fisheries

The treaty-Indian commercial troll fishery quota is 49,000 chinook in ocean management areas and Washington State Statistical Area 4B combined. This quota is lower than the 60,000 chinook quota in 2003. The fisheries include a chinook-directed fishery in May and June (under a quota of 22,500 chinook) and an all-salmon season beginning in July with a 26,500 chinook sub-quota. The coho quota for the treaty-Indian troll fishery in ocean management areas, including Washington State Statistical Area 4B for the July-September period is 75,000 coho, a decrease from the 90,000 coho quota in 2003.

Management Measures for 2005 Fisheries

The timing of the March and April Council meetings makes it impracticable for the Council to recommend fishing seasons that begin before May 1 of the same year. Therefore, the 2005 fishing seasons opening earlier than May 1 are also established in this action. The Council recommended, and NMFS concurs, that the recreational seasons off California from Horse Mountain, CA to the U.S.-Mexico Border and the commercial troll seasons from Cape Falcon, OR to the Oregon-California Border will open in 2005 as indicated in the Season Description section. At the November 2004 meeting, the Council may consider inseason recommendations to adjust commercial and recreational salmon seasons prior to May 1 in areas off Oregon south of Cape Falcon. At the March 2005 meeting, the Council may consider inseason recommendations to open commercial seasons for all salmon, except for coho, prior to May 1 in areas off California between Horse Mountain and Point Arena, CA and identify the areas, season, quota, and special regulations for any experimental April fisheries, which may be proposed at the Council's November 2004 meeting.

Inseason Actions

The following sections set out the management regime for the salmon fishery. Open seasons and days are described in Sections 1, 2, and 3 of the 2004 management measures. Inseason closures in the commercial and recreational fisheries are announced on the NMFS hotline and through the U.S. Coast Guard Notice to Mariners as described in Section 7. Other inseason adjustments to management measures are also announced on the hotline and through the Notice to Mariners. Inseason actions will also be filed with the **Federal Register** as soon as practicable.

The following are the management measures recommended by the Council and approved and implemented here for 2004 and, as specified, for 2005.

Section 1. Commercial Management Measures for 2004 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C that must be followed for lawful participation in the fishery. Each fishing area identified in part A specifies the fishing area by geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR

U.S.-Canada Border to Cape Falcon, OR

May 1 through earlier of June 30 or 29,800 chinook quota. The fishery will be managed to provide a remaining quota of 500 chinook for a June 26 through 30 open period with a 50–fish, per vessel, landing limit for the 5–day open period. All salmon except coho (C.7). Cape Flattery, CA and Columbia Control Zones closed (C.5). See gear restrictions and definitions (C.2, C.3). Washington permitted vessels must land their fish within the area and within 24 hours of any closure of this fishery. Oregon permitted vessels must land their fish within the area or in Garibaldi, OR and within 24 hours of any closure of this fishery. State regulations require Oregon licensed limited fish sellers and fishers intending to transport and deliver their catch outside the area to notify Oregon Department of Fish and Wildlife (ODFW) one hour prior to transport away from the port of landing by calling 541–867–0300, ext. 271. Notification shall include vessel name and number, number of salmon by species, location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts (C.8).

July 8 through earlier of September 15 or 14,700 preseason chinook guideline or a 67,500 coho quota (C.8). The 67,500 coho quota includes a subarea quota of 8,000 coho for the area between the U.S.-Canada border and the Queets River, WA. Fishery is open Thursday through Monday prior to August 11, and Wednesday through Sunday thereafter. Landing and possession limit of 125 chinook per vessel per five-day open period. An inseason conference call may occur no later than August 10 to consider reducing the landing and possession limit beginning August 11. All salmon, except no chum retention north of Cape Alava, WA, in August and September (C.7). All retained coho must have a healed adipose fin clip. An inseason conference call may occur to consider allowing retention of all legal sized coho between Cape Falcon, OR and the Queets River, WA no earlier than September 1. Cape Flattery and Columbia Control Zones closed (C.5). See gear restrictions and definitions (C.2, C.3). Washington permitted vessels must land their fish within the area, and within 24 hours of any closure of this fishery. Oregon permitted vessels must land their fish within the area or in Garibaldi, OR, and within 24 hours of any closure of this fishery. State regulations require Oregon licensed limited fish sellers and fishers intending to transport and deliver their catch outside the area to notify ODFW one hour prior to transport away from the port of landing by calling 541–867–0300 ext. 271. Notification shall include vessel name and number, number of salmon by species, location of delivery, and estimated time of delivery. Trip limits, gear restrictions, and guidelines may be implemented or adjusted inseason (C.8).

South of Cape Falcon, OR

Cape Falcon to Florence South Jetty, OR

March 15 through June 30; July 7 through 12; July 19 through 27; August 1 through 14; August 19 through 24; and September 1 through October 31 (C.9). All salmon except coho (C.7). Chinook 26 inch (66.0 cm) total length minimum size limit prior to May 1, 27 inches (68.6 cm) total length May 1 through September 30, and 28 inches (71.1 cm) total length October 1 through 31 (B). See gear restrictions and definitions (C.2, C.3), and Oregon State regulations for a description of special regulations at the mouth of Tillamook Bay.

In 2005, the season will open March 15 for all salmon except coho, with a 27 inch (68.6 cm) total length chinook minimum size limit. This opening could be modified following Council review at its November 2004 meeting.

Florence South Jetty to Humbug Mountain, OR

March 15 through July 6; July 13 through 18; July 26 through 29; August 1 through 8; August 15 through 22; August 26 through 29; and September 1 through October 31 (C.9). All salmon except coho (C.7). Chinook 26 inch (66.0 cm) total length minimum size limit prior to May 1, 27 inches (68.6 cm) total length May 1 through September 30, and 28 inches (71.1 cm) total length October 1 through 31 (B). See gear restrictions and definitions (C.2, C.3).

In 2005, the season will open March 15 for all salmon except coho, with a 27 inch (68.6 cm) total length chinook minimum size limit. This opening could be modified following Council review at its November 2004 meeting.

Humbug Mountain, OR, to Oregon-California Border

March 15 through May 31. June 1 through earlier of June 30 or 2,600 chinook quota; July 1 through earlier of July 31 or 1,600 chinook quota; August 1 through earlier of August 29 or 2,500 chinook quota; September 1 through earlier of September 30 or 3,000 chinook quota (C.9). All salmon except coho. Chinook 26 inch (66.0 cm) total length minimum size limit prior to May 1, 27 inches (68.6 cm) total length May 1 through August 29, and 28 inches (71.1 cm) total length September 1 through 30. No transfer of remaining quota from earlier fisheries allowed (C.9). Possession and landing limit of 50 fish per trip, per vessel June 1 through August 31, and 65 fish per trip per vessel in September. See gear restrictions and definitions (C.2, C.3). For seasons from June 1 through September 30, vessels must land their fish in Gold Beach, Port Orford, or Brookings, Oregon, and within 24 hours of closure. State regulations require fishers intending to transport and deliver their catch to other locations after first landing in one of these ports to notify ODFW prior to transport away from the port of landing by calling 541–867–0300, ext. 271, with vessel name and number, number of salmon by species, location of delivery, and estimated time of delivery.

In 2005 the season will open March 15 for all salmon except coho, with a 27 inch (68.6 cm) total length minimum size limit. This opening could be modified following Council review at its November 2004 meeting.

Oregon-California Border to Humboldt South Jetty

September 1 through earlier of September 30 or 6,000 chinook quota. All salmon except coho. Chinook minimum size limit of 28 inches (71.1 cm) total length. Possession and landing limit of 30 fish per day per vessel. All fish caught in this area must be landed within the area. See compliance requirements (C.1), and gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed (C.5.). When the fishery is closed between the OR-CA border and Humbug Mountain, OR and open to the south, vessels with fish on board caught in the open area off

California may seek temporary mooring in Brookings, OR, prior to landing in California only if such vessels first notify the Chetco River Coast Guard Station via VHF channel 22A between the hours of 0500 and 2200 and provide the vessel name, number of fish on board, and estimated time of arrival.

Horse Mountain to Point Arena, CA (Fort Bragg)

July 10 through August 29; September 1 through 30. All salmon except coho. Chinook minimum size limit of 27 inches (68.6 cm) total length through August 31; 28 inches (71.1 cm) total length September 1 through 30. Vessels must land and deliver their fish within 24 hours of any closure of this fishery. See gear restrictions and definitions (C.2, C.3).

Point Arena, CA to U.S.-Mexico Border

May 1 through August 29; September 1 through 30. All salmon except coho. Chinook minimum size limit 26 inches (66.0 cm) total length prior to July 1 and 27 inches (68.6 cm) total length beginning July 1 through September 30. Vessels must land and deliver their fish within 24 hours of any closure of this fishery. See gear restrictions and definitions (C.2, C.3).

Point Reyes to Point San Pedro, CA

October 1; October 4 through 8; and October 11 through 15. All salmon except coho. Chinook minimum size limit 26 inches (66.0 cm) total length. See gear restrictions and definitions (C.2, C.3).

B. Minimum Size (Inches) (See C.1)

Area (when open)	Chinook		Coho		Pink
	Total Length	Head-off	Total Length	Head-off	
North of Cape Falcon, OR	28.0	21.5	16.0	12.0	None
C. Falcon to Humbug Mt., OR					
Prior to May 1	26.0	19.5	-	-	None
May 1- September 30	27.0	20.5	-	-	None
October 1–31	28.0	21.5	-	-	None
Beginning March 15, 2005	27.0	20.5	-	-	None
Humbug Mt., OR, to OR-CA Border					
Prior to May 1	26.0	19.5	-	-	None
May 1-August 31	27.0	20.5	-	-	None
September 1–30	28.0	21.5	-	-	None
Beginning March 15, 2005	27.0	20.5	-	-	None
OR/CA Border to Pt. Arena, CA					
July 1-August 31	27.0	20.5	-	-	None
September 1–30	28.0	21.5	-	-	None
Pt. Arena, CA, to US-Mexico Border					
May 1-June 30	26.0	19.5	-	-	None
July 1-September 30	27.0	20.5	-	-	None
October 1–15	26.0	19.5	-	-	None

Metric equivalents: 28.0 in=71.1 cm, 27.0 in=68.6 cm, 26.0 in=66.0 cm, 21.5 in=54.6 cm, 19.5 in=49.5 cm, 16.0in=40.6 cm, and 12.0 in=30.5 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. *Compliance with Minimum Size or Other Special Restrictions:* All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished and the area in which they are landed if that area is open. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught.

C.2. *Gear Restrictions:*

a. Single point, single shank, barbless hooks are required in all fisheries.

b. *Cape Falcon, OR to the Oregon-California border:* No more than 4 spreads are allowed per line.

c. *Oregon-California border to U.S.-Mexico border:* No more than 6 lines are allowed per vessel and barbless circle hooks are required when fishing with bait by any means other than trolling.

C.3. *Gear Definitions:*

a. *Trolling defined:* Fishing from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

b. *Troll fishing gear defined:* One or more lines that drag hooks behind a moving fishing vessel. In that portion of the fishery management area (FMA) off Oregon and Washington, the line or lines must be affixed to the vessel and must not be intentionally disengaged from the vessel at any time during the fishing operation.

c. *Spread defined:* A single leader connected to an individual lure or bait.

d. *Circle hook defined:* A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

C.4. *Transit Through Closed Areas with Salmon on Board:* It is unlawful for a vessel to have troll or recreational gear in the water while transiting any area closed to fishing for a certain species of salmon, while possessing that species of salmon; however, fishing for species other than salmon is not prohibited if the area is open for such species and no salmon for which the area is closed are in possession.

C.5. *Control Zone Definitions:*

a. *Cape Flattery Control Zone:* The area from Cape Flattery, WA (48°23′00″ N. lat.) to the northern boundary of the U.S. EEZ; and the area from Cape Flattery, WA south to Cape Alava, WA, 48°10′00″ N. lat., and east of 125°05′00″ W. long.

b. *Columbia Control Zone:* An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09′ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.) and then along the north jetty to the point of intersection with the Buoy #10 line; and, on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W.

long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

c. *Klamath Control Zone:* The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately 6 nautical miles (11.1 km) north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles (22.2 km) off shore); and, on the south, by 41°26′48″ N. lat. (approximately 6 nautical miles (11.1 km) south of the Klamath River mouth).

C.6. *Notification When Unsafe Conditions Prevent Compliance with Regulations:* If prevented by unsafe weather conditions or mechanical problems from meeting special management area landing restrictions, vessels must notify the U.S. Coast Guard and receive acknowledgment of such notification prior to leaving the area. This notification shall include the name of the vessel, port where delivery will be made, approximate amount of salmon (by species) on board and the estimated time of arrival.

C.7. *Incidental Halibut Harvest:* During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.3 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. License applications for incidental harvest must be obtained from the International Pacific Halibut Commission's (IPHC)(phone 206–634–1838). Applicants must apply prior to April 1 of each year. Incidental harvest is authorized only during May-June troll seasons and after June 30 if quota remains and if announced on the NMFS hotline (phone 800–662–9825). ODFW and Washington Department of Fish and Wildlife (WDFW) will monitor landings. If the landings are projected to exceed the 44,554–lb (20.2–mt) preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to close the incidental halibut fishery.

License holders may land no more than 1 Pacific halibut per each 3 chinook, except 1 Pacific halibut may be landed without meeting the ratio requirement, and no more than 35 halibut may be landed per trip. Pacific halibut retained must be no less than 32 inches (81.3 cm) in total length (with head on).

NMFS and the Council request that salmon trollers voluntarily avoid a "C-shaped" yelloweye rockfish conservation area in order to protect yelloweye rockfish. The area is defined in the Pacific Council Halibut Catch Sharing Plan in the North Coast subarea (WA marine area 3), with the following coordinates in the order listed:

48°18′ N. lat.; 125°18′ W. long;
48°18′ N. lat.; 124°59′ W. long;
48°11′ N. lat.; 124°59′ W. long;
48°11′ N. lat.; 125°11′ W. long;
48°04′ N. lat.; 125°11′ W. long;
48°04′ N. lat.; 124°59′ W. long;
48°00′ N. lat.; 124°59′ W. long;
48°00′ N. lat.; 125°18′ W. long;
and connecting back to 48°18′ N. lat.; 125°18′ W. long.

C.8. *Inseason Management:* In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance is provided to NMFS:

a. Chinook remaining from the May through June non-Indian commercial troll harvest guideline north of Cape Falcon, OR may be transferred to the July through September harvest guideline on a fishery impact equivalent basis.

b. NMFS may transfer fish between the recreational and commercial fisheries north of Cape Falcon, OR if there is agreement among the areas' representatives on the Salmon Advisory Subpanel.

c. At the March 2005 meeting, the Council will consider inseason recommendations for special regulations for any experimental fisheries (proposals must meet Council protocol and be received in November 2004).

C.9. Consistent with Council management objectives, the State of Oregon may establish additional late-season, chinook-only fisheries in state waters. Check state regulations for details.

C.10. For the purposes of California Department of Fish and Game Code, Section 8232.5, the definition of the Klamath Management Zone for the ocean salmon season shall be that area from Humbug Mountain, OR, to Horse Mountain, CA.

Section 2. Recreational Management Measures for 2004 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C that must be followed for lawful participation in the fishery. Each fishing area identified in part A specifies the fishing area by geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR

U.S.-Canada Border to Cape Alava, WA (Neah Bay Subarea)

June 27 through earlier of September 19 or 21,050 coho subarea quota, with a subarea guideline of 3,700 chinook. Seven days per week. All salmon, except no chum retention August 1 through September 19, two fish per day (C.1), no more than one of which may be a chinook (chinook 26 inch (66.0 cm) total length minimum size limit)(B). All retained coho must have a healed adipose fin clip. See gear restrictions and definitions (C.2, C.3). Beginning August 1, chinook non-retention east of the Bonilla-Tatoosh line (C.4.c) during the Council managed ocean salmon fishery. Inseason management may be used to sustain season length and keep harvest within the overall recreational quota for north of Cape Falcon, OR (C.5).

Cape Alava to Queets River, WA (La Push Subarea)

June 27 through earlier of September 19 or 5,200 coho subarea quota with a subarea guideline of 1,900 chinook; September 25 through October 10 or 100 coho quota or 100 chinook quota in the area north of 47°50′00 N. lat. and south of 47°58′00″ N. lat. in state waters (inside three nautical miles) (C.6). Seven days per week. All salmon, two fish per day (C.1), no more than one of which may be a chinook (chinook 26 inch (66.0 cm) total length minimum size limit)(B). All retained coho must have a healed adipose fin clip. See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall chinook recreational quota for north of Cape Falcon (C.5).

Queets River to Leadbetter Point, WA (Westport Subarea)

June 27 through earlier of September 19 or 74,900 coho subarea quota with a subarea guideline of 30,800 chinook. Sunday through Thursday, except there may be a conference call no later than July 28 to consider opening seven days per week. All salmon, two fish per day (C.1), no more than one of which may be a chinook (chinook 26 inch (66.0 cm) total length minimum size limit)(B). All retained coho must have a healed adipose fin clip. See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within

the overall chinook recreational quota for north of Cape Falcon, OR (C.5).

Leadbetter Point, WA to Cape Falcon, OR (Columbia River Subarea)

June 27 through earlier of September 30 or 101,250 coho subarea quota with a subarea guideline of 8,000 chinook. Sunday through Thursday, except there may be a conference call no later than July 28 to consider opening seven days per week. All salmon, two fish per day (C.1), no more than one of which may be a chinook (chinook 26 inch (66.0 cm) total length minimum size limit)(B). All retained coho must have a healed adipose fin clip. See gear restrictions and definitions (C.2, C.3). Columbia Control Zone closed (C.4.a). Closed between Cape Falcon and Tillamook Head (45°56′45″ N. lat.) beginning August 1. Inseason management may be used to sustain season length and keep harvest within the overall chinook recreational quota for north of Cape Falcon, OR (C.5).

Cape Falcon to Humbug Mountain, OR

Except as provided below during the selective fishery, the season will be March 15 through October 31 (C.6). All salmon except coho. Two fish per day (C.1). See gear restrictions and definitions (C.2, C.3).

In 2005 the season will open March 15 for all salmon except coho. Two fish per day (C.1). Same gear restrictions as in 2004. This opening could be modified following Council review at its November 2004 meeting.

Selective fishery for marked coho: Cape Falcon, OR to Oregon-California Border - June 19 through earlier of August 31 or a landed catch of 75,000 coho. Open seven days per week, all salmon, two fish per day (C.1). All retained coho must have a healed adipose fin clip. Open days may be adjusted inseason to utilize the available quota (C.5). All salmon except coho seasons reopen the earlier of September 1 or attainment of the coho quota.

Humbug Mountain, OR to Horse Mountain, CA (Klamath Management Zone)

Except as provided above during the selective fishery, the season will be May 15 through September 12 (C.6). All salmon except coho. Seven days per week, two fish per day (C.1). See gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed August 1 through 31 (C.4.b).

Horse Mountain to Point Arena, CA (Fort Bragg)

February 14 through November 14. All salmon except coho. Two fish per day (C.1). Chinook minimum size limit 24 inches (61.0 cm) total length through April 30, and 20 inches (50.8 cm) total length thereafter (B). See gear restrictions and definitions (C.2, C.3).

In 2005, season opens February 12 (nearest Saturday to February 15) for all salmon except coho. Two fish per day (C.1), chinook minimum size limit 20 inches (50.8 cm) total length, and the same gear restrictions as in 2004.

Point Arena to Pigeon Point, CA (San Francisco)

April 17 through November 14. All salmon except coho. Two fish per day (C.1). Chinook minimum size limit 24 inches (61.0 cm) total length through April 30, and 20 inches (50.8 cm) total length thereafter (B). See gear restrictions and definitions (C.2, C.3).

In 2005, the season will open April 2 for all salmon except coho. Two fish per day (C.1), chinook 20 inch (50.8 cm) total length minimum size limit, and the same gear restrictions as in 2004.

Pigeon Point, CA, to U.S.-Mexico Border

April 3 through October 3. All salmon except coho. Two fish per day (C.1). Chinook minimum size limit 24 inches (61.0 cm) total length through April 30, and 20 inches (50.8 cm) total length thereafter (B). See gear restrictions and definitions (C.2, C.3).

In 2005, the season will open April 2 for all salmon except coho. Two fish per day (C.1), chinook 20 inch (50.8 cm) total length minimum size limit, and the same gear restrictions as in 2004.

B. Minimum Size (Total Length in Inches) (See C.1)

Area (when open)	Chinook	Coho	Pink
North of Cape Falcon, OR	26.0	16.0	None
Cape Falcon, OR, to Horse Mt., CA	20.0	16.0	None, except 20.0 off CA
S. of Horse Mt., CA, prior to May 1	24.0	-	20.0
S. of Horse Mt., CA, beginning May 1	20.0	-	20.0

Metric equivalents: 26.0 in=66.0 cm, 24.0 in=61.0 cm, 20.0 in=50.8 cm, 16.0 in=40.6 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. *Compliance with Minimum Size and Other Special Restrictions:* All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished, and the area in which they are landed if that area is open. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught.

Ocean Boat Limits: Off the coast of Washington, Oregon, and California, each fisher aboard a vessel may continue to use angling gear until the combined daily limits of salmon for all licensed and juvenile anglers aboard has been attained (additional state restrictions may apply).

C.2. *Gear Restrictions:* All persons fishing for salmon, and all persons fishing from a boat with salmon on board must meet the gear restrictions listed below for specific areas or seasons.

a. *U.S.-Canada Border to Point Conception, CA:* No more than one rod may be used per angler and single point, single shank barbless hooks are required for all fishing gear. [Note: ODFW regulations in the state-water fishery off Tillamook Bay, OR may allow the use of barbed hooks to be consistent with inside regulations.]

b. *Cape Falcon, OR, to Point Conception, CA:* Anglers must use no more than 2 single point, single shank, barbless hooks.

c. *Horse Mountain to Point Conception, CA:* Single point, single shank, barbless circle hooks (see circle hook definition below) must be used if angling with bait by any means other than trolling and no more than 2 such hooks shall be used. When angling with 2 hooks, the distance between the hooks must not exceed 5 inches (12.7 cm) when measured from the top of the eye of the top hook to the inner base of the curve of the lower hook, and both hooks must be permanently tied in place (hard tied). Circle hooks are not required when artificial lures are used without bait.

C.3. *Gear Definitions:*

a. *Recreational fishing gear defined:* Angling tackle consisting of a line with no more than one artificial lure or natural bait attached. Off Oregon and Washington, the line must be attached to a rod and reel held by hand or closely

attended; the rod and reel must be held by hand while playing a hooked fish. No person may use more than one rod and line while fishing off Oregon or Washington. Off California, the line must be attached to a rod and reel held by hand or closely attended. Weights directly attached to a line may not exceed four pounds (1.8 kg). While fishing off California north of Point Conception, no person fishing for salmon, and no person fishing from a boat with salmon on board, may use more than one rod and line. Fishing includes any activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.

b. *Circle hook defined:* A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

c. *Trolling defined:* Angling from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

C.4. *Control Zone Definitions:*

a. *Columbia Control Zone:* An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09″ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.) and then along the north jetty to the point of intersection with the Buoy #10 line; and, on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

b. *Klamath Control Zone:* The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately 6 nautical miles (11.1 km) north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles (22.2 km) off shore); and, on the south, by 41°26′48″ N. lat. (approximately 6 nautical miles (11.1 km) south of the Klamath River mouth).

c. *Bonilla-Tatoosh Line:* Defined as a line running from the western end of Cape Flattery, WA to Tatoosh Island Lighthouse (48°23′30″ N. lat., 124°44′12″ W. long.) to the buoy adjacent to Duntze Rock (48°28′00″ N. lat., 124°45′00″ W. long.), then in a straight line to Bonilla Point (48°35′30″ N. lat., 124°43′00″ W. long.) on Vancouver Island, B.C.

C.5. *Inseason Management:* Regulatory modifications may become necessary inseason to meet preseason management objectives such as quotas, harvest guidelines, and season duration. Actions could include modifications to bag limits or days open to fishing, and extensions or reductions in areas open to fishing. NMFS may transfer coho inseason among recreational subareas north of Cape Falcon, OR to help meet the recreational season duration objectives (for each subarea) after conferring with the states, Council, representatives of the affected ports, and the Salmon Advisory Subpanel recreational representatives north of Cape Falcon, OR.

C.6. *Additional Seasons in State Waters:* Consistent with Council management objectives, the States of Washington and Oregon may establish limited seasons in state waters. Oregon state-water fisheries are limited to chinook salmon. Check state regulations for details.

Section 3. Treaty Indian Management Measures for 2004 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C which must be followed for lawful participation in the fishery.

A. Season Descriptions

Tribe and Area Boundaries	Open Seasons	Salmon Species	Minimum Size (inches)*		Special Restrictions by Area
			Chinook	Coho	
MAKAH - Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.	May 1 through earlier of June 30 or chinook quota.	All except coho	24	-	Barbless hooks. No more than 8 fixed lines per boat or no more than 4 hand-held lines per person.
	July 1 through earliest of September 15 or chinook or coho quota.	All	24	16	
QUILEUTE - That portion of the FMA between 48°07′36″ N. lat. (Sand Point) and 47°31′42″ N. lat. (Queets River) and east of 125°44′00″ W. long.	May 1 through earlier of June 30 or chinook quota.	All except coho	24	-	Barbless hooks. No more than 8 fixed lines per boat.
	July 1 through earliest of September 15 or chinook or coho quota.	All	24	16	
HOH - That portion of the FMA between 47°54′18″ N. lat. (Quillayute River) and 47°21′00″ N. lat. (Quinault River) and east of 125°44′00″ W. long.	May 1 through earlier of June 30 or chinook quota.	All except coho	24	-	Barbless hooks. No more than 8 fixed lines per boat.
	July 1 through earliest of September 15 or chinook or coho quota.	All	24	16	

Tribe and Area Boundaries	Open Seasons	Salmon Species	Minimum Size (inches)*		Special Restrictions by Area
			Chinook	Coho	
QUINAULT - That portion of the FMA between 47°40′06″ N. lat. (Destruction Island) and 46°53′18″ N. lat. (Point Chehalis) and east of 125°44′00″ W. long.	May 1 through earlier of June 30 or chinook quota.	All except coho	24	-	Barbless hooks. No more than 8 fixed lines per boat.
	July 1 through earliest of September 15 or chinook or coho quota.	All	24	16	

* Metric equivalents: 24 in=61.0 cm, 16 in=40.6 cm.

B. Special Requirements, Restrictions, and Exceptions

B.1. All boundaries may be changed to include such other areas as may hereafter be authorized by a Federal court for that tribe's treaty fishery.

B.2. Applicable lengths for dressed, head-off salmon, are 18 inches (45.7 cm) for chinook and 12 inches (30.5 cm) for coho. There are no minimum size or retention limits for ceremonial and subsistence harvest.

B.3. The area within a 6–nautical mile (11.1–km) radius of the mouths of the Queets River, WA (47°31′42″ N. lat.) and the Hoh River, WA (47°45′12″ N. lat.) will be closed to commercial fishing. A closure within 2 nautical miles (3.7 km) of the mouth of the Quinault River, WA (47°21′00″ N. lat.) may be enacted by the Quinault Nation and/or the State of Washington and will not adversely affect the Secretary of Commerce's management regime.

C. Quotas

C.1. The overall treaty Indian troll ocean quotas are 49,000 chinook and 75,000 coho. The overall chinook quota is divided into 22,500 chinook in the May-June chinook-directed fishery, and 26,500 chinook in the July through September all-salmon season. If the chinook quota for the May-June fishery is not fully utilized, the excess fish cannot be transferred into the later all-salmon season. The quotas include troll catches by the S'Klallam and Makah tribes in Washington State Statistical Area 4B from May 1 through September 15. If the treaty Indian troll catch taken from areas 4–4B is projected inseason to exceed 55,000 coho, the total treaty Indian troll quota will be adjusted to ensure the exploitation rate impact of the treaty Indian troll fishery on Interior Fraser coho does not exceed the level anticipated under the assumptions employed for impact assessment. The Quileute Tribe will continue a ceremonial and subsistence fishery during the time frame of September 15 through October 15; fish taken during this fishery are to be counted against treaty troll quotas established for the 2004 season.

Section 4. Halibut Retention

Under the authority of the Northern Pacific Halibut Act, NMFS promulgated regulations governing the Pacific halibut fishery which appear at 50 CFR part 300, subpart E. On February 27, 2004, NMFS published a final rule (69 FR 9231) to implement the International Pacific Halibut Commission's (IPHC) recommendations, to announce approval of the Area 2A CSP, and to announce fishery regulations for U.S. waters off Alaska and fishery regulations for treaty commercial and ceremonial and subsistence fisheries and some regulations for non-treaty commercial fisheries for U.S. waters off the West Coast. In addition, a final rule to implement Area 2A Pacific halibut CSP and the Area 2A management measures for 2004, effective May 1, 2004, was filed on April 29, 2004, for publication in the **Federal Register** on May 3, 2004. The regulations and management measures provide that vessels participating in the salmon troll fishery in Area 2A (all waters off the States of Washington, Oregon, and California), which have obtained the appropriate IPHC license, may retain halibut caught incidentally during authorized periods in conformance with provisions published with the annual salmon management measures. A salmon troller may participate in the halibut incidental catch fishery during the salmon troll season or in the directed commercial fishery targeting halibut, but not both.

The following measures have been approved by the IPHC, and implemented by NMFS. The operator of a vessel who has been issued an incidental halibut harvest license by the IPHC may retain Pacific halibut caught incidentally in Area 2A, during authorized periods, while trolling for salmon. Incidental harvest is authorized only during the May and June troll seasons. It is also authorized after June 30 if halibut quota remains and if halibut retention is announced on the NMFS hotline (phone 800–622–9825). License holders may land no more than 1 halibut per each 3 chinook, except 1 halibut may be landed without meeting the ratio requirement, and no more than 35 halibut may be landed per trip. Halibut retained must meet the minimum size limit of 32 inches (81.3 cm) total length. The ODFW and WDFW will monitor landings and, if they are projected to exceed the 44,554–lb (20.2–mt) preseason allocation or the Area 2A non-Indian commercial total allowable catch of halibut, NMFS will take inseason action to close the incidental halibut fishery. License applications for incidental harvest must be obtained from the IPHC. Applicants must apply prior to April 1 of each year.

NMFS and the Council request that salmon trollers voluntarily avoid a "C-shaped" yelloweye rockfish conservation area in order to protect yelloweye rockfish. The area is defined in the Pacific Council Halibut Catch Sharing Plan in the North Coast subarea (WA marine area 3)(See Section 1.C.7. for the coordinates).

Section 5. Geographical Landmarks

Wherever the words "nautical miles off shore" are used in this document, the distance is measured from the baseline from which the territorial sea is measured.Geographical landmarks referenced in this document are at the following locations:

Cape Flattery, WA; 48°23′00″ N. lat.
Cape Alava, WA; 48°10′00″ N. lat.
Queets River, WA; 47°31′42″ N. lat.
Leadbetter Point, WA; 46°38′10″ N. lat.
Cape Falcon, OR; 45°46′00″ N. lat.
Florence South Jetty, OR; 44°00′54″ N. lat.
Humbug Mountain, OR; 42°40′30″ N. lat.
Oregon-California Border; 42°00′00″ N. lat.
Humboldt South Jetty, CA; 40°45′53″ N. lat.
Horse Mountain, CA; 40°05′00″ N. lat.
Point Arena, CA; 38°57′30″ N. lat.
Point Reyes, CA; 37°59′44″ N. lat.

Point San Pedro, CA; 37°35′40″ N. lat.
Pigeon Point, CA; 37°11′00″ N. lat.
Point Conception, CA; 34°27′00″ N. lat.

Section 6. Inseason Notice Procedures

Actual notice of inseason management actions will be provided by a telephone hotline administered by the Northwest Region, NMFS, 206–526–6667 or 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts. These broadcasts are announced on Channel 16 VHF-FM and 2182 KHz at frequent intervals. The announcements designate the channel or frequency over which the Notice to Mariners will be immediately broadcast. Inseason actions will also be filed with the **Federal Register** as soon as practicable. Since provisions of these management measures may be altered by inseason actions, fishermen should monitor either the telephone hotline or Coast Guard broadcasts for current information for the area in which they are fishing.

Classification

This notification of annual management measures is exempt from review under Executive Order 12866.

The provisions of 50 CFR 660.411 state that if, for good cause, an action must be filed without affording a prior opportunity for public comment, the measures will become effective; however, public comments on the action will be received for a period of 15 days after the date of publication in the **Federal Register**. NMFS will receive public comments on this action for 15 days after the date of publication of this action in the **Federal Register**. These regulations are being promulgated under the authority of 16 USC 1855(d).

The Assistant Administrator for Fisheries, NOAA (AA) finds good cause under 5 U.S.C. 553(b)(B), to waive the requirement for prior notice and opportunity for public comment, as such prior notice and opportunity for public comment is impracticable.

The annual salmon management cycle begins May 1 and continues through April 30 of the following year. May 1 was chosen because the pre-May harvests constitute a relatively small portion of the annual catch. The time-frame of the preseason process for determining the annual modifications to ocean salmon fishery management measures depends on when the pertinent biological data are available. Salmon stocks are managed to meet annual spawning escapement goals or specific exploitation rates. Achieving either of these objectives requires designing management measures that are appropriate for the ocean abundance predicted for that year. These pre-season abundance forecasts, which are derived from the previous year's observed spawning escapement, vary substantially from year to year, and are not available until January and February because spawning escapement continues through the fall.

The preseason planning and public review process associated with developing Council recommendations is initiated in February as soon as the forecast information becomes available. The public planning process requires coordination of management actions of four states, numerous Indian tribes, and the Federal Government, all of which have management authority over the stocks. This complex process includes the affected user groups, as well as the general public. The process is compressed into a 2–month period which culminates at the April Council meeting at which the Council adopts a recommendation that is forwarded to NMFS for review, approval and implementation of fishing regulations effective on May 1.

Providing opportunity for prior notice and public comments on the Council's recommended measures through a proposed and final rulemaking process would require 30 to 60 days in addition to the 2–month period required for development of the regulations. Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional 60 days would require that fishing regulations for May and June be set in the previous year without knowledge of current stock status. Although this is currently done for fisheries opening prior to May, relatively little harvest occurs during that period (e.g., in 2003 less than 10 percent of commercial and recreational harvest occurred prior to May 1). Allowing the much more substantial harvest levels normally associated with the May and June seasons to be regulated in a similar way would impair NMFS' ability to protect weak and ESA listed stocks and provide harvest opportunity where appropriate.

Overall, the annual population dynamics of the various salmon stocks require managers to vary the season structure of the various West Coast area fisheries to both protect weaker stocks and give fishers access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose abundance has increased relative to the previous year, thereby undermining the purpose of this agency action. For example, the 2004 forecast ocean abundance for Klamath River fall chinook requires a reduction in the total commercial season length between Horse Mountain and Point Arena, CA from 118 days permitted in 2003 to 82 days in 2004. The reduction in time was accomplished largely by closing the fishery during the month of May. North of Cape Falcon, OR the estimated chinook ocean abundance for 2004 is up slightly from last year. However, impacts in the Canadian commercial fishery are expected to increase substantially from the 2003 preseason forecasts. The May-June commercial troll fishery chinook quota for 2004 is 29,800, compared to 40,000 in 2003. The commercial Treaty troll fishery in May-June was reduced from 30,000 in 2003 to 22,500 in 2004. Requiring 2004 fisheries north of Cape Falcon, OR to operate under the 2003 regulations would compromise the status of certain stocks, including, for example, Snake River fall chinook. NMFS ESA consultation standard for Snake River fall chinook requires a 30 percent reduction in impacts for all ocean fisheries, including Alaska and Canada, relative to the 1988–1993 base period. If the 2004 fisheries were managed under the 2003 regulations, the Snake River fall chinook ESA consultation standard would not be met. Based upon the above-described need to have these measures effective on May 1 and the fact that there is limited time available to implement these new measures after the final Council meeting in April and before the commencement of the ocean salmon fishing year on May 1, NMFS has concluded it is impracticable to provide an opportunity for prior notice and public comment under 5 U.S.C. 553(b)(B).

The AA also finds that good cause exists under 5 U.S.C. 553(d)(3), to waive the 30–day delay in effectiveness of this final rule. As previously discussed, data are not available until February and management measures not finalized until early April. These measures are essential to conserve threatened and endangered ocean salmon stocks, and to provide for harvest of more abundant stocks. If these measures are not in place on May 1, the previous year's management measures will continue to apply. Failure to implement these measures immediately could compromise the status of certain stocks and negatively impact international, state, and tribal salmon fisheries, thereby undermining the purposes of this agency action.

To enhance notification of the fishing industry of these new measures, NMFS

is announcing the new measures over the telephone hotline used for inseason management actions and is also posting the regulations on both of its West Coast regional websites (*www.nwr.noaa.gov* and *swr.nmfs.noaa.gov*). NMFS is also advising the States of Washington, Oregon, and California on the new management measures. These states announce the seasons for applicable state and Federal fisheries through their own public notification systems.

This action contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA), and which have been approved by OMB under control number 0648–0433. The public reporting burden for providing notifications if landing area restrictions cannot be met, or to obtain temporary mooring in Brookings, OR is estimated to average 15 minutes per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see **ADDRESSES**).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Since 1989, NMFS has listed 16 ESUs of salmon on the West Coast. As the listings have occurred, NMFS has conducted formal ESA section 7 consultations and issued biological opinions, and made determinations under section 4(d) of the ESA (Table 1), that consider the impacts to listed salmon species resulting from proposed implementation of the Salmon FMP, or in some cases, from proposed implementation of the annual management measures.

TABLE 1.—NMFS' ENDANGERED SPECIES ACT CONSULTATIONS AND SECTION 4(D) DETERMINATIONS RELATED TO OCEAN FISHERIES IMPLEMENTED UNDER THE SALMON FMP AND DURATION OF THE PROPOSED ACTION COVERED BY EACH.

Date	Evolutionarily Significant Unit covered and effective period
March 8, 1996	Snake River chinook and sockeye (until reinitiated)
April 28, 1999	Oregon coast coho, S. Oregon/N. California coast coho, Central California coast coho (until reinitiated)
April 28, 2000	Central Valley spring chinook and California coast chinook (until reinitiated)
April 27, 2001	Hood Canal summer chum 4(d) limit and associated biological opinion (until reinitiated)
April 30, 2001	Upper Willamette River chinook, Upper Columbia River spring chinook, Ozette Lake sockeye, ten steelhead ESUs, Columbia River chum (until reinitiated)
April 27, 2004	Sacramento River winter chinook (until 2010)
April 29, 2004	Puget Sound chinook and Lower Columbia River chinook (until reinitiated)

Associated with the biological opinions are incidental take statements that specify the level of take that is exempted from the section 9 prohibitions of the ESA. Some of the biological opinions have concluded that implementation of the Salmon FMP is not likely to jeopardize the continued existence of certain listed ESUs and provide incidental take statements. Other biological opinions have found that implementation of the Salmon FMP is likely to jeopardize certain listed ESUs and have identified reasonable and prudent alternatives (consultation standards) that would avoid the likelihood of jeopardizing the continued existence of the ESU under consideration.

In a March 5, 2004, letter to the Council, NMFS provided the Council with ESA consultation standards and guidance for the management of stocks listed under the ESA. These management measures meet those standards for ESUs covered by existing opinions. As discussed below, three ESUs were subject to consultation in 2004, and all have been determined to satisfy the requirement that proposed fisheries not jeopardize the continued existence of the ESUs.

For the Puget Sound chinook, NMFS is now completing its final review of a Resource Management Plan (RMP) for the 2004–2009 fisheries submitted by the Washington Department of Fish and Wildlife and Puget Sound Treaty Tribes under the ESA 4(d) rule. Impacts to Puget Sound chinook in Council area fisheries are quite limited. Anticipated impacts in the 2004 Council fisheries range from zero to 3 percent depending on the population. The state and tribes manage their Council-area and inside Puget Sound fisheries as a package in coordination with the Council and NMFS to ensure that all impacts are accounted for and that conservation constraints are met. NMFS has determined that the management measures for the ocean salmon fisheries are consistent with the state and Tribal RMP, and preliminarily that the RMP is consistent with the 4(d) rule. NMFS completed an associated biological opinion on April 29, 2004, that covers the effects of the 2004 Council area fisheries on Puget Sound chinook salmon.

NMFS also reinitiated consultation to update its guidance for Lower Columbia River chinook. The related review was included in the biological opinion for Puget Sound chinook. NMFS guidance related to the tule component of the Lower Columbia River chinook ESU requires that the total exploitation rate resulting from ocean and inriver fisheries not exceed 49 percent. This guidance is the same as that provided in 2002 and 2003. The recommended management measures for 2004 would result in a total exploitation rate of 46 percent, and thus conform with NMFS guidance.

NMFS issued a new supplemental biological opinion for Sacramento River winter chinook prior to the 2004 season, completed on April 27, 2004. NMFS' guidance for the 2004 fishing season with respect to winter chinook is similar to the reasonable and prudent alternative of the 2002 BO.

The Council's recommended management measures are consistent with the biological opinions that find no jeopardy, with the reasonable and prudent alternatives in the jeopardy biological opinions, and with the terms of the State and Tribal RMPs.

Authority: 16 U.S.C. 773–773k; 1801 *et seq.*

Dated: April 29, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 04–10209 Filed 4–30–04; 4:38 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 87
Wednesday, May 5, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–CE–35–AD]

RIN 2120–AA64

Airworthiness Directives; Burkhart GROB Luft—UND Raumfahrt GmbH & CO KG Models G103 TWIN ASTIR, G103A TWIN II ACRO, and G103C TWIN III ACRO Sailplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to revise Airworthiness Directive (AD) 2003–19–14 which applies to all Burkhart GROB Luft—UND Raumfahrt GmbH & CO KG (GROB) Models G103 TWIN ASTIR, G103 TWIN II, G103A TWIN II ACRO, and G103C TWIN III ACRO sailplanes. AD 2003–19–14 currently requires you to modify the airspeed indicators, install flight speed reduction and aerobatic maneuver restriction placards (as applicable), and revise the flight and maintenance manual. This proposed AD would retain all the actions in AD 2003–19–14 for all Model G103 TWIN ASTIR sailplanes, would remove Model G103 TWIN II from the applicability, and would retain the aerobatic maneuver restriction for Model G103C TWIN III ACRO sailplanes. This proposed AD would also require you to revise the modification to airspeed indicators, install a revised flight speed reduction placard, and revise the flight and maintenance manual for certain Models G103A TWIN II ACRO, and G103C TWIN III ACRO sailplanes. Simple Aerobatic maneuvers would also be re-approved for Model G103A TWIN II ACRO sailplanes. An option for modifying the rear fuselage for Models G103A TWIN II ACRO and G103C TWIN III ACRO sailplanes that terminates the flight limitation restrictions for aerobatic maneuvers is also included in this proposed AD.

DATES: We must receive any comments on this proposed AD by May 21, 2004.

ADDRESSES: Use one of the following to submit comments on this proposed AD:

- *By mail:* FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–35–AD, 901 Locust, Room 506, Kansas City, Missouri 64106.
- *By fax:* (816) 329–3771.
- *By e-mail:* 9–ACE–7–Docket@faa.gov. Comments sent electronically must contain "Docket No. 2003–CE–35–AD" in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII.

You may get the service information identified in this proposed AD from GROB Luft-und Raumfahrt, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Germany; telephone: 011 49 8268 998139; facsimile: 011 49 8268 998200; email: *productsupport@grob-aerospace.de.*

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–35–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on this proposed AD? We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include "AD Docket No. 2003–CE–35–AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it. We will date-stamp your postcard and mail it back to you.

Are there any specific portions of this proposed AD I should pay attention to? We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. If you contact us through a nonwritten communication and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend this proposed AD in light of those comments and contacts.

Discussion

Has FAA taken any action to this point? Reports from the Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, that the safety margins established into the design of the fuselage may not have been sufficient to sustain limit loads during certain maneuvers and during flight at certain speeds caused us to issue AD 2003–19–14, Amendment 39–13317 (68 FR 56152, September 30, 2003). AD 2003–19–14 requires the following:

—Modifying the airspeed indicators;
—installing placards restricting flight speeds, prohibiting aerobatic maneuvers, and restricting load limits; and
—incorporating revisions to the flight and maintenance manuals.

AD 2003–19–14 was issued as an interim action until the manufacturer completed further investigations into the effects of certain flight conditions on the fuselage structure and the development of corrective procedures.

What has happened since AD 2003–19–14 to initiate this proposed AD action? The manufacturer conducted further static strength tests to verify the safety margin of the fuselage on the affected sailplanes. The results of these tests verified the following:

For Model G103 TWIN ASTIR sailplanes:
—retain all flight limitation restrictions in AD 2003–19–14.

For Model G103 TWIN II sailplanes:
—reinstate the original flight speed limitations and maneuver operations.

For Model G103A TWIN II ACRO (utility category) sailplanes:
—reinstate the original flight speed limitations and maneuver operations; and
—allow only basic aerobatic maneuvers (spins, lazy eights, chandelles, stall turns, steep turns, and positive loops).

For Model G103A TWIN II ACRO (aerobatic category) sailplanes:
—reinstate the original flight speed limitations except for rough air (V_B) and maneuvering speeds (V_A); and
—allow only basic aerobatic maneuvers (spins, lazy eights, chandelles, stall turns, steep turns, and positive loops).

For Model G103C TWIN III ACRO sailplanes:
—increase airspeed limits specified in AD 2003–19–14 but maintain a reduction from the original limitations; and
—retain restrictions in AD 2003–19–14 on all aerobatic flights, including simple maneuvers, and cloud flying.

The manufacturer has also developed a modification for Models G103A TWIN II ACRO (aerobatic category) and G103C TWIN III ACRO sailplanes (aerobatic category). When this modification is incorporated, full acrobatic status is restored to these sailplanes.

What are the consequences if the condition is not corrected? If not prevented, damage to the fuselage during limit load flight could result in reduced structural integrity. This condition could lead to loss of control of the sailplane.

Is there service information that applies to this subject? Grob has issued Mandatory Service Bulletin No. MSB315–65, dated September 15, 2003; Optional Service Bulletin OSB 315–66, dated October 16, 2003, and Work Instruction for Optional Service Bulletin OSB–315–66, dated October 16, 2003.

What are the provisions of this service information? Mandatory Service Bulletin No. MSB315–65, dated September 15, 2003, includes procedures for:
—modifying the airspeed indicators;
—installing a revised flight speed reduction placard; and
—revising the flight and maintenance manual (as applicable).

Optional Service Bulletin OSB 315–66, dated October 16, 2003, and Work Instruction for Optional Service Bulletin OSB–315–66, dated October 16, 2003, include procedures for installing stringers in the rear fuselage for Models G103A TWIN II ACRO (aerobatic category) and G103C TWIN III ACRO (aerobatic category) sailplanes to terminate the flight limitation restrictions for aerobatic maneuvers.

What action did the LBA take? The LBA classified Service Bulletin No. MSB315–65, dated September 15, 2003, as mandatory and issued German AD Number D–2004–002, dated January 23, 2004, to ensure the continued airworthiness of these sailplanes in Germany.

Did the LBA inform the United States under the bilateral airworthiness agreement? These GROB Models G103 TWIN ASTIR, G103A TWIN II ACRO, and G103C TWIN III ACRO sailplanes are manufactured in Germany and are type-certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Under this bilateral airworthiness agreement, the LBA has kept us informed of the situation described above.

FAA's Determination and Requirements of This Proposed AD

What has FAA decided? We have examined the LBA's findings, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since the unsafe condition described previously is likely to exist or develop on other GROB Models G103 TWIN ASTIR, G103A TWIN II ACRO, and G103C TWIN III ACRO sailplanes of the same type design that are registered in the United States, we are proposing AD action to prevent the possibility of damage to the fuselage during limit load flight due to inadequate safety margins designed into the fuselage. Such a condition could result in reduced structural integrity of the fuselage and lead to loss of control of the sailplane.

What would this proposed AD require? This proposed AD would require you to incorporate the actions in the previously-referenced service bulletins.

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

Costs of Compliance

How many sailplanes would this proposed AD impact? We estimate that this proposed AD affects 94 sailplanes in the U.S. registry.

What would be the cost impact of this proposed AD on owners/operators of the affected sailplanes? We estimate the following costs to accomplish the proposed modifications to the airspeed indicators, flight limitations placards, and revising the flight and maintenance manual:

Labor cost	Parts cost	Total cost per sailplane	Total cost on U.S. operators
1 workhour × $65 = $65	Not applicable	$65	$65 × 94 = $6,110.

We estimate the following costs to accomplish this proposed modification to 35 of the affected sailplanes in the aerobatic category:

Labor cost	Parts cost	Total cost per sailplane
30 workhours × $65 = $1,950	$5,307	$7,257

Regulatory Findings

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

Would this proposed AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this proposed AD:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

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

We prepared a summary of the costs to comply with this proposed AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket No. 2003–CE–35–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2003–19–14, Amendment 39–13317 (68 FR 56152, September 30, 2003), and by adding the following new airworthiness directive (AD):

Burkhart Grob Luft—UND Raumfahrt GmbH & Co KG: Docket No. 2003–CE–35–AD.

When Is the Last Date I Can Submit Comments on This Proposed AD?

(a) We must receive comments on this proposed airworthiness directive (AD) by May 21, 2004.

What Other ADs Are Affected by This Action?

(b) This AD revises AD 2003–19–14.

What Sailplanes Are Affected by This AD?

(c) This AD affects the following sailplane models and serial numbers that are certificated in any category:

Model	Serial Nos.
G103 TWIN ASTIR ...	All serial numbers.
G103A TWIN II ACRO (aerobatic category).	3544 through 34078 with suffix "K".
G103C TWIN III ACRO (aerobatic category).	34101 through 34203.

What Is the Unsafe Condition Presented in This AD?

(d) This proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified in this AD are intended to prevent the possibility of damage to the fuselage during limit load flight. Such a condition could result in reduced structural integrity of the fuselage and lead to loss of control of the sailplane.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) *For G103 TWIN ASTIR sailplanes:* (i) Modify the airspeed indicators; (ii) Install flight speed, aerobatic maneuver, and load limit restriction placards; and (iii) Revise the flight and maintenance manual.	Within the next 10 hours time-in-service (TIS) after October 20, 2003 (the effective date of AD 2003–19–14).	Following GROB Alert Service Bulletin No. ASB315–64, dated June 30, 2003.
(2) *For G103A TWIN II ACRO (acrobatic category) and G103C TWIN III ACRO (acrobatic category) sailplanes:* (i) Re-set the airspeed indicator to the new placard limitations; and (ii) Install the following placards on Model G103A TWIN II ACRO (aerobatic category) sailplanes:	Within the next 25 hours time-in-service (TIS) after the effective date of this AD.	Follow Grob Service Bulletin No. MSB315–65, dated September 15, 2003.

"Simple Aerobatic" maneuvers (spins, lazy eight, chandelles, stall turns, steep turns, and positive loops) are permitted.

Maximum flying weight		580 kg / 1280 lbs		
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	250	135	155
In rough air:	V_B	170	92	105.5
Aerotow:	V_T	170	92	105.5
Winch or auto tow:	V_W	120	65	74.5
Airbrakes extended:	V_{FE}	250	135	155
Maneuvering speed:	V_A	170	92	105.5

(iii) Install the following placards on Model G103C TWIN III ACRO (aerobatic category) sailplanes:

All aerobatic maneuvers and cloud flying are prohibited

Maximum flying weight		580 kg / 1280 lbs		
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	250	135	155
In rough air:	V_{RA}	170	92	105.5
Aerotow:	V_T	170	92	105.5
Winch or auto tow:	V_W	120	65	74.5
Airbrakes extended:	V_{FE}	250	135	155
Maneuvering speed:	V_A	170	92	105.5

(3) *For G103A TWIN II ACRO (acrobatic category) and G103C TWIN III ACRO (acrobatic category) sailplanes:* as an alternative to the flight restrictions in paragraph (e)(2) of this AD, you may install additional stringers in the rear fuselage section. Installing additional stringers terminates the flight restrictions in paragraph (e)(2) of this AD.

At any time after the effective date of this AD.

Follow Grob Service Bulletin No. OSB 315–66, dated October 16, 2003, and Work Instruction for OSB 315–66, dated October 16, 2003.

(4) *For G103A TWIN II ACRO (acrobatic category) and G103C TWIN III ACRO (acrobatic category) sailplanes:* only if you installed the additional stringers specified in paragraph (e)(3) of this AD, do the following:

Prior to further flight after doing the actions in paragraph (e)(3) of this AD.

Follow Grob Service Bulletin No. OSB 315–66, dated October 16, 2003.

(i) Remove the placard prohibiting all aerobatic maneuvers;

(ii) Install the following flight limitation placard on Model G103A TWIN II ACRO (aerobatic category) sailplanes:

Maximum flying weight		580 kp / 1280 lbs		
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	250	135	155
In rough air:	V_{RA}	180	97	115
Aerotow:	V_T	170	92	105.5
Winch or auto tow:	V_W	120	65	74.5
Airbrakes extended:	V_{FE}	250	135	155
Maneuvering speed:	V_A	180	97	115

(iii) Install the following flight limitation placard on Model G103C TWIN III ACRO (aerobatic category) sailplanes:

Maximum flying weight		600 kp / 1323 lbs		
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	280	151	174
In rough air:	V_B	200	108	124
Aerotow:	V_T	185	100	115
Winch or auto tow:	V_W	140	76	87
Airbrakes extended:	V_{FE}	280	151	174
Maneuvering speed:	V_A	185	100	115

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Standards Office, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Gregory A. Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; facsimile: (816) 329–4090.

May I Get Copies of the Documents Referenced in This AD?

(g) You may get copies of the documents referenced in this AD from GROB Luftund Raumfahrt, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Germany; telephone: 011 49 8268 998139; facsimile: 011 49 8268 998200; email: *productsupport@grob-aerospace.de*. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Is There Other Information That Relates to This Subject?

(h) German AD Number D–2004–002, dated January 23, 2004, also addresses the subject of this AD.

Issued in Kansas City, Missouri, on April 26, 2004.

Dorenda D. Baker,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10145 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–339–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–102, –103, and –106 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Bombardier Model DHC–8–102, –103, and –106 airplanes. This proposal would require repetitive detailed inspections of the left and right aileron tab actuator arm channels for cracking, and corrective actions if necessary. This proposal also provides an optional terminating action for the repetitive inspections. This action is necessary to prevent increased roll forces due to cracking of the left and right aileron tab actuator arms, which could be interpreted by the pilot as a flight control problem and might lead to loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–339–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2002–NM–339–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Richard Beckwith, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Ave., Westbury, NY 11590; telephone (516) 228–7306; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2002–NM–339–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–339–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on certain Bombardier Model DHC–8–102, –103, and –106 airplanes. TCCA advises that it has received reports of cracking of the left and right aileron tab actuator arm channels, possibly due to oscillation of the tab against its stops while the airplane was parked tail into wind. This condition, if not corrected, could result in consequent increased roll forces, which could be interpreted by the pilot as a flight control problem and might lead to loss of control of the airplane.

Explanation of Relevant Service Information

Bombardier has issued Service Bulletin 8–57–07, Revision 'F,' dated March 27, 2002, which describes procedures for repetitive detailed inspections (referred to in the service bulletin as special inspections) of

certain left and right aileron tab actuator arm channels for cracking; and for replacement and/or reinforcement of such aileron tab actuator arm channels, which eliminates the need for the repetitive inspections. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. TCCA classified this service bulletin as mandatory and issued Canadian airworthiness directive CF–2002–29, dated May 22, 2002, to ensure the continued airworthiness of these airplanes in Canada. The service bulletin also describes procedures for replacement of the aileron tab with a new, improved tab, which eliminates the need for the repetitive inspections of the replaced tab. TCCA's AD provides for this action as optional.

FAA's Conclusions

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

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletin described previously.

Difference Between Proposed AD and Canadian Airworthiness Directive

Although the Canadian Airworthiness Directive specifies that inspections, repairs, or modifications accomplished per previous issues of the service bulletin are acceptable, this proposed AD requires actions to be accomplished per revision 'F' of the service bulletin. Revision 'F' of the service bulletin includes additional rework not specified in previous issues.

Cost Impact

The FAA estimates that 30 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish each proposed repetitive inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $1,950, or $65 per airplane, per inspection.

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

Regulatory Impact

The regulations proposed herein 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. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Bombardier, Inc. (Formerly de Havilland, Inc.): Docket 2002–NM–339–AD.

Applicability: Model DHC–8–102, –103, and –106 airplanes; serial numbers 3 through 119 inclusive; without Bombardier Modification 8/0864 incorporated; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent increased roll forces due to cracking of the left and right aileron tab actuator arm channels, which could be interpreted by the pilot as a flight control problem and might lead to loss of control of the airplane, accomplish the following:

Inspection and Corrective Actions

(a) Within 500 flight hours after the effective date of this AD, perform a detailed inspection of the left and right aileron tab actuator arm channels for cracking, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–57–07, Revision "F," dated March 27, 2002.

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

(1) If no cracked actuator arm channel is found, repeat the inspection at intervals not to exceed 500 flight hours, until paragraph (a)(2) or (b) of this AD has been accomplished.

(2) If any cracked actuator arm channel is found, prior to further flight, accomplish paragraph (a)(2)(i) or (a)(2)(ii) of this AD. Accomplishment of paragraph (a)(2)(i) or (a)(2)(ii) terminates the repetitive inspections required by paragraph (a)(1) of this AD for the repaired or replaced aileron tab only.

(i) Replace the actuator arm channel with a new actuator arm channel; install a reinforcing angle on the new actuator arm channel; and replace the balance weight arm with a new balance weight arm; in accordance with Part A of the Accomplishment Instructions of the service bulletin.

(ii) Replace the aileron tab with a new, improved aileron tab in accordance with Part C of the Accomplishment Instructions of the service bulletin.

Optional Terminating Action

(b) Reinforcement of both actuator arm channels with reinforcing angles and installation of new balance weight arms in accordance with Part B of the Accomplishment Instructions of Bombardier Service Bulletin 8–57–07, Revision "F," dated March 27, 2002; or replacement of the aileron tabs with new, improved tabs in accordance with Part C of the Accomplishment Instructions of that service bulletin; constitutes terminating action for the repetitive inspections required by paragraph (a)(1) of this AD.

Part Installation

(c) As of the effective date of this AD, no person may install any actuator arm channel or any aileron tab on any airplane except in accordance with paragraph (a)(2) or (b) of this AD.

Alternative Methods of Compliance

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

Note 2: The subject of this AD is addressed in Canadian airworthiness directive CF–2002–29, dated May 22, 2002.

Issued in Renton, Washington, on April 26, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10253 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AC96

Bighorn Canyon National Recreation Area, Personal Watercraft Use

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service (NPS) is proposing to designate areas where personal watercraft (PWC) may be used in Bighorn Canyon National Recreation Area, Montana and Wyoming. This proposed rule implements the provisions of the NPS general regulations authorizing park areas to allow the use of PWC by promulgating a special regulation. The NPS *Management Policies 2001* directs individual parks to determine whether PWC use is appropriate for a specific park area based on an evaluation of that area's enabling legislation, resources and values, other visitor uses, and overall management objectives.

DATES: Comments must be received by July 6, 2004.

ADDRESSES: Comments on the proposed rule should be sent or hand delivered to Superintendent, Bighorn Canyon NRA, P.O. Box 7458, Fort Smith, MT 59035 or you may hand deliver your comments to the Headquarters at 5 Avenue B, Fort Smith, Montana. Comments may also be sent by e-mail to *bica@den.nps.gov*. If you comment by e-mail, please include "PWC rule" in the subject line and your name and return address in the body of your Internet message.

For additional information *see* "Public Participation" under **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Kym Hall, Special Assistant, National Park Service, 1849 C Street, NW., Room 3145, Washington, DC 20240. Phone: (202) 208–4206. E-mail: *Kym_Hall@nps.gov*.

SUPPLEMENTARY INFORMATION:

Background

Additional Alternatives

The information contained in this proposed rule supports implementation of the preferred alternative for Bighorn Canyon National Recreation Area (NRA) in the Environmental Assessment (EA) published June, 2003. The public should be aware that two other alternatives were presented in the EA, including a no-PWC alternative, and those alternatives should also be reviewed and considered when making comments on this proposed rule.

Personal Watercraft Regulation

On March 21, 2000, the National Park Service published a regulation (36 CFR 3.24) on the management of personal watercraft (PWC) use within all units of the national park system (65 FR 15077). This regulation prohibits PWC use in all national park units unless the NPS determines that this type of water-based recreational activity is appropriate for the specific park unit based on the legislation establishing that park, the park's resources and values, other visitor uses of the area, and overall management objectives. The regulation banned PWC use in all park units effective April 20, 2000, except 21 parks, lakeshores, seashores, and recreation areas. The regulation established a 2-year grace period following the final rule publication to provide these 21 park units time to consider whether PWC use should be permitted to continue.

Description of Bighorn Canyon National Recreation Area

Bighorn Canyon National Recreation Area was established by an act of Congress on October 15, 1966, following the construction of the Yellowtail Dam by the Bureau of Reclamation. This dam, named after the famous Crow chairman Robert Yellowtail, harnessed the waters of the Bighorn River and turned this variable stream into a lake. The most direct route to the southern end of Bighorn is via Montana State road 310 from Billings, Montana, or U.S. Highway 14A from Sheridan, Wyoming.

Bighorn Lake extends approximately 60 miles through Wyoming and Montana, 55 miles of which are held within Bighorn Canyon. The Recreation Area is composed of more than 70,000 acres of land and water, which straddles the northern Wyoming and southern Montana borders. There are two visitor centers and other developed facilities in Fort Smith, Montana, and near Lovell, Wyoming. The Afterbay Lake below the Yellowtail Dam is a good spot for trout fishing and wildlife viewing for ducks, geese, and other animals. The Bighorn River below the Afterbay Dam is a world class trout fishing area.

Purpose of Bighorn Canyon National Recreation Area

The purpose and significance statements listed below are from Bighorn Canyon's Strategic Plan and Master Plan. Bighorn Canyon National Recreation Area was established to:

1. Provide for public outdoor recreation use and enjoyment of Bighorn Lake (also referred to as Yellowtail Reservoir) and lands adjacent thereto within the boundary of the National Recreation Area on NPS lands.

2. Preserve the scenic, scientific, and historic features contributing to public enjoyment of such lands and waters.

3. To coordinate administration of the recreation area with the other purposes of the Yellowtail Reservoir project so that it will best provide for: (1) Public outdoor recreation benefits, (2) preservation of scenic, scientific, and historic features contributing to public enjoyment, and (3) management, utilization, and disposal of renewable natural resources that promotes or is compatible with and does not significantly impair public recreation or scenic, scientific, or historic, or features contributing to public enjoyment.

Significance of Bighorn Canyon National Recreation Area

Bighorn Canyon National Recreation Area is significant for the following reasons:

1. The outstanding scenic and recreational values of the 60-mile long, 12,700 acre Bighorn Lake.

2. The history of over 10,000 years of continuous human habitation.

3. The contribution the recreation area is making to the preservation of wild horses on the Pryor Mountain Wild Horse Range, of which one-third is located within the recreation area, as well as the preservation of a Bighorn sheep herd that repatriated the area in the early 1970s.

The 19,000 acre Yellowtail Wildlife Habitat, which preserves one of the best examples of a Cottonwood Riparian area remaining in the western United States.

Authority and Jurisdiction

Under the National Park Service's Organic Act of 1916 (Organic Act) (16 U.S.C. 1 *et seq.*) Congress granted the NPS broad authority to regulate the use of the Federal areas known as national parks. In addition, the Organic Act (16 U.S.C. 3) allows the NPS, through the Secretary of the Interior, to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks * * *"

16 U.S.C. 1a–1 states, "The authorization of activities shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established * * *"

As with the United States Coast Guard, NPS's regulatory authority over waters subject to the jurisdiction of the United States, including navigable waters and areas within their ordinary reach, is based upon the Property and Commerce Clauses of the U.S. Constitution. In regard to the NPS, Congress in 1976 directed the NPS to "promulgate and enforce regulations concerning boating and other activities on or relating to waters within areas of the National Park System, including waters subject to the jurisdiction of the United States * * *" (16 U.S.C. 1a–2(h)). In 1996 the NPS published a final rule (61 FR 35136, July 5, 1996) amending 36 CFR 1.2(a)(3) to clarify its authority to regulate activities within the National Park System boundaries occurring on waters subject to the jurisdiction of the United States.

PWC Use at Bighorn Canyon National Recreation Area

Personal watercraft use on Bighorn Lake began during the early 1990s. During 2001, personal watercraft comprised approximately 5% of the boat use on Bighorn Lake. Before the ban was imposed in November 2002, personal watercraft were allowed to operate throughout the national recreation area, but most personal watercraft use occurred at the north end of the lake in the vicinity of Ok-A-Beh Marina. The primary use season is mid-May through mid-September. During the other months the water is generally too cold for PWC use.

Bighorn Canyon has two marinas: Horseshoe Bend and Ok-A-Beh. Both provide gas, rental docks, food, and boater supplies, typically from Memorial Day through Labor Day. Personal watercraft (before the ban) and other watercraft could also enter the lake at Barry's Landing, which has a launching ramp but no marina. Primitive access to the lake is available at the causeway, and access to the Bighorn and Shoshone Rivers is available throughout the Yellowtail Wildlife Habitat. Watercraft may be launched at the Afterbay launch ramp and on the river at the Afterbay and Three-Mile access areas.

Personal watercraft (before the closure) and other watercraft are piloted over the main surface of the lake, along the lakeshore, and in coves and back bays. Boaters may camp at one of the national recreation area's 156 developed campsites or at one of nearly 30 primitive campsites.

No surveys have been conducted regarding the operating hours of personal watercraft at Bighorn Canyon National Recreation Area, though most personal watercraft probably operate between the hours of dawn to dusk. There are currently no State regulations regarding hours of operation in either Montana or Wyoming. Due to the narrowness of Bighorn Lake, most watercraft activity, including use of personal watercraft before the ban, occurs in the several wide sections of the lake, or watercraft traverse back and forth across the lake. Some thrill-seeking activity by personal watercraft users did occur.

Before the ban on PWC use, PWC use was such a small percentage of the overall boating use within Bighorn Canyon that accidents involving PWC operators varied greatly from year to year. Two accidents were recorded at Bighorn Canyon National Recreation Area during the 2000 and 2001 seasons. Both accidents were attributed to the operators' inexperience in operating personal watercraft, allowing them to run into other vessels. Statistics for other vessel accidents per year are similar.

Complaints regarding misuse of personal watercraft are infrequent, and the most commonly reported are wakes in the flat-wake zones near boat launch areas. Bighorn Canyon National Recreation Area has issued citations under Montana and Wyoming State law to personal watercraft users for acts such as wake jumping, under-age riding, and failing to wear flotation devices. The most common citation has been for under-age riding. Montana State law requires riders age 13 and 14 to have a certificate, and riders 12 and younger must be accompanied by an adult. Wyoming State law requires riders to be 16 years old.

Resource Protection and Public Use Issues

Bighorn Canyon National Recreation Area Environmental Assessment

The environmental assessment was available for public review and comment for the period June 9, 2003, through July 11, 2003. To request a copy of the document call 307–548–2251 or write Bighorn Canyon National Recreation Area, Attn: PWC EA, 20 Highway 14A East, Lovell, WY 82431. Requests may be e-mailed to *Karen_Schwab@nps.gov.* A copy of the Environmental Assessment may also be found at *www.nps.gov/bica/EAPWC.pdf.*

The purpose of the Environmental Assessment was to evaluate a range of alternatives and strategies for the management of PWC use at Bighorn Canyon to ensure the protection of park resources and values while offering recreational opportunities as provided for in the National Recreation Area's enabling legislation, purpose, mission, and goals. The assessment assumed alternatives would be implemented beginning in 2002 and considered a 10-year period, from 2002 to 2012. The assessment also compares each alternative to PWC use before November 7, 2002, when the service-wide closure took effect. In addition, the Environmental Assessment defines such terms as "negligible" and "adverse." In this document, these terms are used to describe the environmental impact. Refer to the EA for complete definitions.

The environmental assessment evaluates three alternatives addressing the use of personal watercraft at Bighorn Canyon National Recreation Area:

Alternative A—By using a special regulation, the park would reinstate PWC use under those restrictions that applied to PWC use before November 7, 2002, as defined in the park's Superintendent's Compendium. Under this alternative, the following areas would be closed to PWC use:

1. Gated area south of Yellowtail Dam's west side to spillway entrance works, and Bighorn River from Yellowtail Dam to cable 3,500 feet north.

2. At Afterbay Dam—from fenced areas on west side of dam.

3. Afterbay Lake—Area between dam intake works and buoy/cable line 100 feet west.

4. Government docks as posted.

5. At Ok-A-Beh gas dock (customers excepted).

6. From Yellowtail Dam upstream to the log boom.

7. In addition, docking would be limited at courtesy docks at Ok-A-Beh, Barry's Landing, Horseshoe Bend, and at the Box Canyon Comfort Station Dock (exclusive of adjacent slips) to 15 minutes (official and concession vessels excepted). Crooked Creek Bay would be closed to towing of people and personal watercraft use. Also, Montana and Wyoming State laws would continue to apply to personal watercraft operators.

8. Alternative B—By using a special regulation, the park would manage PWC use by imposing management prescriptions in addition to those restrictions in effect before November 7, 2002. In addition to those areas closed to PWC use listed in alternative A, alternative B would include a closure of the Bighorn Lake and shoreline south of the area known as the South Narrows (legal description R94W, T57N at the SE corner of Section 6, the SW corner of Section 5, the NE corner of Section 7, and the NW corner of Section 8). Bighorn Canyon National Recreation Area would also install buoys to delineate this boundary and personal watercraft users would be required to stay north of this boundary. Under alternative B, Bighorn Canyon would also establish a PWC user education program implemented through vessel inspections, law enforcement contacts, and signing.

No-Action Alternative—Under the no-action alternative, the National Park Service would take no action to reinstate the use of personal watercraft at Bighorn Canyon National Recreation Area and no special rule would be promulgated to continue personal watercraft use. Under this alternative, NPS would continue the ban on personal watercraft use at Bighorn Canyon National Recreation Area begun in November 2002.

Alternative B is the park's preferred alternative because it would best fulfill the park responsibilities as trustee of the sensitive habitat; ensure safe, healthful, productive, and aesthetically and culturally pleasing surroundings; and attain a wider range of beneficial uses of the environment without degradation, risk of health or safety, or other undesirable and unintended consequences.

As previously noted, NPS will consider the comments received on this proposal, as well as the comments received on the Environmental Assessment. In the final rule, the NPS will implement one of these alternatives as proposed, or choose a different alternative or combination of alternatives. Therefore, the public should review and consider the other alternatives contained in the Environmental Assessment when making comments on this proposed rule.

The following summarizes the predominant resource protection and public use issues associated with reinstating PWC use at Bighorn Canyon National Recreation Area. Each of these issues is analyzed in the *Bighorn Canyon National Recreation Area, Personal Watercraft Use Environmental Assessment.*

Water Quality

Most research on the effects of personal watercraft on water quality focuses on the impacts of two-stroke engines, and it is assumed that any impacts caused by these engines also apply to the personal watercraft powered by them. There is general agreement that two-stroke engines discharge a gas-oil mixture into the water. Fuel used in PWC engines contains many hydrocarbons, including benzene, toluene, ethylbenzene, and xylene (collectively referred to as BTEX) and polyaromatic hydrocarbons (PAH). PAH also are released from boat engines, including those in personal watercraft. These compounds are not found appreciably in the unburned fuel mixture, but rather are products of combustion. Discharges of these compounds—BTEX and PAH—have potential adverse effects on water quality.

A typical conventional (*i.e.*, carbureted) two-stroke PWC engine discharges as much as 30% of the unburned fuel mixture directly into the water. At common fuel consumption rates, an average two-hour ride on a personal watercraft may discharge 3 gallons of fuel into the water. According to the California Air Resources Board, an average personal watercraft can discharge between 1.2 and 3.3 gallons of fuel during one hour at full throttle. However, hydrocarbon (HC) discharges to water are expected to decrease substantially over the next 10 years due to mandated improvements in engine technology from the Environmental Protection Agency (EPA).

Under this proposed rule, PWC use would be reinstated within Bighorn Canyon with some new restrictions. In addition to the areas that were closed to PWC use before the ban, the proposed rule would also close Bighorn Lake and its shoreline south of the area known as the South Narrows. The adverse impacts on water quality from this proposed rule would be the same as was the case before the ban. Closure of the South Narrows area to PWC use would not measurably change water quality impacts because in an average year the water levels in this area are generally below the elevation of launch facilities thus precluding the use of PWC in that area. PWC use under the proposed rule would have negligible adverse effects on water quality based on ecotoxicological threshold volumes. All pollutant loads in 2002 and 2012 from personal watercraft and other motorboats would be negligible and well below ecotoxicological benchmarks and criteria.

Adverse water quality impacts from PWC from benzo(a)pyrene, benzene, and MTBE based on human health (ingestion of water and fish) benchmarks would be negligible in both 2002 and 2012, based on water quality criteria set by the EPA, as well as water quality criteria for Wyoming and Montana. Cumulative adverse impacts from personal watercraft and other watercraft would be negligible for benzo(a)pyrene, benzene and MTBE. Therefore, the implementation of the proposed rule would not result in an impairment of the water quality resource.

Air Quality

PWC emit various compounds that pollute the air. In the two-stroke engines commonly used in PWC, the lubricating oil is used once and is expelled as part of the exhaust; and the combustion process results in emissions of air pollutants such as volatile organic compounds (VOC), nitrogen oxides (NO_X), particulate matter (PM), and carbon monoxide (CO). PWC also emit fuel components such as benzene that are known to cause adverse health effects. Even though PWC engine exhaust is usually routed below the waterline, a portion of the exhaust gases go into the air. These air pollutants may adversely impact park visitor and employee health, as well as sensitive park resources.

For example, in the presence of sunlight VOC and NO_X emissions combine to form ozone. Ozone causes respiratory problems in humans, including cough, airway irritation, and chest pain during inhalations. Ozone is also toxic to sensitive species of vegetation. It causes visible foliar injury, decreases plant growth, and increases plant susceptibility to insects and disease. Carbon monoxide can affect humans as well. It interferes with the

oxygen carrying capacity of blood, resulting in lack of oxygen to tissues. NO_X and PM emissions associated with PWC use can also degrade visibility. NO_X can also contribute to acid deposition effects on plants, water, and soil. However, because emission estimates show that NO_X from personal watercraft are minimal (less than 5 tons per year), acid deposition effects attributable to personal watercraft use are expected to be minimal.

Under the proposed rule the annual number of personal watercraft using Bighorn Lake would be essentially the same as before the ban (approximately 449 PWC per year). Additional management strategies in the proposed rule would not affect the number of PWC using Bighorn Lake in 2002 through 2012. Therefore, the emission levels and impacts of continued PWC use to air quality related values would be negligible adverse. In addition, cumulative adverse impacts on air quality related values at Bighorn Canyon National Recreation Area in both 2002 and 2012 would also be negligible.

This conclusion is based on calculated levels of pollutant emissions and the low SUM06 values (ozone levels). There are no observed visibility impacts or ozone-related plant injury in the recreation area. Therefore, implementation of the proposed rule would not result in an impairment of air quality related values.

Soundscapes

Historically, PWC use patterns in Bighorn Canyon are characterized by several people per PWC who take turns riding. Personal watercraft will return to the area where a group is picnicking/camping to rest or switch riders. From park staff observations, personal watercraft generally run at higher speeds (and higher noise levels) leaving the launch or picnic/camping areas than when personal watercraft are in open water. While in the Montana jurisdictional area (which is the majority of the proposed use area), PWC users must travel at flat wake speed when operating on a lake within 100 feet of a drifting, trolling, or anchored watercraft, persons in the water, or on a river within 50 feet of a dock, swimming raft, non-motorized boat, or anchored vessel. However, there are picnic and other shoreline use areas where PWC can operate closer to shore, if no swimmers are present. Users at the picnic areas or swimming areas at those locations are exposed to PWC noise as they come in and out of the shore area if allowed, and from the noise of several PWC that may be operating at high [illegible] speeds in the vicinity. Currently, no Montana or Wyoming laws restrict PWC speed other than when in a flat wake area. The noise impact from a PWC coming into the shore area is dependent on the distance from shore that the operator slows down and at what speed they approach the shoreline. One PWC operating at 50 feet from shore at 40 mph would generate noise levels of approximately 78 dBA to a shoreline observer; at 20 mph, the noise level would be approximately 73 dBA. At a distance of 100 feet, the noise level would be approximately 6 dBA less than at a distance of 50 feet. The noise level from two identical watercraft would be 3 dBA higher than from a single vessel. With new designs of personal watercraft, engines may be quieter in the future.

The proposed rule would implement restrictions in addition to those in place before the closure. Specifically, PWC would not be allowed south of the area known as the South Narrows. The geographic restriction of the proposed rule would result in the elimination of PWC noise experienced by park visitors in the areas south of the South Narrows, including fishermen, shoreline, and near shoreline users of the swimming, picnic, and camping areas. Because PWC use is already limited in this area due to low water levels, beneficial impacts from a reduction of PWC noise would be negligible.

Overall, the types and levels of adverse impacts from PWC to the soundscape north of the South Narrows would be generally the same as before the ban, which would include short-term, minor to moderate adverse impacts at certain locations along the lake on days of higher PWC use. Minor adverse impacts would occur at times and places where use is infrequent and distanced from other park users, for example, as PWC users operated farther from shore. Moderate adverse impacts would occur at landings on the lake on days of relatively consistent PWC operation with more than one PWC operating at one time. Moderate adverse impacts would occur from highly concentrated PWC use in one area and in areas where PWC noise is magnified off the surrounding cliffs. Impacts would generally be short-term, although could periodically be longer-term at shoreline areas on the very high use days, where motorized noise may predominate off and on for most of the day.

Non-PWC noise sources in Bighorn Canyon include natural sounds such as waves or wind, other boats, and other visitor activities. Motorboats account for approximately 96% of all watercraft use on Bighorn Lake. Although some motorboats can generate maximum sound levels similar to PWC, the motorboats are generally not perceived to be as annoying due to their more typical steady rate of speed and direction. Further, at Bighorn Canyon, most are driven at slow speeds for fishing/trolling or sightseeing and create relatively low noise levels. The geographic restriction of this proposed rule would only slightly reduce cumulative noise impacts south of the South Narrows area compared to before the ban because PWC use is already limited in this area due to low water levels.

The proposed rule would result in a negligible to moderate adverse impact on the national recreation area soundscape. PWC impacts would be negligible south of the South Narrows due to geographic restriction of PWC in this area. Minor and moderate PWC noise impacts would occur in the areas of the national recreation area north of the South Narrows. Impacts would generally be short-term, although could periodically be longer-term at shoreline areas on the very high use days, where motorized noise may predominate off and on for most of the day. Cumulative noise impacts from personal watercraft, motorboats, and other visitors would be minor to moderate because these sounds would be heard occasionally throughout the day, and may predominate on busy days during the high use season. Therefore, implementation of the proposed rule would not result in an impairment of soundscape values.

Wildlife and Wildlife Habitat

Some research suggests that PWC use affects wildlife by causing interruption of normal activities, alarm or flight, avoidance or degradation of habitat, and effects on reproductive success. This is thought to be a result of the combination of PWC speed, noise, and ability to access sensitive areas, especially in shallow-water depths. Waterfowl and nesting birds are the most vulnerable to personal watercraft. Fleeing a disturbance created by personal watercraft may force birds to abandon eggs during crucial embryo development stages, prevent nest defense from predators, and contribute to stress and associated behavior changes. Impacts on sensitive species are documented under "Threatened, Endangered, or Special Concern Species."

Under the proposed rule, PWC use would occur as before the ban, with additional restrictions. Restrictions on PWC use would include a closure of Bighorn Lake and shoreline south of the [illegible]

area known as the South Narrows. Buoys would be installed to delineate the boundary and PWC users would be required to stay north of this boundary. A user education program would also be implemented through vessel inspections, law enforcement contacts, and signing. Interactions between wildlife and human visitors would be limited because of the low abundance of wildlife within the PWC use areas and the lack of shoreline access.

The proposed rule would result in some beneficial impacts on wildlife as increased user awareness and a decreased area of PWC activity would reduce the likelihood of user and wildlife conflicts. The Yellowtail Wildlife Habitat area, typically an area of infrequent PWC use due to low water levels but with potential for use when water levels are sufficient, would be closed. Adverse impacts on fish and wildlife from PWC use on Bighorn Lake would remain negligible to minor, but would be less than those predicted without the additional restrictions. All wildlife impacts would be temporary and short term.

The cumulative effects of the proposed rule would be the same as before the ban. Adverse impacts on wildlife and wildlife habitat from visitor activities including PWC and boating use would be short-term and minor to moderate.

Therefore, when compared to before the ban, the reinstatement of PWC use with additional restrictions and education efforts would have beneficial impacts on wildlife due to the decreased noise and disturbance from PWC. Although reduced, impacts on wildlife and wildlife habitat from PWC use would remain adverse negligible to minor in 2002 and 2012, similar to before the ban. All wildlife impacts from personal watercraft would be temporary and short term. Cumulative adverse impacts from visitor activities would be minor to moderate which is the same as before the ban. Lake level fluctuations would also contribute to cumulative adverse impacts through minor to moderate levels of short to long-term habitat disturbance. Therefore, the implementation of the proposed rule would not result in impairment to wildlife or wildlife habitat.

Threatened, Endangered, or Special Concern Species

The same issues described for PWC use and general wildlife also pertain to special concern species. Potential impacts from personal watercraft include inducing flight and alarm responses, disrupting normal behaviors and causing stress, degrading habitat quality, and potentially affecting reproductive success. Special status species at the recreation area include Federal or State listed threatened, endangered, or candidate species. Additionally, some species at Bighorn Lake are designated by Wyoming and/or Montana as special concern species.

The Endangered Species Act (16 U.S.C 1531 *et seq.*) mandates that all Federal agencies consider the potential effects of their actions on species listed as threatened or endangered. If the National Park Service determines that an action may adversely affect a Federally listed species, consultation with the U.S. Fish and Wildlife Service is required to ensure that the action will not jeopardize the species' continued existence or result in the destruction or adverse modification of critical habitat.

Under this proposed rule, PWC use would occur as it did prior to the closure, with additional restrictions. Restrictions on PWC use would include a closure of Bighorn Lake and shoreline south of the area known as the South Narrows. Buoys would be installed to delineate the boundary and PWC users would be required to stay north of this boundary. A user education program will also be implemented through vessel inspections, law enforcement contacts, and signing.

The closure of the southernmost portion of Bighorn Lake would eliminate noise and disturbance from the infrequent use that occurs in this area when water levels are sufficient for PWC use. Special status species that are known to occur in this area such as the bald eagle and persistent sepal yellowcress would benefit from the closure and no effect on these species would be expected from PWC under the proposed rule. The establishment of a user education program would assist in lowering PWC accident frequency, as well as in increasing PWC user awareness of potential conflicts with wildlife. This would lead to a reduction in the potential for PWC-related effects on special status species relative to before the ban.

Under the proposed rule, cumulative impacts on special status species would be similar to before the ban and may affect, but would not likely adversely affect special status species or their habitat. Cumulative impacts would result from lake level fluctuations as well as visitor activities that are concentrated mostly in developed areas rather than in habitat for special status species.

Under the proposed rule, PWC use at Bighorn Lake may affect, but would not likely adversely affect, special status species including Rocky Mountain bighorn sheep, American peregrine falcon, Townsend's big-eared bat, or northern leopard frog. However, the potential for impacts on these species would be reduced relative to before the ban due to the decreased area of allowed PWC use and increased PWC user education efforts. Potential effects on the bald eagle and persistent sepal yellowcress would be eliminated by the closure of the area south of the South Narrows to PWC use and no effects from PWC would occur to these species under this proposed rule. There would be no PWC-caused effects on all other Federal or State listed species including the mountain plover, plains spadefoot toad, Hapeman's sullivantia, Lesica's bladderpod, sweetwater milkvetch, or rabbit buckwheat as was the case before the ban. All impacts on special status species would be temporary and short term. Cumulative impacts may affect but would not be likely to adversely affect special status species and would result from lake level fluctuations as well as visitor activities that are concentrated mostly in developed areas rather than in habitat for special status species. Therefore, the implementation of this proposed rule would not result in an impairment of threatened or endangered species.

Shoreline Vegetation

PWC are able to access areas that other types of watercraft may not, which may cause direct disturbance to vegetation. Indirect impact on shoreline vegetation may occur through trampling if operators disembark and engage in activities on shore. In addition, wakes created by personal watercraft may affect shorelines through erosion by wave action. The proposed rule aims to limit these disturbances to the shoreline areas.

Under the proposed rule, PWC use would occur as before the ban with additional restrictions. Restrictions on PWC use would include a closure of Bighorn Lake and shoreline south of the area known as the South Narrows. Buoys would be installed to delineate the boundary and PWC users would be required to stay north of this boundary. A user education program will also be implemented through vessel inspections, law enforcement contacts, and signing.

The closure of the area south of the South Narrows would have potential benefits to the wetland and riparian communities during times when water levels are sufficient for PWC access. In addition, the user education program would increase the awareness of visitors to the importance of these vegetation

communities. Impacts from PWC use to shorelines and sensitive shoreline vegetation would remain negligible, adverse, and short-term.

Cumulative adverse impacts related to other watercraft and visitor activities would be the same as before the ban and would be negligible to minor. Impacts from water level fluctuations to shorelines and shoreline vegetation would continue to be minor to moderate.

Reduced PWC access would eliminate adverse impacts in the southern most portion of the national recreation area during times when there are sufficient water levels to provide access by PWC, resulting in beneficial impacts on sensitive shoreline vegetation. Cumulative adverse impacts from PWC and other watercraft use and visitor activities would remain negligible to minor, while impacts from lake level fluctuations would remain minor to moderate. Therefore, the implementation of this proposed rule would not result in an impairment of shoreline vegetation.

Visitor Experience

The proposed rule will minimize potential conflicts between PWC use and other park visitors. PWC use would be reinstated as before the ban, with some additional restrictions including a closure of Bighorn Lake and shoreline south of the area known as the South Narrows. Buoys would be installed to delineate the boundary, and PWC would be required to stay north of this boundary.

Impacts on PWC Users. The use restriction south of the South Narrows would have a negligible adverse impact on the experience of PWC users. This area is not popular with PWC users and the rest of the lake would still be open to PWC use; however, the restriction does eliminate the possibility of PWC use in this area. Overall, this proposed rule would have a long-term negligible adverse impact on PWC users at Bighorn Canyon.

Impacts on Other Boaters. Other boaters (motorized and non-motorized) would interact with PWC operators and experience impacts similar to before the ban. The PWC use restriction south of the South Narrows would benefit other boaters using this area, as there would be no potential for PWC to adversely impact their experience. Further, since this part of Bighorn Canyon has not historically had high PWC use, closure south of the South Narrows would not force a large number of PWC to other parts of the lake and shoreline, thereby impacting other boaters. Therefore, impacts on all boaters south of the South Narrows will be beneficial, and north of the South Narrows will be negligible adverse.

Impacts on Other Visitors. Campers, swimmers, water skiers, anglers, hikers, and other shoreline visitors to the lake would interact with PWC users and experience impacts similar to those that occurred before the ban on PWC use. Closure of the lake south of the South Narrows would not result in PWC users relocating to other parts of the lake since this was not a high PWC use area. Thus, impacts on other visitors would be similar to before the ban. Under the proposed rule, north of the South Narrows the impact would be negligible to minor adverse on the shoreline visitors and minor to moderate adverse on those seeking natural quiet. South of the South Narrows impacts would be beneficial to all visitors.

The cumulative impacts on visitor use and experience under the proposed rule would be the same as before the ban. Predictable cumulative impacts related to the use of personal watercraft, motorized boats, and other visitor activities would be negligible adverse over the short and long term. Designation of the closed area south of the South Narrows would have a negligible adverse impact on most PWC users since this area has not had high PWC use, and most of Bighorn Lake would still be open for use. Other boaters and all shoreline users would experience negligible adverse impacts north of the South Narrows and beneficial impacts south of the South Narrows. Cumulative effects of PWC use, other watercraft, and other visitors would result in long-term, negligible adverse impacts.

Visitor Conflict and Safety

The proposed rule will minimize or reduce the potential for PWC user accidents and the potential safety conflicts between PWC users and other water recreationists. Under the proposed rule PWC use would be reinstated as before the ban, with additional restrictions including a closure of Bighorn Lake and shoreline south of the area known as the South Narrows. Buoys would be installed to delineate this boundary, with PWC required to stay north of this boundary.

Personal Watercraft/Swimmer Conflicts. The greatest potential for conflict between PWC and swimmers is at the designated swim beaches at Horseshoe Bend and Ok-A-Beh. The area south of the South Narrows is not a high swim-use area, thus impacts on swimmers related to visitor safety and conflicts would be negligible adverse.

Personal Watercraft/Other Boat Conflicts. Impacts on other boaters would be similar to before the ban north of the South Narrows and would be negligible to minor adverse. South of the South Narrows, impacts on other boaters would be beneficial, due to closing this area to PWC use.

Personal Watercraft/Other Visitor Conflicts. Bighorn Lake and its shoreline are used by a variety of visitors, including, campers, anglers, and hikers; however, due to the steep topography of the shoreline, most activity is concentrated near developed areas. Shoreline areas that are popular with both PWC and other shoreline users include Horseshoe Bend and Ok-A-Beh. Since lakewide PWC use is expected to increase by one PWC per high-use day by 2012, conflicts and safety issues between PWC users and other visitors would be expected to increase minimally north of the South Narrows and would be negligible adverse. South of the South Narrows, impacts on safety and conflict issues related to all other visitors would be beneficial.

Cumulative impacts would be similar to before the ban. Predictable cumulative impacts related to the use of personal watercraft, motorized boats, and other visitor activities would be negligible adverse over the short and long term. Reinstated PWC use under the proposed rule would have beneficial impacts on visitor conflict and safety goals south of the South Narrows. North of the South Narrows impacts on visitor conflict and safety goals would be negligible adverse. Cumulative impacts related to visitor conflicts and safety would be negligible to minor adverse for all user groups in the short and long term, particularly near the high use areas.

The Proposed Rule

Under the proposed rule in § 7.92 the following areas would remain closed to PWC operations:

1. Gated area south of Yellowtail Dam's west side to spillway entrance works and Bighorn River from Yellowtail Dam to cable 3,500 feet north.
2. At Afterbay Dam from fenced areas on west side of dam up to the dam.
3. In Afterbay Lake, the area between dam intake works and buoy/cable line 100 feet west.
4. Government docks as posted.
5. At Ok-A-Beh, the gas dock except for customers.
6. From Yellowtail Dam upstream to the log boom.
7. Big Horn Lake and shoreline south of the area known as the South Narrows

near the Yellowtail Wildlife Habitat Area.

Bighorn Canyon National Recreation Area would install buoys to delineate the south boundary. Personal watercraft users would be required to stay north of this boundary. Bighorn Canyon would establish a PWC user education program implemented through vessel inspections, law enforcement contacts, and signing. Additionally the park will develop maps of the park with all closures delineated and post these maps on the park's Web site. All applicable State of Montana and State of Wyoming laws would continue to apply to personal watercraft users. It should be noted that the water area south of the South Narrows is closed to all vessels. There is not enough water in that area of the lake to sustain vessel use at this time. Should the water levels rise in the future, the area would continue to remain closed to all vessels for wildlife habit management purposes.

Summary of Economic Impacts

Alternative A would permit PWC use as previously managed within the park before the November 7, 2002, ban, while Alternative B would permit PWC use with additional management strategies. Alternative B is the preferred alternative, and includes a closure of the reservoir and shoreline south of the area known as the South Narrows, and a PWC user education program implemented through vessel inspections, law enforcement contacts, and signing. Alternative C is the no-action alternative and represents the baseline conditions for this economic analysis. Under that alternative, the November 7, 2002, ban would be continued. All benefits and costs associated with Alternatives A and B are measured relative to that baseline.

The primary beneficiaries of Alternatives A and B would be the park visitors who use PWCs and the businesses that provide services to PWC users such as rental shops, restaurants, gas stations, and hotels. Additional beneficiaries include individuals who use PWCs outside the park due to the November 7, 2002, ban. Over a ten-year horizon from 2003 to 2012, the present value of benefits to PWC users is expected to range between $540,900 and $693,650, depending on the alternative analyzed and the discount rate used. The present value of benefits to businesses over the same timeframe is expected to range between $27,420 and $210,640. These benefit estimates are presented in Table 1. The amortized values per year of these benefits over the ten-year timeframe are presented in Table 2.

TABLE 1.—PRESENT VALUE OF BENEFITS FOR PWC USE IN BIGHORN CANYON NATIONAL RECREATION AREA, 2003–2012

[2001 $][a]

	PWC users	Businesses	Total
Alternative A:			
Discounted at 3%[b]	$693,650	$36,980 to $210,640	$730,630 to $904,290.
Discounted at 7%[b]	$569,370	$29,230 to $166,440	$598,600 to $735,810.
Alternative B:			
Discounted at 3%[b]	$658,960	$34,700 to $196,470	$693,660 to $855,430.
Discounted at 7%[b]	$540,900	$27,420 to $155,240	$568,320 to $696,140.

[a] Benefits were rounded to the nearest ten dollars, and may not sum to the indicated totals due to independent rounding.
[b] Office of Management and Budget Circular A–4 recommends a 7% discount rate in general, and a 3% discount rate when analyzing impacts to private consumption.

TABLE 2.—AMORTIZED TOTAL BENEFITS PER YEAR FOR PWC USE IN BIGHORN CANYON NATIONAL RECREATION AREA, 2003–2012

[2001 $]

	Amortized total benefits per year[a]
Alternative A:	
Discounted at 3%[b]	$85,652 to $106,010.
Discounted at 7%[b]	$85,227 to $104,763.
Alternative B:	
Discounted at 3%[b]	$81,318 to $100,282.
Discounted at 7%[b]	$80,916 to $99,115.

[a] This is the present value of total benefits reported in Table 1 amortized over the ten-year analysis timeframe at the indicated discount rate.
[b] Office of Management and Budget Circular A–4 recommends a 7% discount rate in general, and a 3% discount rate when analyzing impacts to private consumption.

The primary group that would incur costs under Alternatives A and B would be the park visitors who do not use PWCs and whose park experiences would be negatively affected by PWC use within the park. At Bighorn Canyon National Recreation Area, non-PWC uses include boating, canoeing, fishing, and hiking. Additionally, the public could incur costs associated with impacts to aesthetics, ecosystem protection, human health and safety, congestion, nonuse values, and enforcement. However, these costs could not be quantified because of a lack of available data. Nevertheless, the magnitude of costs associated with PWC use would likely be greatest under Alternative A, and lower for Alternative B due to increasingly stringent restrictions on PWC use.

Because the costs of Alternatives A and B could not be quantified, the net benefits associated with those alternatives (benefits minus costs) also could not be quantified. However, from an economic perspective, the selection of Alternative B as the preferred alternative was considered reasonable even though the quantified benefits are smaller than under Alternative A. That is because the costs associated with non-PWC use, aesthetics, ecosystem protection, human health and safety, congestion, and nonuse values would likely be greater under Alternative A

than under Alternative B. Quantification of those costs could reasonably result in Alternative B having the greatest level of net benefits.

Compliance With Other Laws

Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and has not been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The National Park Service has completed the report entitled "Economic Analysis of Management Alternatives for Personal Watercraft in Bighorn Canyon National Recreation Area (MACTEC Engineering and Consulting, Inc., July 2003).

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Actions taken under this rule will not interfere with other agencies or local government plans, policies or controls. This rule is an agency specific rule.

(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. This rule will have no effects on entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No grants or other forms of monetary supplements are involved.

(4) This rule does not raise novel legal or policy issues. This rule is one of the special regulations being issued for managing PWC use in National Park Units. The National Park Service published general regulations (36 CFR 3.24) in March 2000, requiring individual park areas to adopt special regulations to authorize PWC use. The implementation of the requirement of the general regulation continues to generate interest and discussion from the public concerning the overall effect of authorizing PWC use and National Park Service policy and park management but the specific effects of this rule are nominal.

Regulatory Flexibility Act

The Department of the Interior certifies that this rulemaking will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on a report entitled "Economic Analysis of Management Alternatives for Personal Watercraft in Bighorn Canyon National Recreation Area" (MACTEC Engineering and Consulting, Inc., July 2003).

Small Business Regulatory Enforcement Fairness Act (SBREFA)

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

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

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

c. 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.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. This rule is an agency specific rule and does not impose any other requirements on other agencies, governments, or the private sector.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. A taking implication assessment is not required. No taking of personal property will occur as a result of this rule.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. This proposed rule only affects use of NPS administered lands and waters. It has no outside effects on other areas by allowing PWC use in specific areas of the park.

Civil Justice Reform (Executive Order 12988)

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

Paperwork Reduction Act

This regulation does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act is not required. An OMB Form 83–I is not required.

National Environmental Policy Act

As a companion document to this NPRM, NPS has issued the *Personal Watercraft Use Environmental Assessment for Bighorn Canyon National Recreation Area.* The environmental assessment was available for public review and comment for the period June 9, 2003, through July 11, 2003. To request a copy of the document call 307–548–2251 or write Bighorn Canyon National Recreation Area, Attn: PWC EA, 20 Highway 14A East, Lovell, WY 82431. Requests may be e-mailed to *Karen_Schwab@nps.gov.* A copy of the environmental assessment may also be found at *www.nps.gov/bica/EAPWC.pdf.*

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2, we have evaluated potential effects on Federally recognized Indian tribes and have determined that there are no potential effects.

Clarity of Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to read if it 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 [§ 7.92 Bighorn Canyon Recreation Area]) (5) Is the description of the rule in the "Supplementary Information" section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street,

NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov.*

Drafting Information: The primary authors of this regulation are: Judy Shafer, Office of Policy and Regulations and Kym Hall, Special Assistant, Washington, DC.

Public Participation

Comments on the proposed rule should be sent to Superintendent, Bighorn Canyon NRA, P.O. Box 7458, Fort Smith, MT 59035 or you may hand deliver your comments to the Headquarters at 5 Avenue B, Fort Smith, Montana. Comments may also be sent by e-mail to *bica@den.nps.gov.* If you comment by e-mail, please include "PWC rule" in the subject line and your name and return address in the body of your Internet message.

Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, available for public inspection in their entirety.

List of Subjects in 36 CFR Part 7

District of Columbia, National Parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 7 as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority for Part 7 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8–137(1981) and D.C. Code 40–721 (1981).

2. Amend § 7.92 by adding paragraph (d) to read as follows:

§ 7.92 Bighorn Canyon National Recreation Area.

* * * * *

(d) *Personal Watercraft (PWC).* (1) PWC use is allowed in Bighorn Canyon National Recreation Area, except in the following areas:

(i) In the gated area south of Yellowtail Dam's west side to spillway entrance works and Bighorn River from Yellowtail Dam to cable 3,500 feet north.

(ii) At Afterbay Dam from fenced areas on west side of dam up to the dam.

(iii) In Afterbay Lake, the area between dam intake works and buoy/cable line 100 feet west.

(iv) At Government docks as posted.

(v) At the Ok-A-Beh gas dock, except for customers.

(vi) From Yellowtail Dam upstream to the log boom.

(vii) In Bighorn Lake and shoreline south of the area known as the South Narrows (legal description R94W, T57N at the SE corner of Section 6, the SW corner of Section 5, the NE corner of Section 7, and the NW corner of Section 8). Personal watercraft users are required to stay north of the boundary delineated by park installed buoys.

(2) The Superintendent may temporarily limit, restrict, or terminate access to the areas designated for PWC use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

Dated: April 19, 2004.

Paul Hoffman,

Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–10140 Filed 5–4–04; 8:45 am]

BILLING CODE 4312–FY–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WV065–6034b; FRL–7653–9]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Sulfur Dioxide Attainment Demonstration for the City of Weirton Including the Clay and Butler Magisterial Districts in Hancock County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State Implementation Plan (SIP) revision submitted by the State of West Virginia. This revision contains enforceable emission limitations for the Weirton Steel Corporation, and the Wheeling-Pittsburgh Steel Corporation in Hancock County, West Virginia, and provides for, and demonstrates, the attainment of the national ambient air quality standards (NAAQS) for sulfur oxides, measured as sulfur dioxide (SO_2) in the City of Weirton, including the Clay and Butler Magisterial Districts, Hancock County nonattainment area. EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the **ADDRESSES** section of this document. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by June 4, 2004.

ADDRESSES: Submit your comments, identified by WV065–6034 by one of the following methods:

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

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

C. *Mail:* Makeba Morris, Chief, Mailcode 3AP21, U.S. Environmental Protection Agency, Region lll, 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 lD No. WV065–6034. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The federal regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the

body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the West Virginia Department of Environmental Protection, Division of Air Quality, 7012 MacCorkle Avenue, SE., Charleston, WV 25304–2943.

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

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, approving an attainment demonstration for the City of Weirton, including the Clay and Butler Magisterial Districts in Hancock County, West Virginia, that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: April 20, 2004.

James W. Newsom,

Acting Regional Administrator, Region III.

[FR Doc. 04–10096 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[FRL–7658–4]

Reopening of the Comment Period for the Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule, announcement of reopening of public comment period.

SUMMARY: The EPA is announcing that the period for providing public comments on the January 30, 2004 Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, and on the March 16, 2004 Supplemental Proposed Utility Mercury Reductions Rule that closed April 30, 2004 is being reopened for 60 days, to end June 29, 2004.

DATES: *Comments.* The public comment period for these actions is being reopened effective April 30, 2004 for 60 days to June 29, 2004 in order to provide the public additional time to submit comments and supporting information.

ADDRESSES: *Comments.* Written comments on the proposed rule may be submitted to EPA electronically, by mail, by facsimile, or through hand delivery/courier. Please refer to the proposal for the addresses and detailed instructions.

Docket. Documents relevant to this action are available for public inspection at the EPA Docket Center, located at 1301 Constitution Avenue, NW., Room B102, Washington, DC between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying. Documents are also available through EPA's electronic Docket system at *http://www.epa.gov/edocket.*

Worldwide Web. The EPA Web site for these rulemakings is at *http://www.epa.gov/mercury.*

FOR FURTHER INFORMATION CONTACT: Questions concerning the proposed rule should be addressed to William Maxwell, U.S. EPA, Office of Air Quality Planning and Standards, Emission Standards Division, Combustion Group (C439–01), Research Triangle Park, NC 27711, telephone number (919) 541–5430, e-mail at *maxwell.bill@epa.gov.* For information on section 111 mercury model trading rule, contact Mary Jo Krolewski, U.S. EPA, 1200 Pennsylvania Avenue (MC 6204J), Washington, DC 20460, telephone number (202) 343–9847, fax number (202) 343–2358, electronic mail (e-mail) address, *krolewski.maryjo@epa.gov.* For information on the part 75 mercury monitoring requirements, contact Ruben Deza, U.S. EPA, 1200 Pennsylvania Avenue (MC 6204J), Washington, DC 20460, telephone number (202) 343–3956, fax number (202) 343–2358, electronic mail (e-mail) address, *deza.ruben@epa.gov.*

SUPPLEMENTARY INFORMATION:

Comment Period

Due to the many requests we have received from both the public and members of Congress to extend the public comment period for the January 30, 2004 (69 FR 4652) Proposed Utility Mercury Reductions Rule to reduce air emissions of mercury and nickel, and on the March 16, 2004 Supplemental Proposed Utility Mercury Reductions Rule 69 FR 12398, EPA is reopening the public comment period effective April 30, 2004 for an additional 60 days. Therefore, the public comment period will end on June 29, 2004, rather than April 30, 2004.

How Can I Get Copies of This Document and Other Related Information?

The EPA has established the official public docket for the Supplemental Proposal and the Proposed Utility Mercury Reductions Rule under Docket ID No. OAR–2002–0056. The EPA has also developed Web sites for these proposed rulemakings at the addresses given above. Please refer to the Supplemental Proposal for details on accessing information related to that action.

Dated: April 30, 2004.

Robert Brenner,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 04–10335-Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[FRL–7656–7]

Missouri: Tentative Approval of Missouri Underground Storage Tank Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; tentative determination on application of State of Missouri for final approval; public comment period.

SUMMARY: Missouri has applied to EPA for final approval of its underground storage tank (UST) program under Subtitle I of the Resource Conservation and Recovery Act (RCRA). EPA has reviewed the Missouri application and has made a tentative determination that Missouri's UST program satisfies all of the requirements necessary to qualify for final approval. Thus, by this proposed rule, EPA is providing notice that EPA intends to grant final approval to Missouri to operate its UST program in lieu of the Federal program. Missouri's application for approval is available for public review and comment. A public hearing will be held to solicit comments on the application, if significant public interest is expressed.

DATES: Comments must be received on or before June 4, 2004.

ADDRESSES: Send written comments to Linda Garwood, EPA Region 7, ARTD/STOP, 901 North 5th Street, Kansas City, Kansas 66101. Comments may also be submitted electronically, or through hand delivery/courier. Please follow the detailed instructions described in Part (III) (B) (1) (i) through (iii) of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Linda Garwood at (913) 551–7268, or by e-mail at *garwood.linda@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended, requires that EPA develop standards for Underground Storage Tanks (UST) systems as may be necessary to protect human health and the environment, and procedures for approving state programs in lieu of the Federal program. EPA promulgated state program approval procedures at 40 CFR part 281. Program approval may be granted by EPA pursuant to RCRA section 9004(b), if the Agency finds that the state program is "no less stringent" than the Federal program for the seven elements set forth at RCRA section 9004(a)(1) through (7); includes the notification requirements of RCRA section 9004(a)(8); and provides for adequate enforcement of compliance with UST standards of RCRA section 9004(a). Note that RCRA sections 9005 (information-gathering) and 9006 (Federal enforcement) by their terms apply even in states with programs approved by EPA under RCRA section 9004. Thus, the Agency retains its authority under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, the Agency will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than the state authorized analogues to these provisions.

II. Missouri UST Program

The Missouri Department of Natural Resources (MDNR) is the lead implementing agency for the UST program in Missouri. MDNR has broad statutory authority to regulate UST releases under Sections 260.500 through 260.550 of the Revised Statutes of Missouri (RSMo.) and more specific authority to regulate the installation, operation, maintenance, and closure of USTs under sections 319.100 through 319.139, RSMo., the Missouri UST Law. Additional authorities, in particular the appeals process through the Missouri Clean Water Commission, are found at Chapter 644, RSMo., the Missouri Clean Water Law.

The State of Missouri submitted a state program approval application to EPA by letter dated July 28, 2003. EPA evaluated the information provided and determined the application package met all requirements for a complete program application. On December 11, 2003, EPA notified Missouri that the application package was complete.

Included in the state's Application is an Attorney General's statement. The Attorney General's statement provides an outline of the state's statutory and regulatory authority and details concerning areas where the state program is broader in scope or more stringent than the Federal program. Also included was a transmittal letter from the Governor of Missouri requesting program approval, a description of the Missouri UST program, a demonstration of Missouri's procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of EPA and the Missouri Department of Natural Resources, and copies of all applicable state statutes and regulations. EPA has reviewed the application and supplementary materials, and has tentatively determined that the State's UST program meets all of the requirements necessary to qualify for final approval.

Specifically, the Missouri UST program has requirements that are no less stringent than the Federal requirements at 40 CFR 281.30 New UST system design, construction, installation, and notification; 40 CFR 281.31 Upgrading existing UST systems; 40 CFR 281.32 General operating requirements; 40 CFR 281.33 Release detection; 40 CFR 281.34 Release reporting, investigation, and confirmation; 40 CFR 281.35 Release response and corrective action; 40 CFR 281.36 Out-of-service UST systems and closure; 40 CFR 281.37 Financial responsibility for UST systems containing petroleum; and 40 CFR 281.39 Lender Liability.

Additionally, the Missouri UST program has adequate enforcement of compliance, as described at 40 CFR 281.40 Requirements for compliance monitoring program and authority; 40 CFR 281.41 Requirements for enforcement authority; 40 CFR 281.42 Requirements for public participation; and 40 CFR 281.43 Sharing of information.

III. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. A copy of Missouri's application is available for review at EPA Region 7, Library, 901 N. 5th Street, Kansas City, KS 66101. EPA requests that, if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your review. The Regional Office's official hours of business are Monday through Friday, 8 to 4:30, excluding Federal holidays.

2. Copies of the state submittal are also available during normal business hours at the following addresses: The U.S. EPA Docket Clerk, Office of Underground Storage Tanks, c/o RCRA Information Center, 1235 Jefferson Davis Highway, Arlington, Virginia 22202, telephone (703) 603–9230, and at the Missouri Department of Natural Resources, P.O. Box 176, Jefferson City, Missouri 65102, telephone (573) 751–2058.

3. Electronic Access. You may access this **Federal Register** document electronically through the Regulations.gov Web site located at

http://www.regulations.gov where you can find, review, and submit comments on Federal rules that have been published in the **Federal Register**, the Government's legal newspaper, and are open for comment.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in the official public rulemaking file. The entire printed comment, including the copyrighted material, will be available at the Regional Office for public inspection.

B. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate rulemaking by including the text "Public comment on proposed rulemaking for the Missouri UST Program" in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. E-mail. Comments may be sent by electronic mail (e-mail) to *garwood.linda@epa.gov*, please include the text "Public comment on proposed rulemaking for the Missouri UST Program" in the subject line. EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly without going through Regulations.gov, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket.

ii. Regulations.gov. Your use of Regulations.gov is an alternative method of submitting electronic comments to EPA. Go directly to Regulations.gov at *http://www.regulations.gov*, click on "To Search for Regulations," then select Environmental Protection Agency and use the "go" button. The list of current EPA actions available for comment will be listed. Please follow the online instructions for submitting comments. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

iii. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Section 2, directly below. These electronic submissions will be accepted in WordPerfect, Word or ASCII file format. Avoid the use of special characters and any form of encryption.

2. By Mail. Send your comments to Linda Garwood, EPA Region 7, ARTD/STOP, 901 North 5th Street, Kansas City, Kansas 66101. Please include the text "Public comment on proposed rulemaking for the Missouri UST Program" in the subject line on the first page of your comment.

3. By Hand Delivery or Courier. Deliver your comments to Linda Garwood, EPA Region 7, ARTD/STOP, 901 North 5th Street, Kansas City, Kansas 66101. 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 to 4:30 excluding Federal holidays.

C. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically to EPA. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the official public regional rulemaking file. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public file and available for public inspection without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

D. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate rulemaking by including the text "Public comment on proposed rulemaking for the Missouri UST Program" in the subject line on the first page of your comment. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

Notice of Public Hearing

A public hearing will be scheduled if there is sufficient public interest communicated to EPA by June 4, 2004. EPA will determine by June 21, 2004, whether there is significant interest to hold the public hearing. The state of Missouri will participate in such public hearing held by EPA on this subject.

Anyone wishing to learn the status of the public hearing on the state's application may telephone the following

contacts after June 21, 2004: Linda Garwood, EPA Region 7, ARTD/STOP, 901 North 5th Street, Kansas City, Kansas 66101, (913) 551–7268; John Balkenbush, Chief, Tanks Section, Hazardous Waste Program, Air and Land Protection Division, Missouri Department of Natural Resources, P.O. Box 176, Jefferson City, Missouri 65102, (573) 526–0971.

Statutory and Executive Order Reviews

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. 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 authorize state requirements for the purpose of RCRA section 9004 and would impose no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this action 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 proposed action proposes to authorize 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). For the same reason, this proposed action does not have tribal implications within the meaning of Executive Order 13175 (65 FR 67249, November 6, 2000). It does not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This proposed action 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 (64 FR 43255, August 10, 1999), because it merely proposes to authorize state requirements as part of the state underground storage tank program without altering the relationship or the distribution of power and responsibilities established by RCRA. This proposed action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

Under RCRA section 9004, EPA grants approval of a state's program as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a state program application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. 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 proposed action 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 proposed action 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 in 40 CFR Part 281

Environmental protection, Administrative practice and procedure, Hazardous materials, State program approval, Underground storage tanks.

Authority: This document is issued under the authority of Section 9004 of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: April 16, 2004.

James B. Gulliford,

Regional Administrator, Region 7.

[FR Doc. 04–10214 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI44

Endangered and Threatened Wildlife and Plants; Notice of a Public Hearing for the Proposed Listing of the Southwest Alaska Distinct Population Segment of the Northern Sea Otter as Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; announcement of public hearing.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) will hold a public hearing on the proposed listing of the Southwest Alaska Distinct Population Segment of the Northern Sea Otter (*Enhydra lutris kenyoni*) as threatened.

DATES: One public hearing will be held on May 19, 2004, in Kodiak, Alaska, from 7 p.m. to 10 p.m. The public is invited to participate and to provide oral testimony. The public hearing will be preceded by an informational meeting from 5 p.m. to 7 p.m. Teleconference facilities will be available for members of the public who wish to participate by teleconference.

ADDRESSES: The public hearing will be held at the Best Western Hotel, 236 Rezanof Drive, Kodiak, Alaska 99615. To participate by teleconference call toll-free 888/391–1373. The Teleconference Leader is Ms. Sue Detwiler and the Passcode is Sea Otter.

FOR FURTHER INFORMATION CONTACT: Douglas Burn, U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503 (telephone 907/786–3800; facsimile 907/786–3816)

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We solicit comments on our proposal to list the southwest Alaska distinct population segment (DPS) of the northern sea otter (69 FR 6600, February 11, 2004). Of particular interest to us are comments concerning:

(1) Biological, commercial trade, or any other relevant data concerning any threat (or lack thereof) to the DPS;

(2) The location of any additional populations of this DPS;

(3) The specific physical and biological features to consider, and specific areas that meet the definition of critical habitat and that should or should not be considered for critical

habitat designation as provided by section 4 of the Endangered Species Act;

(4) Additional information concerning the range, distribution, and size of this DPS; and

(5) Current or planned activities in the subject area and their possible impacts on this DPS.

Background

On February 11, 2004, we published in the **Federal Register** (69 FR 6600) a proposed rule to list the southwest Alaska DPS of the northern sea otter as threatened under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). The comment period for the proposed listing closes on June 10, 2004. We are announcing a public hearing to allow all interested parties to submit oral comments on the proposed rule. We are seeking comments or suggestions from the public, other concerned agencies, the scientific community, industry, or any other interested parties concerning the proposed rule. Comments already submitted on the proposed rule need not be resubmitted as they will be fully considered in our final determination.

Section 4(b)(5)(E) of the Act requires that a public hearing be held if it is requested within 45 days of the publication of a proposed rule. In response to a request from the Alaska Sea Otter and Steller Sea Lion Commission, we are holding a public hearing on the date and at the address described in the **DATES** and **ADDRESSES** section.

Anyone wishing to make an oral statement for the record is encouraged to provide a written copy of the statement and present it to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. There are no limits to the length of written comments presented at the hearing or mailed to us.

Persons needing reasonable accommodations in order to attend and participate in the public hearing should contact M. Ellen Baier at 907/786–3800, as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the hearing date. Information regarding our proposal is available in alternative formats upon request.

Author

The primary author of this notice is Susan Detwiler, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503 (telephone 907/786–3868; facsimile 907/786–3350).

Authority: The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: April 29, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–10282 Filed 4–30–04; 4:48 pm]

BILLING CODE 4310–55–U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 040427134–4134–01; I.D. 042004D]

RIN 0648–AR64

Fisheries of the Exclusive Economic Zone Off Alaska; Fish Meal

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to allow processors to use the offal from Pacific salmon (salmon) and Pacific halibut (halibut) intended for the Prohibited Species Donation (PSD) program for commercial products including fish meal, fish oil, and bone meal. This action is necessary to change current regulations which prohibit the sale of any parts of salmon or halibut that are processed under the PSD program. This action is intended to promote the objectives of the PSD program and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Comments on the proposed rule must be received on or before June 4, 2004.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, Attn: Lori Durall. Comments may be submitted by:

- Mail to NMFS, P.O. Box 21668, Juneau, AK 99802–1668;
- Hand delivery to the Federal Building, Room 420A, 709 West 9th Street, Juneau, Alaska;
- FAX to 907–586–7557;
- E-mail to *PSCW–0648–AR64@noaa.gov* and include in the subject line of the e-mail comment the document identifier: 0648–AR64; or
- Website to the Federal eRulemaking Portal at *http:www.regulations.gov* and following the instructions at that site for submitting comments.

Copies of the Categorical Exclusion and Regulatory Impact Review prepared for this action, and the Environmental Assessment prepared for Amendments 26/29 and Amendments 50/50, may be obtained from the same address.

FOR FURTHER INFORMATION CONTACT: Jay Ginter, 907–586–7228, or *jay.ginter@noaa.gov*.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the exclusive economic zone of the Bering Sea and Aleutian Islands Management Area (BSAI) under the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (BSAI FMP). NMFS manages the groundfish fishery in the exclusive economic zone of the Gulf of Alaska (GOA) under the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP). The North Pacific Fishery Management Council (Council) prepared, and NMFS approved, the BSAI and GOA FMPs under the authority of the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*). Regulations implementing the BSAI and GOA FMPs appear at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

Background

Prohibited species are defined at § 679.2 to include all species of salmon, steelhead trout, halibut, Pacific herring, king crab and Tanner crab caught by a vessel regulated under part 679 while fishing for groundfish in the BSAI or GOA.

All prohibited species catch (PSC) is to be avoided, but if caught while fishing for groundfish, prohibited species must be returned to the sea with a minimum of injury, under regulations at § 679.21.

Some groundfish fishing vessels are incapable of sorting their catch at sea, and deliver their entire catch to an onshore processor or a processor vessel. Sorting and discarding of prohibited species occurs at delivery. To reduce the amount of edible protein discarded in that process, the Council initially recommended the PSD program for salmon, which was implemented by NMFS in 1996. The program was expanded to include halibut in 1997. Regulations implementing the PSD program are codified at § 679.26.

The PSD program allows PSC salmon and halibut to be processed and distributed through tax-exempt hunger relief organizations. The implementing regulations prohibit authorized

distributors from consuming or retaining prohibited species for personal use. They may not sell, trade or barter any prohibited species that is retained under the PSD program.

In 2001, processors stopped retaining salmon under the PSD program because current regulations prohibit them from processing and selling the waste parts of salmon (eg. heads, guts, bones, skin) that are not distributed under the PSD program. Processors found it impractical to separate this offal from the offal of commercial groundfish that are rendered into meal and oil products that may be subsequently marketed.

To stop the processing of PSC salmon and halibut for this reason, however, would defeat the PSD program's purpose of donating fish for hunger relief that otherwise would be discarded. Therefore, NMFS Enforcement issued an advisory bulletin on April 4, 2002 (Information Bulletin 02–30), stating that NMFS would not enforce regulations that prohibit converting halibut or salmon offal into meal under the PSD program. According to the bulletin, "NMFS does not believe that retention of Pacific halibut or salmon heads and guts for meal constitutes sufficient potential for revenue to undermine the intent of the PSD program. Rather, concern continues to be focused on prohibiting the sale, trade or barter of edible flesh. Therefore, NMFS intends to propose regulations that would clarify the conditions under which parts of prohibited species may be retained by a processor in a manner that would not undermine the intent of the PSD program."

This proposed rule would amend the PSD program regulations at § 679.26 (d) to allow processors to convert offal from salmon or halibut that has been prepared for the PSD program into fish meal, fish oil, or bone meal, and retain the proceeds from the sale of these products. No other regulatory changes are proposed.

Classification

NMFS has determined that the proposed rule is consistent with the BSAI and GOA FMPs and initially determined that the rule is consistent with the Magnuson-Stevens Act and other applicable laws.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS has determined that this action is categorically excluded from the requirement to prepare an environmental assessment, in accordance with NAO 216–6. The rule falls within the scope of alternatives and impacts addressed in the Environmental Assessments prepared for the BSAI and GOA FMPs Amendments 26/29 and Amendments 50/50 (see ADDRESSES) and implements only minor changes that do not have the potential to pose significant impacts on the quality of the human environment.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Certification of this action is appropriate for the following reasons:

1. The proposed rule does not impose any additional requirements on entities. Participation in the PSD program is voluntary, so an entity that found the program requirements onerous could stop participating without financial cost to itself. Moreover, the action relieves a restriction on entities that choose to participate in the PSD program. By explicitly allowing participating processors to sell the offal of PSC species, this action would allow participating processors to convert offal into commercial products. Finally, for practical purposes, the proposed rule would bring regulations into conformity with established enforcement policy, thereby maintaining current fishing and processing practices. For these reasons, this action does not have a significant economic impact on any regulated entities, large or small.

2. This action does not have an impact on any small entities. Three seafood processing firms in Dutch Harbor have participated in the PSD program. None of these firms are small entities within the meaning of the Regulatory Flexibility Act. Under criteria established by the Small Business Administration, a seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. None of the three participating firms meet this standard.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: April 29, 2004.

Rebecca Lent

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 679 is proposed to be amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*; Title II of Division C, Pub. L. 105–277; Sec. 3027, Pub. L. 106–31, 113 Stat. 57.

2. In § 679.26, paragraph (d)(3) is revised to read as follows:

§ 679.26 Prohibited Species Donation Program.

* * * * *

(d) * * *

(3) Authorized distributors and persons conducting activities supervised by authorized distributors may retain prohibited species only for the purpose of processing and delivering the prohibited species to hunger relief agencies, food networks or food distributors as provided by this section. Such persons may not consume or retain prohibited species for personal use and may not sell, trade or barter, or attempt to sell, trade or barter any prohibited species that is retained under the PSD program, except that processors may convert offal from salmon or halibut that has been retained pursuant to the PSD program into fish meal, fish oil, or bone meal, and sell or trade these products.

* * * * *

[FR Doc. 04–10208 Filed 5–4–04; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 69, No. 87
Wednesday, May 5, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Wasatch-Cache National Forest; Utah; Table Top Exploratory Oil Well

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare a supplemental environmental impact statement to the Table Top Exploratory Oil Well Project.

SUMMARY: The USDA Forest Service announces its intent to prepare a Supplemental Environmental Impact Statement (SEIS) to the Table Top Exploratory Oil Well Final Environment Impact Statement (FEIS). The Table Top Exploratory Oil Well FEIS evaluated alternatives for well pad locations, gravel sources, and associated road improvements in response to a Surface Use Plan of Operations to drill an exploratory oil well.

DATES: Scoping will not be conducted in accordance with 40 CFR 1502.9(c)(4). The draft supplemental environmental impact statement is expected in August 2004 and the final supplemental environmental impact statement is expected in December 2004.

ADDRESSES: Send written comments to Faye Krueger, Acting Forest Supervisor, Wasatch-Cache National Forest, 8236 Federal Building, 125 South State Street, Salt Lake City, Utah 84138.

FOR FURTHER INFORMATION CONTACT: Steve Ryberg, District Ranger, (307) 789–3194, Evanston Ranger District, P.O. Box 1880, Evanston, Wyoming, 82930.

SUPPLEMENTARY INFORMATION: On January 6, 1994, then Forest Supervisor Susan Giannettino made a decision to approve Chevron USA's proposal to construct and drill an exploratory oil well in the Main Fork Drainage on the Evanston Ranger District. Construction on the access road to the wellpad site began in September 1995. In October 1995 work stopped on construction because of frozen conditions Chevron withdrew as Unit Operator. Later Double Eagle was approved by the Bureau of Land Management (BLM) as Unit Operator and is the current proponent of the project. In 1997 a suspension of lease terms was requested which BLM did not grant. The decision was vacated by Interior Board of Land Appeals in April of 1999 and BLM granted a suspension retroactive to April 1996. The suspension request was based on nearby unleased lands being available for lease. The current suspension will terminate upon commencement of operations; one year after the effective date of newly issued Federal Leases resulting from the unleased lands being offered in a competitive sale; or when the authorized officer deems the suspension is no longer in the interest of conservation. Double Eagle has acquired the nearby unleased lands and is now ready to move forward.

New circumstances or information relevant to environmental concerns such as the recently revised 2003 Forest Plan and the listing of the Canada lynx as threatened by the Fish and Wildlife Service in 2000 have been identified. The SEIS will be limited in its scope and address environmental impacts directly related to the decision made in January 1994.

If a new decision is not needed following preparation of the supplemental environmental impact statement, the action is not subject to appeal in accordance with 36 CFR 215.12.

Cooperating Agency

The Bureau of Land Management, Utah State Office is a cooperating agency.

Responsible Official

Faye Krueger, Acting Forest Supervisor, 8236 Federal Building, 125 South State Street, Salt Lake City, Utah 84138.

Dated: April 27, 2004.

Faye Krueger,

Acting Forest Supervisor.

[FR Doc. 04–10166 Filed 5–4–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Olympic Provincial Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Meeting.

SUMMARY: The Olympic Province Advisory Committee (OPAC) will meet on Friday, May 21, 2004. The meeting will be held at the DNR/Forest Service Conference Room, 437 Tillicum Lane, Forks, Washington. The meeting will begin at 9:30 a.m. and end at approximately 3:30 p.m. Agenda topics are: Current status of key Forest issues; Off-Road Vehicle Management; Title II Project Update; Ecology of Marbled Murrlet on Olympic Peninsula; Olympic Natural Resource Center Research Update; Open forum; and Public comments.

All Olympic Province Advisory Committee Meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Ken Eldredge, Province Liaison, USDA, Olympic National Forest Headquarters, 1835 Black Lake Blvd. Olympia, WA 98512–5623, (360) 956–2323 or Dale Hom, Forest Supervisor, at (360) 956–2301.

Dated: April 29, 2004.

Dale Hom,

Forest Supervisor, Olympic National Forest.

[FR Doc. 04–10167 Filed 5–4–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Changes to Section IV of the Field Office Technical Guide (FOTG) of the Natural Resources Conservation Service in Indiana

AGENCY: Natural Resources Conservation Service (NRCS), Agriculture.

ACTION: Notice of availability of proposed changes in Section IV of the FOTG of the NRCS in Indiana for review and comment.

SUMMARY: It is the intention of NRCS in Indiana to issue two revised

conservation practice standards in Section IV of the FOTG. The revised standards are: Cover Crop (340), and Fishpond Management (399). These practices may be used in conservation systems that treat highly erodible land and/or wetlands.

DATES: Comments will be received for a 30-day period commencing with this date of publication.

ADDRESSES: Address all requests and comments to Jane E. Hardisty, State Conservationist, Natural Resources Conservation Service (NRCS), 6013 Lakeside Blvd., Indianapolis, Indiana 46278. Copies of this standard will be made available upon written request. You may submit you electronic requests and comments to *Darrell.brown@in.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Jane E. Hardisty; telephone 317–290–3200.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that after enactment of the law, revisions made to NRCS state technical guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days, the NRCS in Indiana will receive comments relative to the proposed changes. Following that period, a determination will be made by the NRCS in Indiana regarding disposition of those comments and a final determination of changes will be made.

Dated: April 19, 2004.

Jane E. Hardisty,

State Conservationist, Indianapolis, Indiana.

[FR Doc. 04–10150 Filed 5–4–04; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Rural Telephone Bank

Sunshine Act Meetings

ACTION: Staff Briefing for the Board of Directors.

TIME AND DATE: 3 p.m., Thursday, May 13, 2004.

PLACE: Conference Room 104–A, Jamie L. Whitten Federal Building, U.S. Department of Agriculture, 12th & Jefferson Drive, SW., Washington, DC.

STATUS: Open.

MATTERS TO BE DISCUSSED:

1. Broadband Program update.
2. Privatization discussion.
3. Administrative and other issues.

ACTION: Board of Directors Meeting.

TIME AND DATE: 9 a.m., Friday, May 14, 2004.

PLACE: Conference Room 104–A, Jamie L. Whitten Federal Building, U.S. Department of Agriculture, 12th & Jefferson Drive, SW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The following matters have been placed on the agenda for the Board of Directors meeting:

1. Call to order.
2. Action on Minutes of the February 13, 2004, board meeting.
3. Secretary's Report on loans approved.
4. Treasurer's Report.
5. Discussion on Privatization.
6. Governor's Remarks.
7. Adjournment.

FOR FURTHER INFORMATION CONTACT: Roberta D. Purcell, Assistant Governor, Rural Telephone Bank, (202) 720–9554.

Dated: May 3, 2004.

Hilda Legg,

Governor, Rural Telephone Bank.

[FR Doc. 04–10387 Filed 5–3–04; 3:22 pm]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–816]

Corrosion-Resistant Carbon Steel Flat Products From Korea: Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of Partial Rescission of the Antidumping Duty Administrative Review.

SUMMARY: On September 30, 2003, in response to a request made by International Steel Group, Inc., an importer of the subject merchandise, the Department of Commerce ("Department") published a notice of initiation of an antidumping duty administrative review of Corrosion-Resistant Carbon Steel Flat Products from Korea ("Korean CORE"), for the period of review ("POR") August 1, 2002 through July 31, 2003. Because neither SeAH Steel Corporation ("SeAH"), an exporter of the subject merchandise, nor any of its affiliates had exports or sales of the subject merchandise to the United States during the POR, the Department is rescinding this review in part in accordance with 19 CFR 351.213(d)(3).

EFFECTIVE DATE: May 5, 2004.

FOR FURTHER INFORMATION CONTACT: John D. A. LaRose, Enforcement Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230; telephone: 202–482–3794.

SUPPLEMENTARY INFORMATION:

Background

On August 29, 2003, International Steel Group requested that the Department conduct an administrative review of the antidumping duty order on Korean CORE for the period August 1, 2002 through July 31, 2003. On July 1, 2003, the Department published a notice of initiation of the antidumping administrative review of Korean CORE, in accordance with 19 CFR 351.221(c)(1)(i). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocations in Part*, 68 FR 56262 (September 30, 2003). This review covers several exporters of the subject merchandise, including SeAH. On October 9, 2003, SeAH submitted a timely letter stating that the company and its affiliates did not have exports or sales of the subject merchandise to the United States during the POR. The letter also requested that the Department terminate the administrative review with respect to SeAH.

On October 23, 2003, the Department sent an electronic message to U.S. Customs and Border Protection ("CBP") requesting that CBP officials report any known entries of subject merchandise from SeAH during the POR. In its message to CBP, the Department stated that no reply was required if CBP officials were not aware of any entries. By the deadline stated in our request, the Department received no reply. The Department also examined the online CBP listing of entries suspended under the order and found no SeAH entries during the POR. On March 15, 2004, the Department provided interested parties with a draft rescission, soliciting comments by March 22, 2004. *See Memorandum to Edward Yang from Lisa Shishido Regarding Intent to Partially Rescind the Antidumping Duty Administrative Review of Korean Core*, March 15, 2004. No interested parties submitted comments with regard to this rescission in part.

Rescission of Review

SeAH stated in its October 9, 2003 letter that it had no exports or sales in the United States of subject merchandise during the POR, and the Department has confirmed from available CBP data that SeAH had no entries of subject merchandise during the POR. In addition, no interested party commented on that finding.

Pursuant to the Department's regulations, the Department will rescind an administrative review "with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be." *See* 19 CFR 351.213(d)(3). SeAH's timely letter and the Department's efforts to identify entries, exports or sales of subject merchandise through U.S. Customs and Border Protection ("CBP") for the POR show no such entries, exports or sales for SeAH or any of its affiliates. Accordingly, we are rescinding the administrative review for the period August 1, 2002 through July 31, 2003, and will issue appropriate assessment instructions to CBP.

This notice serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation. This determination is issued in accordance with 19 CFR 351.213(d)(4) and section 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: April 27, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–10231 Filed 5–4–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–863]

Honey From the People's Republic of China: Final Results of First Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of first antidumping duty administrative review.

SUMMARY: On December 16, 2003, the Department published the preliminary results of the first administrative review of the antidumping duty order on honey from the People's Republic of China (PRC) (68 FR 69988). This review covers four exporters or producer/exporters, (1) Zhejiang Native Produce and Animal By-Products Import & Export Corp. a.k.a. Zhejiang Native Produce and Animal By-Products Import and Export Group Corporation (Zhejiang) and its unaffiliated suppliers; (2) Henan Native Produce and Animal By-Products Import & Export Company (Henan); (3) High Hope International Group Jiangsu Foodstuffs Import and Export Corp. (High Hope); and (4) Kunshan Foreign Trade Company (Kunshan), and exports of the subject merchandise to the United States during the period February 10, 2001, through November 30, 2002.[1]

Based on our analysis of the record, including factual information obtained since the preliminary results, we have made changes to Zhejiang's margin calculations to adjust the inflators used to achieve a surrogate raw honey value contemporaneous with the period of review and to adjust our calculation of net U.S. prices. We also adjusted the surrogate value for labor to reflect the updated PRC regression-based wages calculated by the Department. Therefore, the final results differ from the preliminary results. *See* "Final Results of Review" section below.

EFFECTIVE DATE: May 5, 2004.

FOR FURTHER INFORMATION CONTACT: Angelica Mendoza or Brandon Farlander at (202) 482–3019 or (202) 482–0182, respectively; Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

We published in the **Federal Register** the preliminary results of the first administrative review on December 16, 2003. *See Notice of Preliminary Results of First Administrative Antidumping Duty Review: Honey from the People's Republic of China,* 68 FR 69988 (December 16, 2003) (*Preliminary Results*).

The period of review (POR) is February 10, 2001, through November 30, 2002. We invited parties to comment on our *Preliminary Results*. We received case briefs from the respondent, Zhejiang, and the American Honey Producers Association and the Sioux Honey Association (collectively, petitioners), on January 21, 2004.[2] We received rebuttal briefs from the same parties on January 27, 2004.[3] On January 28, 2004, we held a public hearing for this review.

Scope of the Antidumping Duty Order

The products covered by this order are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise subject to this review is currently classifiable under subheadings 0409.00.00, 1702.90.90, and 2106.90.99 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and the U.S. Customs and Border Protection (CBP) purposes, the Department's written description of the merchandise under order is dispositive.

Analysis of Comments Received

All issues raised in the briefs are addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues raised, all of which are in the Issues and Decision Memorandum, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in the briefs and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit (CRU), room B–099 of the main Department building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at *http://ia.ita.doc.gov*. The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on the comments received from the interested parties, we have made changes to the margin calculation for Zhejiang. For a discussion of these changes, *see* Issues and Decision

[1] As stated in the *Preliminary Results*, the Department rescinded the administrative reviews of five exporters or producer/exporters. *See Honey from the People's Republic of China: Final Rescission, in Part, of Antidumping Duty Administrative Review*, 68 FR 44045 (July 25, 2003).

[2] On January 28, 2004, Zhejiang submitted a letter of objection to new factual information contained in petitioners' rebuttal brief. Per the Department's letter dated February 13, 2004, petitioners re-filed their rebuttal brief on February 18, 2004.

[3] In their rebuttal brief dated January 28, 2004, petitioners alleged that Zhejiang had submitted new factual information in its case brief. *See* Petitioners' Rebuttal Brief re-filed on February 18, 2004 at 2. Per the Department's letter dated February 13, 2004, Zhejiang re-filed its case brief on February 18, 2004.

Memorandum. For business proprietary details of our analysis of the changes described below to our preliminary margin calculations, *see* Memorandum to the File regarding Analysis of the Data Submitted by Zhejiang Native Produce and Animal By-Products Import & Export Corp. a.k.a. Zhejiang Native Produce and Animal By-Products Import and Export Group Corporation (Zhejiang) in the Final Results of the First Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China (April 28, 2004) (Final Analysis Memo) and Memorandum to the File regarding Final Results of the First Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China; Factors of Production Valuation (April 28, 2004) (Final FOP Memo).

For the final results, we adjusted our inflation calculations used to achieve a surrogate raw honey value contemporaneous with the POR and adjusted our calculation of net U.S. prices. We also adjusted the surrogate value for labor to reflect the updated PRC regression-based wages calculated by the Department. *See* Issues and Decision Memorandum at Comments 4 and 6, and Final FOP Memo at 2 and Attachments 1–4.

The PRC-Wide Rate and Application of Facts Otherwise Available

The Department did not receive comments on its preliminary determination to apply adverse facts available (AFA) to the PRC-wide entity (including Kunshan, Henan, and High Hope). Therefore, we have not altered our decision to apply total AFA to the PRC-wide entity (including Kunshan, Henan, and High Hope) for these final results, in accordance with sections 776(a)(2)(A) and (B), as well as section 776(b) of the Tariff Act of 1930, as amended (the Act). For a complete discussion of the Department's decision to apply total AFA, *see Preliminary Results* at 69991 and 69992. Furthermore, as stated in the *Preliminary Results*, the Department determined that because Kunshan, Henan, and High Hope did not respond to our requests for information regarding separate rates, that these companies do not merit separate rates. *See, e.g., Natural Bristle Paint Brushes and Brush Heads from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review*, 61 FR 57389 (November 6, 1996); *Final Determination of Sales at Less than Fair Value: Certain Helical Spring Lock Washers from China*, 58 FR 48833 (September 20, 1993); and *Final Determination of Sales at Less than Fair Value: Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof from the People's Republic of China*, 58 FR 37908 (July 14, 1993). Consequently, consistent with the statement in our notice of initiation, we preliminarily found that, because these companies did not qualify for separate rates, they were deemed to be part of the PRC-entity. *See Initiation of Antidumping and Countervailing Duty Administrative Review and Requests for Revocations in Part*, 68 FR 3009 (January 22, 2003) at 3011 n.2. *See also Preliminary Results* at 6990.

As above stated, the PRC-wide entity did not respond to our requests for information. Because the PRC-wide entity did not respond to our request for information, we find it necessary, under sections 776(a)(2) and 776(b) of the Act, to use AFA as the basis for these final results of review for the PRC-wide entity. In accordance with the Department's practice, we have assigned to the PRC-wide entity (including Kunshan, Henan, and High Hope) the rate of 183.80 percent as AFA. *See, e.g., Rescission of Second New Shipper Review and Final Results and Partial Rescission of First Antidumping Duty Administrative Review: Brake Rotors from the People's Republic of China*, 64 FR 61581, 61584 (November 12, 1999). This rate is the highest dumping margin from any segment of this proceeding and was established in the less-than-fair-value investigation based on information contained in the petition. *See Notice of Final Determination of Sales at Less Than Fair Value; Honey from the PRC*, 66 FR 50608 (October 4, 2001) and accompanying Issues and Decision Memorandum (*Final Determination*). *See also Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Honey From the People's Republic of China*, 66 FR 63670 (December 10, 2001). As discussed below, this rate has been corroborated.

Corroboration of Secondary Information Applied as AFA

Section 776(c) of the Act requires that, when the Department relies on secondary information for purposes of facts available, the Department shall corroborate such information, to the extent practicable, from independent sources. To be considered corroborated, information must be found to be both reliable and relevant. As stated above, we are applying as AFA the highest rate from any segment of the proceeding. *See Final Determination*. The information upon which the AFA rate is based in the current review was corroborated in the final determination and revisited in the preliminary results. *See Preliminary Results* at 69991 and 69992, and Memorandum to the File, dated December 10, 2003, placing the Memorandum to Richard O. Weible, Office Director, The Use of Facts Available for the PRC-wide entity; and Corroboration of Secondary Information, dated May 4, 2001 (AFA & Corroboration Memo) on the record of this administrative review. No information has been presented in the current review that calls into question the reliability of this information. Thus, the Department finds that the information is reliable. Following the methodology of our corroboration analysis from the less-than-fair-value (LTFV) investigation, we compared the petition information to information on the record of this proceeding. We find that the petition information is reliable when compared to the range of Zhejiang's reported gross unit prices for honey it sold to the United States during the current POR. *See* AFA & Corroboration Memo at 5 and Exhibit 7 of Zhejiang's July 18, 2003, submission. Moreover, following the methodology of our corroboration analysis from the LTFV investigation, the highest calculated NV for Zhejiang (calculated as a separate NV for each of its two processed honey suppliers) is comparable to the NV relied on by petitioners to calculate the petition rate. *See* AFA & Corroboration Memo at 6 and the Margin Calculation Output for Zhejiang, dated December 10, 2003.[4]

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin irrelevant. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and*

[4] Following the methodology of our corroboration analysis from the less than fair value investigation, we compared the petition information to information on the record of this proceeding. We find that the petition information is both reasonable and reliable when compared to the range of Zhejiang's reported gross unit prices for honey it sold to the United States during the current POR. *See* AFA & Corroboration Memo at 5 and Exhibit 7 of Zhejiang's July 18, 2003, submission. Moreover, following the methodology of our corroboration analysis from the LTFV investigation, the highest calculated NV for Zhejiang (calculated as a separate NV for each of its two processed honey suppliers) is comparable to the NV relied on by petitioners to calculate the petition rate. *See* AFA & Corroboration Memo at 6 and the Margin Calculation Output for Zhejiang, dated April 28, 2004.

Partial Termination of Administrative Reviews, 61 FR 57391, 57392 (November 6, 1996) (*TRBs*). Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. *See TRBs* at 57392. *See also Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, 6814 (February 22, 1996) (disregarding the highest margin in the case as best information available because the margin was based on another company's uncharacteristic business expense resulting in an extremely high margin). Similarly, the Department does not apply a margin that has been discredited. *See D & L Supply Co.* v. *United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated). The rate used is the rate currently applicable to all exporters subject to the PRC-wide rate. Further, as noted above, there is no information on the record that the application of this rate would be inappropriate in this administrative review or that the margin is not relevant. Therefore, we find that the information is relevant. Accordingly, the Department determines that the PRC-wide entity rate of 183.80 is, to the extent practicable, corroborated within the meaning of section 776(c) of the Act.

Final Results of Review

We determine that the following antidumping duty margins exist:

Exporter	POR	Margin (percent)
Zhejiang Native Produce & Animal By-Products Import & Export Corporation a.k.a. Zhejiang Native Produce & Animal By-Products Import & Export Group Corporation	02/10/01–11/30/02	68.35
PRC-wide Entity (including Kunshan, Henan, and High Hope)	02/10/01–11/30/02	183.80

For details on the calculation of the antidumping duty weighted-average margin for Zhejiang, *see* the Final Analysis Memo, dated April 28, 2004. A public version of this memorandum is on file in the CRU.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of these final results for this administrative review for all shipments of honey from the PRC, entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(c) of the Act: (1) For Zhejiang, the cash deposit rate will be the rate listed above under the "Final Results of Review" section; (2) for previously-reviewed PRC and non-PRC exporters with separate rates, the cash deposit rate will be the company-specific rate established for the most recent period; (3) for all other PRC exporters which do not have a separate rate, including the exporters named as part of the PRC-wide entity above, the cash deposit rate will be the PRC-wide entity rate, 183.80 percent; and (4) for all other non-PRC exporters of the subject merchandise, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Assessment of Antidumping Duties

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. For assessment purposes for Zhejiang, we do not have the information to calculate entered value because Zhejiang was unable to supply importer-specific information for the subject merchandise.[5] Accordingly, we have calculated customer-specific duty assessment rates for Zhejiang by aggregating the dumping margins calculated for all U.S. sales to each customer and dividing this amount by the total quantity of those sales. We will direct CBP to assess the resulting rates or the entered CBP quantity for each of the importer's entries during the POR. For all other entries, we will direct CBP to assess the resulting assessment rates against the CBP values for the subject merchandise on each of the exporter's entries during the POR. In accordance with § 351.106(c)(2), we will instruct CBP to liquidate any entries without regard to antidumping duties for which the assessment rate is *de minimis*. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under § 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 351.305(a)(3) of the Department's regulations. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 28, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix I—List of Issues

Comment 1: Costs Incurred by Zhejiang on Certain U.S. Sales
Comment 2: Costs Associated with Shipping Honey Samples to U.S. Customers
Comment 3: Surrogate Value Source for Raw Honey
Comment 4: Calculation of Inflators for the Raw Honey Surrogate Value
Comment 5: Surrogate Source for Factory Overhead, Selling, General and Administrative (SG&A), and Profit Ratios
Comment 6: Deduction of Bank Fees from U.S. price
Comment 7: Exclusion of Certain Import Data in Calculating Certain Surrogate Values

[FR Doc. 04–10234 Filed 5–4–04; 8:45 am]

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[5] Rather, Zhejiang reported total sales value. See Zhejiang's July 18, 2003, submission at Exhibit 7.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–813]

Certain Preserved Mushrooms from India: Notice of Extension of Time Limit for Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, United States Department of Commerce.

EFFECTIVE DATE: May 5, 2004.

FOR FURTHER INFORMATION CONTACT: David J. Goldberger, Kate Johnson, or Tinna Beldin at (202) 482–4136, (202) 482–4929, or (202) 482–1655, respectively, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Extension of Time Limit for the Final Results of Administrative Review

The Department of Commerce ("the Department") published the preliminary results of the administrative review of the antidumping duty order on certain preserved mushrooms from India on March 8, 2004 (69 FR 0659). Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), the Department shall make a final determination in an administrative review of an antidumping duty order within 120 days after the date on which the preliminary results is published. The current deadline for the final results in this review is July 6, 2004. If it is not practicable to complete the review within the foregoing time, the administering authority may extend that 120-day period to 180 days. The Department finds that it is not practicable to complete this administrative review within the original time frame due to the fact that a sales verification has been scheduled for mid-May which will set back the briefing schedule in this case until sometime after the issuance of the verification report. Thus, the Department is fully extending the time limit for completion of the final results until September 7, 2004, which is 183[1] days after the date on which notice of the preliminary results was published in the **Federal Register**.

[1] Since the extended due date falls on Saturday, September 4, 2004 (180 days), the final results are due on the next business day, September 7, 2004.

Dated: April 28, 2004.

Jeffrey May,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 04–10233 Filed 5–4–04; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–807]

Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request by the petitioner and one producer/exporter of the subject merchandise, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain steel concrete reinforcing bars (rebar) from Turkey. This review covers three manufacturers/exporters of the subject merchandise to the United States. This is the fifth period of review (POR), covering April 1, 2002, through March 31, 2003.

We have preliminarily determined that sales have been made below the normal value by only one of the respondents in this proceeding, Colakoglu Metalurji A.S. (Colakoglu). In addition, we have preliminarily determined to rescind the review with respect to the following companies because these companies had no shipments of subject merchandise during the POR: Cebitas Demir Celik Endustrisi A.S. (Cebitas), Cemtas Celik Makina Sanayi ve Ticaret A.S. (Cemtas), Demirsan Haddecilik Sanayi ve Ticaret A.S. (Demirsan), Ege Celik Endustrisi Sanayi ve Ticaret A.S. (Ege Celik), Ekinciler Holding A.S. and Ekinciler Demir Celik San A.S. (collectively "Ekinciler"), Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. (Habas), Iskenderun Iron & Steel Works Co. (Iskenderun), Izmir Demir Celik Sanayi A.S. (Izmir), Kaptan Demir Celik Endustrisi ve Ticaret A.S. (Kaptan), Kardemir—Karabuk Demir Celik Sanayi ve Ticaret A.S. (Karabuk), Kroman Celik Sanayi A.S. (Kroman), Metas Izmir Metalurji Fabrikasi Turk A.S. (Metas), Nurmet Celik Sanayi ve Ticaret A.S. (Nurmet), Nursan Celik Sanayi ve Haddecilik A.S. (Nursan), Sivas Demir Celik Isletmeleri A.S. (Sivas), Tosyali Demir Celik Sanayi A.S. (Tosyali), and Ucel Haddecilik Sanayi ve Ticaret A.S. (Ucel). If these preliminary results are adopted in the final results of this review, we will instruct Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries.

Finally, we have preliminarily determined not to revoke the antidumping duty order with respect to ICDAS Celik Enerji Tersane ve Ulasim Sanayi, A.S. (ICDAS).

We invite interested parties to comment on these preliminary results. Parties who wish to submit comments in this proceeding are requested to submit with each argument: (1) A statement of the issue; and (2) a brief summary of the argument.

EFFECTIVE DATE: May 5, 2004.

FOR FURTHER INFORMATION CONTACT: Irina Itkin or Elizabeth Eastwood, Office of AD/CVD Enforcement, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–0656 or (202) 482–3874, respectively.

Background

On April 1, 2003, the Department published in the **Federal Register** a notice of "Opportunity To Request Administrative Review" of the antidumping duty order on rebar from Turkey (68 FR 15704).

In accordance with 19 CFR 351.213(b)(2), on April 30, 2003, the Department received a request from ICDAS to conduct an administrative review of the antidumping duty order on rebar from Turkey. As part of this request, ICDAS also requested that the Department revoke the dumping order with regard to it, in accordance with 19 CFR 351.222(b). In accordance with 19 CFR 351.213(b)(1), on April 30, 2002, the Department also received a request for an administrative review from the petitioners, Gerdau AmeriSteel Corporation, Commercial Metals Company (SMI Steel Group), and Nucor Corporation, for the following 22 producers/exporters of rebar: Cebitas, Cemtas, Colakoglu, Demirsan, Diler Demir Celik Endustrisi ve Ticaret A.S., Yazici Demir Celik Sanayi ve Ticaret A.S. and Diler Dis Ticaret A.S. (collectively "Diler"), Ege Celik, Ege Metal Demir Celik Sanayi ve Ticaret A.S. (Ege Metal), Ekinciler, Habas, ICDAS, Iskenderun, Izmir, Kaptan, Karabuk, Kroman, Kurum Demir Sanayi ve Ticaret Metalenerji A.S. (Kurum), Metas, Nurmet, Nursan, Sivas, Tosyali, and Ucel.

In May 2003, the Department initiated an administrative review for each of

these companies and issued questionnaires to them. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 68 FR 27781 (May 21, 2003).

In May and June 2003, the following companies informed the Department that they had no shipments or entries of subject merchandise during the POR: Cebitas, Cemtas, Demirsan, Ege Celik, Ekinciler, Habas, Iskenderun, Izmir, Kaptan, Karabuk, Kroman, Metas, Nurmet, Nursan, Sivas, Tosyali, and Ucel. We reviewed CBP data and confirmed that there were no entries of subject merchandise from any of these companies except Habas. We also confirmed with CBP data that Ege Metal and Kurum did not have shipments or entries of subject merchandise during the POR. Consequently, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we are preliminarily rescinding our review for Cebitas, Cemtas, Demirsan, Ege Celik, Ege Metal, Ekinciler, Iskenderun, Izmir, Kaptan, Karabuk, Kroman, Kurum, Metas, Nurmet, Nursan, Sivas, Tosyali, and Ucel.

Regarding Habas, CBP information indicates that there were entries of subject merchandise produced by Habas during the POR. Based on this information, we asked Habas to explain the circumstances surrounding these entries. Habas responded that this merchandise had been sold to an unaffiliated customer in a third country who then exported this merchandise to the United States, and it provided documentation to support its claim that it did not have knowledge that this merchandise was destined for the United States. We therefore find that Habas did not have any reviewable entries during this POR. Accordingly, we are rescinding our review for Habas. For further discussion, see the "Partial Rescission of Review" section of this notice, below.

In June 2003 Colakoglu, Diler and ICDAS requested that the Department modify its reporting requirements with respect to their home market sales, in light of the fact that these respondents only made U.S. sales in certain months of the POR. We granted Colakoglu's and Diler's requests on June 10, 2003, and ICDAS' request on June 30, 2003.

In July 2003 we received responses to sections A through C of the questionnaire (*i.e.*, the sections regarding sales to the home market and the United States) and Section D of the questionnaire (*i.e.*, the section regarding cost of production (COP) and constructed value (CV)) from Colakoglu, Diler, and ICDAS.

In July, August, and September 2003, we issued supplemental questionnaires to each of the participating respondents. We received responses to these questionnaires in August, September, and October 2003.

On October 8, 2003, the Department postponed the preliminary results of this review until no later than April 29, 2004. *See Certain Steel Concrete Reinforcing Bars From Turkey; Notice of Extension of Time Limits for Preliminary Results in Antidumping Duty Administrative Review,* 68 FR 59368 (Oct. 15, 2003).

In January 2004, we issued an additional cost supplemental questionnaire to ICDAS. We received a response to this questionnaire in February 2004. We verified the sales and cost information submitted by ICDAS in January and February 2004. Also, in February and March 2004, we requested and received revised databases from ICDAS incorporating our findings at verification.

In March 2004, we issued an additional supplemental questionnaire to Diler. We received a response to this questionnaire in March 2004.

Scope of the Review

The product covered by this review is all stock deformed steel concrete reinforcing bars sold in straight lengths and coils. This includes all hot-rolled deformed rebar rolled from billet steel, rail steel, axle steel, or low-alloy steel. It excludes (i) plain round rebar, (ii) rebar that a processor has further worked or fabricated, and (iii) all coated rebar. Deformed rebar is currently classifiable in the *Harmonized Tariff Schedule of the United States* (HTSUS) under item numbers 7213.10.000 and 7214.20.000. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

Period of Review

The POR is April 1, 2002, through March 31, 2003.

Partial Rescission of Review

As noted above, Cebitas, Cemtas, Demirsan, Ege Celik, Ekinciler, Habas, Iskenderun, Izmir, Kaptan, Karabuk, Kroman, Metas, Nurmet, Nursan, Sivas, Tosyali, and Ucel informed the Department that they had no shipments of subject merchandise to the United States during the POR. We have confirmed this with CBP. Therefore, in accordance with 19 CFR 351.213(d)(3) and consistent with the Department's practice, we are preliminarily rescinding our review with respect to these companies. *See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part,* 68 FR 53127, 53128 (Sept. 9, 2003) (*2001–2002 Rebar Review*). We have also confirmed with CBP that neither Ege Metal nor Kurum had shipments of subject merchandise during the POR. Therefore, in accordance with 19 CFR 351.213(d)(3) and consistent with the Department's practice, we are preliminarily rescinding our review with respect to Ege Metal and Kurum.

Regarding Habas, as noted above, we found that certain shipments of subject merchandise produced by this company entered the United States during the POR. On October 15, 2003, we requested that Habas explain these shipments, in light of its claim that it had none during the POR. On November 3, 2003, Habas informed the Department that it did not have knowledge that these shipments were destined for the United States because they were made by an unaffiliated customer. Habas also provided documentation to support its claim. Consequently, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we are preliminarily rescinding our review with respect to Habas.

Notice of Intent Not To Revoke in Part

On April 30, 2003, ICDAS submitted a letter to the Department requesting revocation of the antidumping duty order with respect to its sales of the subject merchandise, pursuant to 19 CFR 351.222(b).

The Department "may revoke, in whole or in part" an antidumping duty order upon completion of a review under section 751 of the Tariff Act of 1930, as amended (the Act). While Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is described in 19 CFR 351.222. 19 CFR 351.222(b)(2) notes that the Secretary may revoke an antidumping duty order in part if the Secretary concludes, *inter alia,* that one or more exporters or producers covered by the order have sold the subject merchandise in commercial quantities at not less than normal value (NV) for a period of at least three consecutive years. *See Notice of Final Results of the Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands,* 65 FR 742, 743 (Jan. 6, 2000).

ICDAS's request was accompanied by a certification that it has sold the subject merchandise at not less that NV during the current POR and will not sell the merchandise at less than NV in the future. ICDAS further certified that it sold the subject merchandise to the United States in commercial quantities for a period of at least three consecutive years.[1] The company also agreed to immediate reinstatement of the antidumping duty order, as long as any exporter or producer is subject to the order, if the Department concludes that, subsequent to the revocation, ICDAS sold the subject merchandise at less than NV.

In this administrative review, we preliminarily find that ICDAS does not qualify for revocation under 19 CFR 351.222(d), which states:

"The Secretary will not revoke an order or terminate a suspended investigation under paragraphs (b) or (c) of this section unless the Secretary has conducted a review under this subpart of the first and third (or fifth) years of the three- and five-year consecutive time periods referred to in those paragraphs."

This provision also makes clear that the Department will not revoke an order unless the relevant exports to the United States during each of these time periods were made in commercial quantities.

We preliminarily determine that ICDAS does not qualify for revocation in this review because it has not met the applicable requirements of 19 CFR 351.222(d). First, we note that the Department determined that ICDAS did not have sales in commercial quantities in the 1999–2000 review and, therefore, the Department cannot include this period in its revocation analysis for ICDAS. *See 2001–2002 Rebar Review* and accompanying decision memorandum at *Comment 5*. Second, we also note that the 2000–2001 review cannot count as the first of the three years under consideration for ICDAS because the Department did not conduct a review of this time period for ICDAS.[2] Therefore, because the requirements of 19 CFR 351.222(d) have not been met, we preliminarily find that ICDAS does not qualify for revocation.

Verification

As provided in section 782(i)(3)(a) of the Act, we verified the sales and cost information provided by ICDAS. We used standard verification procedures, including examination of relevant sales and financial records. Our verification results are outlined in the verification reports placed in the case file in the Central Records Unit, main Commerce building, room B–099.

Comparisons to Normal Value

To determine whether sales of rebar from Turkey were made in the United States at less than NV, we compared the export price (EP) to the NV. Because Turkey's economy experienced significant inflation during the POR, as is Department practice, we limited our comparisons to home market sales made during the same month in which the U.S. sale occurred and did not apply our "90/60" contemporaneity rule (*see, e.g., Certain Porcelain on Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review*, 62 FR 42496, 42503 (Aug. 7, 1997)). This methodology minimizes the extent to which calculated dumping margins are overstated or understated due solely to price inflation that occurred in the intervening time period between the U.S. and home market sales.

When making comparisons in accordance with section 771(16) of the Act, we considered all products sold in the home market as described in the "Scope of the Review" section of this notice, above, that were in the ordinary course of trade for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade (*i.e.*, sales within the same month which passed the cost test), we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade, based on the characteristics listed in sections B and C of our antidumping questionnaire, or CV, as appropriate.

Product Comparisons

In accordance with section 771(16) of the Act, we first attempted to compare products produced by the same company and sold in the U.S. and home markets that were identical with respect to the following characteristics: form, grade, size, and ASTM specification. Where there were no home market sales of foreign like product that were identical in these respects to the merchandise sold in the United States, we compared U.S. products with the most similar merchandise sold in the home market based on the characteristics listed above, in that order of priority.

Export Price

For all U.S. sales made by Colakoglu, Diler, and ICDAS, we used EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation and constructed export price methodology was not otherwise warranted based on the facts of record.

A. Colakoglu

We based EP on packed prices to the first unaffiliated purchaser in the United States. We made deductions for inspection fees, lashing and loading expenses, demurrage expenses, overage premium expenses, crane charges (offset by freight commission revenue, wharfage revenue, despatch revenue, demurrage commission revenue, agency fee revenue, attendance fee revenue, and other freight-related revenue), and ocean freight expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

B. Diler

We based EP on packed prices to the first unaffiliated purchaser in the United States. We made deductions for foreign inland freight expenses, brokerage and handling expenses, and loading expenses (including charges for loading supervision), where appropriate, in accordance with section 772(c)(2)(A) of the Act.

C. ICDAS

We based EP on packed prices to the first unaffiliated purchaser in the United States. We made deductions for surveying expenses, customs overtime fees, loading expenses, ocean freight expenses, U.S. customs duties, and U.S. brokerage charges, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

Normal Value

A. Home Market Viability

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is five percent or more of the aggregate volume of U.S. sales), we compared the volume of each respondent's home market sales of the foreign like product to the volume of U.S. sales of subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Based on this comparison, we determined that each respondent had a viable home market during the POR.

[1] ICDAS requested that the Department consider four review periods in its revocation analysis: 1999–2000, 2000–2001, 2001–2002, and 2002–2003.

[2] The Department rescinded the 1999–2000 administrative review for ICDAS because it had no entries during that time period. *See 2001–2002 Rebar Review* and accompanying decision memorandum at *Comment 5*.

Consequently, we based NV on home market sales.

For each respondent, in accordance with our practice, we excluded home market sales of non-prime merchandise made during the POR from our preliminary analysis based on the limited quantity of such sales in the home market and the fact that no such sales were made to the United States during the POR. (*See, e.g., Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Korea*, 58 FR 37176, 37180 (July 9, 1993); *Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results of Antidumping Duty Administrative Review*, 67 FR 21634, 21636 (May 1, 2002) (unchanged by the final results); *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review*, 66 FR 56274 (Nov. 7, 2001) and accompanying decision memorandum at *Comment 1 (1999–2000 Rebar Review).*

B. Affiliated Party Transactions and Arm's Length Test

Diler and ICDAS made sales of rebar to affiliated parties in the home market during the POR. Consequently, we tested these sales to ensure that they were made at "arm's length" prices, in accordance with 19 CFR 351.403(c). To test whether the sales to affiliates were made at arm's-length prices, we compared the unit prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, and packing expenses. Where the price to that affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise sold to the unaffiliated parties at the same level of trade (LOT), we determined that the sales made to the affiliated party were at arm's length. *See Modification Concerning Affiliated Party Sales in the Comparison Market*, 67 FR 69186 (Nov. 15, 2002).

C. Cost of Production Analysis

Pursuant to section 773(b)(2)(A)(ii) of the Act, for Colakoglu, Diler, and ICDAS there were reasonable grounds to believe or suspect that these respondents had made home market sales at prices below their COPs in this review because the Department had disregarded sales that failed the cost test for these companies in the most recently completed segment of this proceeding in which these companies participated (*i.e.*, the 2001–2002 administrative review for Colakoglu and ICDAS, and the 1999–2000 administrative review for Diler). As a result, the Department initiated an investigation to determine whether these companies had made home market sales during the POR at prices below their COPs. *See 2000–2001 Rebar Review*, 67 FR at 66111. *See also, 1999–2000 Rebar Review*, 66 FR at 56275.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the respondents' cost of materials and fabrication for the foreign like product, plus amounts for general and administrative expenses (G&A), and interest expenses. *See* the "Test of Comparison Market Sales Prices" section below for treatment of home market selling expenses.

As noted above, we determined that the Turkish economy experienced significant inflation during the POR. Therefore, in order to avoid the distortive effect of inflation on our comparison of costs and prices, we requested that each respondent submit the product-specific cost of manufacturing (COM) incurred during each month of the reporting period. We calculated a period-average COM for each product after indexing the reported monthly costs during the reporting period to an equivalent currency level using the Turkish Wholesale Price Index from the *International Financial Statistics* published by the International Monetary Fund. We then restated the period-average COMs in the currency values of each respective month.

We relied on the COP information Colakoglu and Diler provided in their questionnaire responses. In addition, we relied on the COP information provided by ICDAS, except for the following adjustments:

1. We revised the reported COM for rebar by allocating direct labor, variable overhead, and fixed overhead costs incurred at the rolling mills based on actual time including stoppage.

2. We revised the G&A expense rate calculation as follows:

(a) We excluded the revenue items associated with ICDAS's separate line of business;

(b) we excluded the revenues and expenses not related to the 2002 fiscal year; and

(c) we adjusted the gain on the sale of an asset to an affiliated party to reflect the market price.

3. We revised the interest expense ratio calculation to include the following items: interest expenses, foreign exchange gains, and foreign exchange losses.

For further discussion of these adjustments, see the memorandum from Sheikh M. Hannan to Neal Halper entitled "Cost of Production and Constructed Value Adjustments for the Preliminary Results," dated April 29, 2004.

2. Test of Home Market Sales Prices

We compared the weighted-average COP figures to home market prices of the foreign like product, as required under section 773(b) of the Act, in order to determine whether these sales had been made at prices below the COP. On a product-specific basis, we compared the COP to home market prices, less any applicable movement charges, selling expenses, and packing expenses.

In determining whether to disregard home market sales made at prices below the COP, we examined whether such sales were made: (1) In substantial quantities within an extended period of time; and (2) at prices which permitted the recovery of all costs within a reasonable period of time. See sections 773(b)(2)(B), (C), and (D) of the Act.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of a respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product were at prices below the COP, we found that sales of that model were made in "substantial quantities" within an extended period of time (as defined in section 773(b)(2)(B) of the Act), in accordance with section 773(b)(2)(C)(i) of the Act. In such cases, we also determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, for purposes of this administrative review, we disregarded these below-cost sales for ICDAS and Diler and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

Regarding Colakoglu, we preliminarily find that this respondent did not make any below-cost sales in substantial quantities during the POR. Therefore, we did not disregard any of Colakoglu's home market sales in determining NV.

D. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same LOT as EP. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, SG&A, and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from the exporter to the unaffiliated U.S. customer.

To determine whether NV sales are at a different LOT than EP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act.

All respondents claimed that they made home market sales at only one LOT. We analyzed the information on the record for each company and found that two of these respondents, Colakoglu and Diler, performed essentially the same marketing functions in selling to all of their home market and U.S. customers, regardless of customer category (*e.g.*, end-user, distributor). Therefore, we determine that these sales are at the same LOT. We further determine that no LOT adjustment is warranted for these respondents.

Regarding ICDAS, we found that this company performs additional selling functions on certain home market sales. Specifically, we found that ICDAS performs an additional layer of selling functions on its sales through affiliated distributors which are not performed on its sales to unaffiliated customers. Because these additional selling functions are significant, we find that ICDAS's sales through affiliated distributors are at a different LOT than its direct sales to unaffiliated parties. We further find that the LOT for U.S. sales is the same as the home market LOT for ICDAS's direct sales to unaffiliated parties because the selling functions performed by ICDAS are essentially the same in both markets. Consequently, we compared ICDAS's EP sales to sales at the same LOT in the home market (*i.e.*, ICDAS's direct home market sales). For further discussion, see the memorandum entitled "Concurrence Memorandum," dated April 29, 2004.

E. Calculation of Normal Value

1. Colakoglu

We based NV on the starting prices to home market customers. For those home market sales which were negotiated in U.S. dollars, we used the U.S.-dollar price, rather than the Turkish lira (TL) price adjusted for *kur farki* (*i.e.*, an adjustment to the TL invoice price to account for the difference between the estimated and actual TL value on the date of payment), because the only price agreed upon was a U.S.-dollar price, and this price remained unchanged; the buyer merely paid the TL-equivalent amount at the time of payment. This treatment is consistent with our treatment of these transactions in the most recently completed segment of this proceeding. *See Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke in Part*, 68 FR 23972, 23977 (unchanged in the final results). Where appropriate, we made deductions from the starting price for foreign inland freight expenses, in accordance with section 773(a)(6)(B) of the Act.

Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(c), we made circumstance-of-sale adjustments for credit expenses (offset by interest revenue), commissions, bank charges, other direct selling expenses, and exporter association fees. Although it is the Department's practice to offset commissions paid in only one market with the indirect selling expenses incurred in the other (*see, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyvinyl Alcohol From the Republic of Korea*, 68 FR 13681, 13685 (Mar. 20, 2003)), we were unable to do so here because Colakoglu did not report sufficient data to permit such a calculation. However, we have requested that Colakoglu provide this information, and we intend to consider it for purposes of the final results.

We deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(6) of the Act.

Where appropriate, we made adjustments to NV to account for differences in physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable costs of manufacturing for the foreign like product and subject merchandise, using POR-average costs as adjusted for inflation for each month of the POR, as described above.

2. Diler

We based NV on the starting prices to home market customers. For those home market sales which were negotiated in U.S. dollars, we used the U.S.-dollar price, rather than the TL price adjusted for *kur farki*, because the only price agreed upon was a U.S.-dollar price, and this price remained unchanged. For further discussion, see above. Where appropriate, we made deductions from the starting price for foreign inland freight expenses, in accordance with section 773(a)(6)(B) of the Act.

Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(c), we made circumstance-of-sale adjustments for credit expenses (offset by interest revenue), bank fees, and exporter association fees.

We deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(6) of the Act.

Where appropriate, we made adjustments to NV to account for differences in physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable costs of manufacturing for the foreign like product and subject merchandise, using period-average costs as adjusted for inflation for each month of the reporting period, as described above.

3. ICDAS

We based NV on the starting prices to home market customers. For those home market sales which were negotiated in U.S. dollars, we used the U.S.-dollar price, rather than the TL price adjusted for *kur farki*, because the only price agreed upon was a U S.-dollar price, and this price remained unchanged. For further discussion, see above.

Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(c), we made circumstance-of-sale adjustments for credit expenses, bank charges, and exporter association fees.

We deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(6) of the Act.

Where appropriate, we made adjustments to NV to account for differences in physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable costs of manufacturing for the foreign like

product and subject merchandise, using POR-average costs as adjusted for inflation for each month of the POR, as described above.

Currency Conversion

The Department's preferred source for daily exchange rates is the Federal Reserve Bank. However, the Federal Reserve Bank does not track or publish exchange rates for Turkish Lira. Therefore, we made currency conversions based on exchange rates from the Dow Jones News/Retrieval Service.

Preliminary Results of the Review

We preliminarily determine that the following margins exist for the respondents during the period April 1, 2002, through March 31, 2003:

Manufacturer/producer/exporter	Margin percentage
Colakoglu Metalurji A.S.	9.33
Diler Demir Celik Endustrisi ve Ticaret A.S., Yazici Demir Celik Sanayi ve Ticaret A.S., and Diler Dis Ticaret A.S.	0.36
ICDAS Celik Enerji Tersane ve Ulasim Sanayi, A.S.	0.02

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. Interested parties may request a hearing within 30 days of publication. Any hearing, if requested, will be held two days after the date rebuttal briefs are filed. Pursuant to 19 CFR 351.309, interested parties may submit cases briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than 37 days after the date of publication of this notice. The Department will issue the final results of the administrative review, including the results of its analysis of issues raised in any such written comments, within 120 days of publication of these preliminary results.

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), because ICDAS reported the entered value of all U.S. sales, we have calculated importer-specific assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales.

Regarding Colakoglu and Diler, we note that these companies did not report the entered value for any of their U.S. sales. Accordingly, we have calculated importer-specific assessment rates for the merchandise in question by aggregating the dumping margins calculated for all U.S. sales to each importer and dividing this amount by the total quantity of those sales. To determine whether the duty assessment rates were *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer-specific *ad valorem* ratios based on the EPs. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.*, less than 0.50 percent). The Department will issue appraisement instructions directly to CBP.

Further, the following deposit requirements will be effective for all shipments of rebar from Turkey entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(2)(c) of the Act: (1) The cash deposit rates for the reviewed companies will be the rates established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106, the cash deposit will be zero; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or the less than fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 16.06 percent, the all others rate established in the LTFV investigation.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 29, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–10232 Filed 5–4–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration, North American Free Trade Agreement, Article 1904 NAFTA Panel Reviews; Notice of Panel Decision

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of Panel Decision.

SUMMARY: On April 19, 2004, the binational panel issued its decision in the review of the final results of the affirmative injury re-determination on remand made by the International Trade Commission (ITC) respecting Certain Softwood Lumber Products from Canada (Secretariat File No. USA-CDA–2002–1904–07) affirmed in part and remanded in part the determination of the International Trade Commission. The Commission will return the second determination on remand no later than May 10, 2004. A copy of the complete panel decision is available from the NAFTA Secretariat.

FOR FURTHER INFORMATION CONTACT: Caratina L. Alston, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement ("Agreement") establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* ("Rules"). These Rules were published in the

Federal Register on February 23, 1994 (59 FR 8686).

Panel Decision: On April 19, 2004, the Binational Panel affirmed in part and remanded in part the International Trade Commission's final injury determination on remand. The following issues were remanded to the Commission:

1. The Commission's finding of Canadian producers' excess production and projected increases in capacity utilization and production, indicating the likelihood of substantially increased imports of the subject merchandise into the United States, is not supported by substantial evidence.

2. The Commission's finding that the domestic industry is threatened with material injury by reason of a significant rate of increase of the volume or market penetration of imports of the volume or market penetration of imports of the subject merchandise, indicating the likelihood of substantially increased imports into the United States, is not supported by substantial evidence.

3. The Commission's finding that the domestic industry is threatened with material injury by reason of the fact that imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports is not supported by substantial evidence.

4. The Commission's finding that the domestic industry has curbed its overproduction of softwood lumber is not supported by substantial evidence.

The Commission was directed to issue it's determination on remand within 21 days of the panel decision or not later than May 10, 2004.

Dated: April 29, 2004.

Caratina L. Alston,

United States Secretary, NAFTA Secretariat.

[FR Doc. 04–10149 Filed 5–4–04; 8:45 am]

BILLING CODE 3510–GT–P

CONSUMER PRODUCT SAFETY COMMISSION

Petition Requesting Ban of Sulfuric Acid Drain Openers for Consumer Use (Petition No. HP 04–2)

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The United States Consumer Product Safety Commission (Commission or CPSC) has received a petition (HP 04–2) requesting that the Commission ban sulfuric acid drain openers (SADOs) for consumer use, or in the alternative, require that SADOs for consumers be packaged in "one-shot" containers and be limited to a maximum sulfuric acid concentration of 84 percent. The Commission solicits written comments concerning the petition.

DATES: The Office of the Secretary must receive comments on the petition by July 6, 2004.

ADDRESSES: Comments on the petition, preferably in five copies, should be mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 504–7923, or delivered to the Office of the Secretary, Room 502, 4330 East-West Highway, Bethesda, Maryland 20814. Comments may also be filed by facsimile to (301) 504–0127 or by e-mail to *cpsc-os@cpsc.gov*. Comments should be captioned "Petition HP 04–2, Petition for Ban on Sulfuric Acid Drain Openers for Consumer Use." A copy of the petition is available for inspection at the Commission's Public Reading Room, Room 419, 4330 East-West Highway, Bethesda, Maryland. The petition is also available on the CPSC Web site at *http://www.cpsc.gov*.

FOR FURTHER INFORMATION CONTACT: Rockelle Hammond, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–6833, e-mail *rhammond@cpsc.gov*.

SUPPLEMENTARY INFORMATION: The Commission has received correspondence from Mr. Michael Fox requesting that the Commission ban SADOs for consumer use, or in the alternative, require that SADOs for consumers be packaged in "one-shot" containers and be limited to a maximum sulfuric acid concentration of 84 percent.

Mr. Fox asserts that such action is necessary because "sulfuric acid drain cleaners (SADOs) are unreasonably dangerous and should not be sold to ordinary consumers." Mr. Fox provides injury data that he asserts supports that proposition.

The request for a ban or a restriction to packaging in "one-shot" containers with a limit on sulfuric acid concentration of a maximum of 84 percent is docketed as petition number HP 04–2 under the Federal Hazardous Substances Act, 15 U.S.C. 1261–1278.

Interested parties may obtain a copy of the petition by writing or calling the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–7923. The petition is available on the CPSC Web site at *http://www.cpsc.gov*. A copy of the petition is also available for inspection from 8:30 a.m. to 5 p.m., Monday through Friday, in the Commission's Public Reading Room, Room 419, 4330 East-West Highway, Bethesda, Maryland.

Dated: April 28, 2004.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 04–10162 Filed 5–4–04; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

General Services Administration

National Aeronautics and Space Administration

[OMB Control No. 9000–0135]

Federal Acquisition Regulation; Submission for OMB Review; Prospective Subcontractor Requests for Bonds

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0135).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning subcontractor requests for bonds. A request for public comments was published at 69 FR 5512 on February 5, 2004. No comments were received. However, upon further review, we believe that the time required to provide a copy to a requestor should be reduced from one-half hour to a quarter-hour.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to

respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before June 4, 2004.

ADDRESSES: Submit comments including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0135, Subcontractor Requests for Bonds, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Acquisition Policy Division, GSA (202) 219–0202.

SUPPLEMENTARY INFORMATION:

A. Purpose

Part 28 of the FAR contains guidance related to obtaining financial protection against damages under Government contracts (*e.g.*, use of bonds, bid guarantees, insurance etc.). Part 52 contains the texts of solicitation provisions and contract clauses. These regulations implement a statutory requirement for information to be provided by Federal contractors relating to payment bonds furnished under construction contracts which are subject to the Miller Act (40 U.S.C. 270a–270d). This collection requirement is mandated by section 806 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Pub. L. 102–190), as amended by section 2091 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–335). The clause at 52.228–12, Prospective Subcontractor Requests for Bonds, implements section 806(a)(3) of Pub. L. 102–190, as amended, which specifies that, upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of a construction contract for which a payment bond has been furnished to the United States pursuant to the Miller Act, the contractor shall promptly provide a copy of such payment bond to the requestor.

In conjunction with performance bonds, payment bonds are used in Government construction contracts to secure fulfillment of the contractor's obligations under the contract and to assure that the contractor makes all payments, as required by law, to persons furnishing labor or material in performance of the contract. This regulation provides prospective subcontractors and suppliers a copy of the payment bond furnished by the contractor to the Government for the performance of a Federal construction contract subject to the Miller Act. It is expected that prospective subcontractors and suppliers will use this information to determine whether to contract with that particular prime contractor. This information has been and will continue to be available from the Government. The requirement for contractors to provide a copy of the payment bond upon request to any prospective subcontractor or supplier under the Federal construction contract is contained in section 806(a)(3) of Pub. L. 102–190, as amended by sections 2091 and 8105 of Pub. L. 103–355.

B. Annual Reporting Burden

Respondents: 12,698.
Responses Per Respondent: 5.
Total Responses: 63,490.
Hours Per Response: .25.
Total Burden Hours: 15,872.50.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (MVA), Room 4035, 1800 F Street, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0135, Subcontractor Requests for Bonds, in all correspondence.

Dated: April 29, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

[FR Doc. 04–10146 Filed 5–4–04; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Cancellation of the Notice of Intent To Prepare a Draft Environmental Impact Statement for the Potential Multipurpose Projects for Ecosystem Restoration, Flood Damage Reduction, and Recreation Alternatives Within and Along the Portion of the San Antonio River Located in San Antonio, Bexar County, TX

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice; cancellation.

SUMMARY: The Fort Worth District, U.S. Army Corps of Engineers hereby cancels its notice of intent to prepare a Draft Environmental Impact Statement (DEIS) for the potential multipurpose projects for ecosystem restoration, flood damage reduction, and recreation alternatives within and along the portion of the San Antonio River located in San Antonio, Bexar County, TX, as published in the **Federal Register** on April 25, 2002 (67 FR 20497).

Section 335 of the Water Resources Development Act (WRDA) of 2000, passed by Congress, amended the San Antonio Channel Improvement Project (SACIP) by authorizing ecosystem restoration and recreation as project purposes in addition to the previously authorized flood damage reduction project purpose. An initial assessment based on implementation guidance for section 335 indicated a Federal interest in continuing with more detailed studies for these purposes. In accordance with the National Environmental Policy Act (NEPA), the DEIS was required to evaluate and compare ecosystem restoration, flood damage reduction, and recreation alternatives within and along two reaches of the San Antonio River. The DEIS was also required to assess the impacts to the quality of the human environment associated with each design alternative.

Past channelization and clearing of floodways associated with the SACIP, along with urbanization, have significantly degraded the terrestrial and aquatic habitat along and within the San Antonio River. Consequently, ecosystem restoration measures were developed and evaluated to address the degraded habitats. In addition, recreation measures were developed and evaluated as complements to proposed ecosystem restoration measures. The preliminary lack of significant adverse impacts from proposed project design alternatives and the lack of public controversy indicated that a DEIS was no longer required under NEPA. Instead, the U.S. Army Corps of Engineers will prepare a Draft Environmental Assessment (DEA) for the potential multipurpose projects for ecosystem restoration, flood damage reduction, and recreation alternatives within and along the portion of the San Antonio River located in San Antonio, Bexar County, TX. Therefore, the cancellation of the Notice of Intent (NOI) to prepare a DEIS is being filed for publication in the Notice Section of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Eli A. Kangas, CESWF–PER–PF, U.S. Army Corps of Engineers, Fort Worth District, P.O. Box 17300, 819 Taylor Street, Fort Worth, TX 76102–0300, phone (817) 886–1924, fax (817) 886–6498.

SUPPLEMENTARY INFORMATION: Alternatives for ecosystem restoration, flood damage reduction, and recreation are being developed and evaluated based on ongoing fieldwork and data collection and past studies conducted by the U.S. Army Corps of Engineers, the San Antonio River Authority, and the City of San Antonio. Ecosystem restoration alternatives that are being

evaluated include restoring meanders within the San Antonio River, restoring, protecting and expanding the riparian corridor, creating riffle-pool complexes, and constructing wetlands. It is anticipated that ecosystem restoration alternatives would aid in improving water quality, optimizing aquatic and terrestrial habitat, and minimizing erosion and scouring along and within the river. Alternatives for flood damage reduction measures are being evaluated from both a non-structural and structural aspect. Non-structural measures that will be evaluated include acquisition and removal of structures or flood proofing of structures for protection from potential future flood damage. Structural measures that are being evaluated include diversion channels and/or channel modifications of various widths and depths and/or a combination of these measures. Recreation measures that are being evaluated include multipurpose trails and passive recreation features, such as interpretive guidance, media, and picnic areas. Recreation measures will be developed to a scope and scale compatible with proposed ecosystem restoration measures without significantly diminishing ecosystem benefits.

The public will be given the opportunity to review the DEA during the 30-day public comment period. Prior to the close of the comment period, any person may make a written request for a public meeting, setting forth the particular reasons for the request. The District Engineer will then determine whether the issues raised are substantial and should be considered in his decision. If a public meeting is warranted, all known interested parties will be notified of the time, date, and location of such a meeting in the local news media. Release of the DEA for public comment is scheduled for June 2004. The exact release date, once established, will be announced in the local news media.

Dated: April 21, 2004.

John R. Minahan,

Colonel, Corps of Engineers, Commanding.

[FR Doc. 04–10184 Filed 5–4–04; 8:45 am]

BILLING CODE 3710–20–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Grant an Exclusive License to Senera Corporation, Waltham, MA

AGENCY: Department of the Army, U.S. Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: In accordance with 37 CFR 404.7(a)(1)(i), announcement is made of prospective exclusive licenses for use in bridge and dam scour monitoring of the following U.S. patents: 5,784,338; 5,790,471; 6,084,393; 6,100,700; 6,121,894; 6,281,688; 6,526,189; 6,541,985 which are more fully described in **SUPPLEMENTARY INFORMATION.**

DATES: Written objections must be filed not later than May 20, 2004.

ADDRESSES: United States Army Engineer Research and Development Center, Cold Regions Research and Engineering Laboratory, 7701 Telegraph Road, Kingman Building, Alexandria, VA 22315–3860.

FOR FURTHER INFORMATION CONTACT: Ms. Sharon Borland, ATTN: CEERD–ZA–TT; (703) 428–9112, FAX (703) 428–6275; email: *Sharon.L.Borland@usace.army.mil.*

SUPPLEMENTRY INFORMATION:

Patent No. 5,784,338 entitled "Time Domain Reflectometry System for Real-time Bridge Scour Detection and Monitoring," invented by Dr. Norbert E. Yankielun and Leonard J. Zabilansky, issued July 21, 1998; Patent No. 5,790,471 entitled "Water/Sediment Interface Monitoring System using Frequency-Modulated Continuous Wave," invented by Dr. Norbert E. Yankielun and Leonard J. Zabilansky, issued August 4, 1998; Patent No. 6,084,393 entitled "Scour Probe Assembly," invented by Dr. Norbert E. Yankielun, issued July 4, 2000; Patent No. 6,100,700 entitled "Bridge Scour Detection and Monitoring Apparatus using Time Domain Reflectometry (TDR)," invented by Dr. Norbert E. Yankielun and Leonard J. Zabilansky, issued August 8, 2000; Patent No. 6,121,894 entitled "Low Cost Time Domain Reflectometry System for Bridge Scour Detection and Monitoring", invented by Dr. Norbert E. Yankielun and Leonard Zabilansky, issued September 19, 2000; Patent No. 6,281,688 entitled "Transmission Line Reflectometer using Frequency-Modulated Continuous Wave," invented by Dr. Norbert E. Yankielun, issued August 28, 2001; Patent No. 6,526,189 entitled "Scour Sensor Assembly," invented by Dr. Norbert E. Yankielun, issued February 25, 2003; Patent No. 6,541,985 entitled "System and Method for Remotely Monitoring an Interface Between Dissimilar Materials," invented by Dr. Norbert E. Yankielun, issued April 1, 2003. The United States of America as represented by the Secretary of the Army intends to grant an exclusive license for the field of use of bridge and dam scour monitoring, in the manufacture, use, and sale of the patented technology in the territories and possessions of the U.S.A., to Senera Corporation, 41 Seyon St. Building 1, Suite 500, Waltham, MA 02453. Pursuant to 37 CFR 404.7(b)(1)(I), any interested party may file a written objection to this prospective partially exclusive license agreement.

Richard L. Frenette,

Counsel.

[FR Doc. 04–10183 Filed 5–4–04; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Chief of Naval Operations (CNO) Executive Panel

AGENCY: Department of the Navy, DOD.

ACTION: Notice of closed meeting.

SUMMARY: The CNO Executive Panel is to report the findings and recommendations of the Shaping the Force Study Group to the Chief of Naval Operations. The meeting will consist of discussions of policy considerations to advance efforts to shape the Navy's workforce and develop a systematic Navy Human Resources strategy.

DATES: The meeting will be held on Friday, May 14, 2004, from 12 p.m. to 1 p.m.

ADDRESSES: The meeting will be held at the Chief of Naval Operations Office, Room 4E540, 2000 Navy Pentagon, Washington, DC 20350–2000.

FOR FURTHER INFORMATION CONTACT: Commander David Hughes, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, VA 22311, (703) 681–4908.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), these matters relate solely to the internal personnel rules and practices of the Navy. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(2) of title 5, United States Code.

Dated: April 30, 2004.

S. A. Hughes,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 04–10289 Filed 5–4–04; 8:45 am]

BILLING CODE 3810–FF–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

FOIA Fee Schedule Update

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice.

SUMMARY: The Defense Nuclear Facilities Safety Board is publishing its annual update to the Freedom of Information Act (FOIA) Fee Schedule pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations.

EFFECTIVE DATE: May 1, 2004.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Pusateri, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (202) 694–7060.

SUPPLEMENTARY INFORMATION: The FOIA requires each Federal agency covered by the Act to specify a schedule of fees applicable to processing of requests for agency records. 5 U.S.C. 552(a)(4)(i). On March 15, 1991, the Board published for comment in the **Federal Register** its proposed FOIA Fee Schedule. 56 FR 11114. No comments were received in response to that notice and the Board issued a final Fee Schedule on May 6, 1991.

Pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations, the Board's General Manager will update the FOIA Fee Schedule once every 12 months. Previous Fee Schedule updates were published in the **Federal Register** and went into effect, most recently, on April 30, 2003, 68 FR 23112.

Board Action

Accordingly, the Board issues the following schedule of updated fees for services performed in response to FOIA requests:

DEFENSE NUCLEAR FACILITIES SAFETY BOARD—SCHEDULE OF FEES FOR FOIA SERVICES

[Implementing 10 CFR 1703.107(b)(6)]

Search or Review Charge.	$60.00 per hour.
Copy Charge (paper)	.04 per page, if done in-house, or generally available commercial rate (approximately $.10 per page).
Electronic Media	5.00.
Copy Charge (audio cassette).	3.00 per cassette.
Duplication of Video ..	25.00 for each individual videotape; 16.50 for each additional individual videotape.
Copy Charge for large documents (*e.g.*, maps, diagrams).	Actual commercial rates.

Dated: April 30, 2004.

Kenneth M. Pusateri,

General Manager.

[FR Doc. 04–10219 Filed 5–4–04; 8:45 am]

BILLING CODE 3670–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IN03–11–000]

CenterPoint Energy Gas Transmission Company; Notice of Filing

April 28, 2004.

Take notice that on April 5, 2004, CenterPoint Energy Gas Transmission Company (CEGT) tendered for filing pursuant to section IV., paragraph 2 of a Stipulation and Consent Agreement (Settlement) approved by Commission Order in this proceeding issued March 4, 2004, an informational filing containing a list of contract provisions cited in Appendix A of the Settlement, together with a detailed narrative for each provision, as further specified in the Settlement. CEGT states that the detailed narrative outlines the manner in which the listed contract terms differ from the form of service agreements found in CEGT's tariff in effect at the time the contract terms were entered into, the effect of such terms on the rights of the parties, and why such deviations from the standard form of service agreements does not present a risk of undue discrimination.

This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free (866) 208–3676 or TTY, (202) 502–8659.

CEGT states that this filing is also available for public inspection during regular business hours at their offices at 525 Milam, Shreveport, Louisiana.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1023 Filed 5–4–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–260–000]

Dauphin Island Gathering Partners; Notice Rescinding Prior Notice

April 29, 2004.

On April 23, 2004, the Commission issued a "Notice of Proposed Changes in FERC Gas Tariff" in Docket No. RP04–260–000. This proceeding has been redocketed as Docket No. CP99–16–001. The April 23, 2004, Notice in Docket No. RP04–260–000 is hereby rescinded.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1021 Filed 5–4–04; 8:45 a.m.]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–16–001]

Dauphin Island Gathering Partners; Notice of Proposed Changes In FERC Gas Tariff

April 29, 2004.

Take notice that on April 20, 2004, as supplemented on April 21, 2004, Dauphin Island Gathering Partners (Dauphin Island) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the revised tariff sheets identified within the filings, with an effective date of May 20, 2004.

Dauphin Island states that these tariff sheets are being filed to reflect a reference to the incremental charge associated with the lease of Texas Eastern Transmission, LP by Dauphin Island.

Dauphin Island states that copies of the filing are being served on all participants listed on the service list in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions

or protests must be filed in accordance with section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1022 Filed 5–04–04; 8:45 a.m.]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No.CP04–121–000]

El Paso Natural Gas Company; Notice Of Application

April 29, 2004.

Take notice that El Paso Natural Gas Company (El Paso), Post Office Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP04–121–000 on April 21, 2004, an application pursuant to section 7(b) of the Natural Gas Act (NGA), as amended, to abandon pipeline facilities consisting of 0.62 mile of 24-inch diameter pipeline in San Juan County, New Mexico, by sale to Gulfterra Field Services, LLC, El Paso's gathering affiliate, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be also viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call (202) 502–8659 or TTY, (202) 208–3676.

Any questions regarding this application should be directed to Robert T. Tomlinson, Director, Regulatory Affairs, at (719)520–3788, fax (719)520–4318.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: May 20, 2004.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1028 Filed 5–4–04; 8:45 a.m.]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR04–7–001]

Raptor Natural Pipeline LLC; Notice of Offer of Settlement

April 29, 2004.

Take notice that on April 23, 2004, Raptor Natural Pipeline LLC (Raptor) filed an Offer of Settlement and Stipulation and Agreement (Settlement) in the above referenced proceeding. Raptor and Commission Staff (the only participants) have agreed to the continued use of market based rates for storage services, and the following maximum rates for transportation service and in-kind fuel reimbursement percentages: (i) Firm transportation rate of $1.6796/Dth/month; (ii) interruptible transportation rate of $0.0552 per Dth; (iii) loss and unaccounted for allowance of 0.15%; (iv) APEX Compression Station Fuel Usage of 1.58%; and (v) Booster Compression Station Fuel Usage of 0.62%.

The Settlement also provides that, on or before December 31, 2006, Raptor shall file an application in which Raptor proposes, pursuant to section 284.123(b)(2) of the Commission's regulations, either to justify its current effective rates or to establish new system rates applicable to section 311(a)(2) services.

Initial comments on Raptor's filing are due on or before May 3, 2004, and reply comments are due on or before May 7, 2004. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "Documents & Filing" tab.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1027 Filed 5–4–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–416–001, et al.]

Public Service Company of New Mexico, et al.; Electric Rate and Corporate Filings

April 28, 2004

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Public Service Company of New Mexico

[Docket No. ER04–416–001]

Take notice that on April 23, 2004, Public Service Company of New Mexico (PNM) submitted for filing its response to the Commission's Letter Order issued April 9, 2004, in Docket No. ER04–416–000, concerning certain deficiencies regarding PNM's proposed variations to the FERC pro forma Large Generator Interconnection Procedures (LGIP) and Large Generator Interconnection Agreement (LGIA), filed on January 20, 2004.

PNM states that copies of the filing have been sent to the New Mexico Public Regulation Commission, the New Mexico Attorney General, all of PNM's large generation interconnection customers and entities that have requested large generator interconnection service, and to all parties that have requested or have been granted intervention in this proceeding.

Comment Date: May 14, 2004.

2. Sierra Pacific Power Company; Nevada Power Company

[Docket No. ER04–418–002]

Take notice that on April 23, 2004, Nevada Power Company and Sierra Pacific Power Company (the Nevada Companies) tendered for filing an amendment to its January 20, 2004, filing in the referenced docket, which proposed revisions to its Open Access Transmission Tariff (OATT) with respect to the Large Generator Interconnection Procedures and Agreement issued by the Commission in FERC Order Nos. 2003 and 2003–A. Nevada Companies state that the amendment to the filing provides information responsive to the Commission's deficiency letter issued April 9, 2004, in Docket No. ER04–418–000.

Nevada Companies state that copies of this letter have been served on all parties that have intervened in referenced docket, and the public utilities commissions of Nevada and California.

Comment Date: May 14, 2004.

3. American Transmission Company, LLC

[Docket No. ER04–422–001]

Take notice that on April 23, 2004, American Transmission Company LLC (ATCLLC) tendered for filing an Interconnection and Operating Agreement between the Midwest Independent Transmission System Operator, Inc., ATCLLC and White Pine Copper Refinery, Inc. replacing the two-party agreement filed January 16, 2004, in Docket No. ER04–422–000. ATCLLC requests an effective date of January 16, 2004.

Comment Date: May 14, 2004.

4. Public Service Company of New Mexico

[Docket No. ER04–534–001]

Take notice that on April 23, 2004, Public Service Company of New Mexico (PNM) submitted for filing its Refund Report for services provided prior to the effective date granted by the Commission's order issued April 6, 2004, in Docket No. ER04–534–000, in association with PNM's filing of two firm point-to-point service agreements.

PNM states that copies of the filing have been mailed to the Texas-New Mexico Power Company, the New Mexico Public Regulation Commission and the New Mexico Attorney General.

Comment Date: May 14, 2004.

5. New England Power Pool

[Docket No. ER04–756–000]

Take notice that on April 23, 2004, the New England Power Pool (NEPOOL) Participants Committee filed revisions to NEPOOL Market Rule 1 to modify the current criteria for the reimbursement of Internet-Based Communication Systems installation costs. NEPOOL requests a June 1, 2004, effective date.

The NEPOOL Participants Committee states that copies of these materials were sent to the NEPOOL Participants and the New England State governors and regulatory commissions.

Comment Date: May 14, 2004.

6. Southern California Edison Company

[Docket No. ER04–757–000]

Take notice that on April 23, 2004, Southern California Edison Company (SCE) tendered for filing the Amended and Restated Edison–AEPCO Firm Transmission Service Agreement, Second Revised Rate Schedule FERC No. 131 and the Amended and Restated Edison–AEPCO Load Control Agreement, Second Revised Rate Schedule FERC No. 132 between SCE and the Arizona Electric Power Cooperative, Inc. and the Southwest Transmission Cooperative, Inc. SCE requests an effective date of May 1, 2004.

SCE states that copies of this filing were served upon the Public Utilities Commission of the State of California, AEPCO and SWTC.

Comment Date: May 14, 2004.

7. Entergy Services, Inc.

[Docket No. ER04–758–000]

Take notice that on April 23, 2004, Entergy Services, Inc., on behalf of Entergy Arkansas, Inc., (Entergy Arkansas) tendered for filing the Thirty-third Amendment to the Power Coordination, Interchange and Transmission Service Agreement between Entergy Arkansas, and Arkansas Electric Cooperative Corporation, dated March 1, 2004, pursuant to section 205 of the Federal Power Act.

Comment Date: May 14, 2004.

8. Puget Sound Energy, Inc.

[Docket No. ER04–761–000]

Take notice that on April 26, 2004, Puget Sound Energy, Inc. (PSE) tendered for filing proposed revisions to its Open Access Transmission Tariff (OATT), to comply with the Commission's Order No. 2003, *Standardization of Interconnection Agreements and Procedures,* FERC Stats. & Regs. Preambles ¶ 31,146 (2003) and Order No. 2003–A, *Standardization of Interconnection Agreements and Procedures,* 106 FERC ¶ 61,220 (March 5, 2004).

PSE states that it has served copies of this filing on the Washington Utilities and Transportation Commission. Additionally, PSE states that it has sent a letter by U.S. mail to all of its Transmission Customers to notify them that this filing has been made and to let them know that a copy of the filing can be obtained on the PSE OASIS.

Date: May 17, 2004.

9. Kandiyohi Power Cooperative

[Docket No. ES04–24–000 and EC04–95–000]

Take notice that on April 8, 2004, Kandiyohi Power Cooperative (Kandiyohi) pursuant to sections 203 and 204 of the Federal Power Act (FPA), 16 U.S.C. 824b and 824c, and Parts 33 and 34 of the Commission's Regulations, 18 CFR parts 33 and 34, filed a request for a no action order with respect to a promissory note issued in 1998 to United Power Association (UPA) and the acquisition from UPA of several substations used, in part for

jurisdictional services, without prior Commission authorization. Kandiyohi states that the filing is available for public inspection at its offices in Willmar, Minnesota.

Comment Date: May 7, 2004.

10. South Carolina Public Service Authority

[Docket No. NJ04–3–000]

Take notice that on April 26, 2004, South Carolina Public Service Authority (Santee Cooper) tendered revisions to its open access transmission tariff (OATT) in order to incorporate a Standard Large Generator Interconnection Procedure and a Standard Large Generator Interconnection Agreement, in response to the Commission's Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003*, 68 FR 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles 31,146 (2003), *order on reh'g, Order No. 2003–A*, 69 FR 15,932 (March 26, 2004), FERC Stats. & Regs., Regulations Preambles 31,160 (2004); *Notice Clarifying Compliance Procedures,* 106 FERC 61,009 (2004).

South Carolina Public Service Authority states that copies of the filing were served upon Santee Cooper's customers under the OATT.

Comment Date: May 17, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1029 Filed 5–4–04; 8:45 a.m.]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

April 29, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary permit.

b. *Project No:* 12492–000.

c. *Date Filed:* March 16, 2004.

d. *Applicant:* Ha-Best Inc.

e. *Name of Project:* Miner Shoal Waterpower Project.

f. *Location:* The proposed project would be located near Clarksville Georgia, on the Soquee River in Habersham County, Georgia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Don Ferguson, 34 West Jarrard Street, Cleveland, GA 30528; (706) 865–3999.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Lynn R. Miles, Sr. at (202) 502–8763.

j. *Deadline for filing motions to intervene, protests and comments:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–12492–000) on any comments, protest, or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed run-of-river project would consist of the following: (1) An existing 30-foot-high, 540-foot-long dam, (2) a proposed reservoir with a normal water surface elevation of 1,285 feet mean sea level with a surface area of 265 acres and a storage capacity of 1,960 acre-feet, (3) a proposed 90-foot-long, 6-foot-diameter steel penstock, (4) two powerhouses containing a total of three turbines with a total installed capacity of 1500 kilowatts, (5) a transformer connected to the powerhouse by three conductors located 295 feet east of the powerhouse, and (6) appurtenant facilities. The project would have an annual generation of 4.12 megawatt-hours.

l. *Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (*see* 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

o. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no

later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

p. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

q. *Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

r. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

s. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings

t. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1024 Filed 5–4–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

April 29, 2004.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Water withdrawal increase.

b. *Project No:* 1951–125.

c. *Date Filed:* April 14, 2004.

d. *Applicant:* Georgia Power Co.

e. *Name of Project:* Sinclair Hydroelectric Project.

f. *Location:* Lake Sinclair, City of Sparta, Hancock County, Georgia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Scott Hendricks, Georgia Power, 241 Ralph McGill Boulevard, NE., Atlanta, Georgia 30308–3374, (404) 506–2392.

i. *FERC Contact:* Any questions on this notice should be addressed to Ms. Andrea Shriver at (202) 502–8171, or e-mail address: *andrea.shriver@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing comments and or motions:* June 1, 2004.

l. *Description of Request:* Georgia Power (licensee) is requesting Commission approval for the City of Sparta to increase the amount of water withdrawn from the Sinclair Hydroelectric Project from 1.0 million gallons per day (MGD) to up to 2.0 MGD. The increase will not require any new construction or conveyance of lands within the project boundary. Water withdrawn will be for municipal use only.

m. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

o. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

p. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. All documents (original and eight copies) should be filed with:

Magalie Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

q. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

r. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1026 Filed 5–4–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1494–215]

Grand River Dam Authority; Notice of ADR Teleconference Calls

April 29, 2004.

Pursuant to rule 601 of the Commission's rules of practice and procedure, 18 CFR ¶ 385.601 (2001), the Dispute Resolution Service will convene teleconference calls on Monday, May 3, 2004, and Wednesday, May 5, 2004, to discuss how the Alternative Dispute Resolution processes and procedures may assist the participants in resolving disputes related to fish entrainment matters in the above-docketed proceeding. A representative from the Federal Energy Regulatory Commission, Office of Energy Projects will participate on these calls. These will be teleconference calls with an 800 phone-in number, beginning at 2 p.m. central time and 3 p.m. eastern time each day and each will last approximately one hour.

Steven A. Shapiro and Jerrilynne Purdy, acting for the Dispute Resolution Service, will convene the teleconference calls. They will be available to communicate in private with any participant prior to the teleconference calls. If a participant has any questions regarding the teleconference calls and would be interested in participating in the calls, please contact Mr. Shapiro at 202/502–8894 or Ms. Purdy at 202/502–8671 or e-mail *Steven.Shapiro@ferc.gov* or *Jerrilynne.Purdy@ferc.gov*. Parties may also communicate with Richard Miles, the Director of the Dispute Resolution Service, at 1 877 FERC ADR (337–2237) or 202/502–8702 or by e-mail at *Richard.Miles@ferc.gov*.

Linda Mitry,

Acting Secretary.

[FR Doc. E4–1025 Filed 5–4–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice; Sunshine Act Meeting

April 28, 2004.

The following notice of meeting is published pursuant to section 3(A) of the Government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: May 5, 2004, 10:30 a.m.

PLACE: Room 2C, 888 First Street, NE., Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.* Note—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Magalie R. Salas, Secretary, telephone (202) 502–8400. For a recording listing items stricken from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Reference and Information Center.

858th—Meeting May 5, 2004, Regular Meeting 10:30 a.m.

Administrative Agenda

A–1.
DOCKET# AD02–1,000, Agency Administrative Matters

A–2.
DOCKET# AD02–7,000, Customer Matters, Reliability, Security and Market Operations

A–3.
DOCKET# MO04–4,000, Regional Market Monitor State of Market Presentations

A–4.
DOCKET# PL03–3,004, Price Discovery in Natural Gas and Electric Markets
OTHER#S AD03–7,004, Natural Gas Price Formation

Markets, Tariffs and Rates—Electric

E–1.
OMITTED

E–2.
OMITTED

E–3.
DOCKET# EL03–236,000, PJM Interconnection L.L.C.

E–4.
OMITTED

E–5.
DOCKET# ER03–1102,002, California Independent System Operator Corporation

E–6.
DOCKET# EL01–118,003, Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations

E–7.
DOCKET# ER04–608,000, PJM Interconnection, L.L.C.

E–8.
DOCKET# ER04–618,000, American Transmission Systems, Inc.
OTHER#S ER04–618,001, American Transmission Systems, Inc.

E–9.
DOCKET# ER04–632,000, California Independent System Operator Corporation

E–10.
DOCKET# ER04–623,000, New England Power Pool

E–11.
DOCKET# ER04–638,000, Entergy Services, Inc.

E–12.
DOCKET# ER04–377,001, Pacific Gas and Electric Company
OTHER#S ER04–377,000, Pacific Gas and Electric Company
ER04–743,000, Pacific Gas and Electric Company

E–13.
OMITTED

E–14.
DOCKET# ER04–158,000, Midwest Independent Transmission System Operator, Inc.

E–15.
OMITTED

E–16.
OMITTED

E–17.
DOCKET# ER04–652,000, FirstEnergy Solutions Corporation

E–18.
OMITTED

E–19.
DOCKET# ER03–1277,001, Midwest Independent Transmission System Operator, Inc.
OTHER#S ER03–1277,002, Midwest Independent Transmission System Operator, Inc.

E–20.
DOCKET# EC04–73,000, Midwest Generation, LLC, Nesbitt Asset Recovery, Series C–1, Nesbitt Asset Recovery, Series C–2, Nesbitt Asset Recovery, Series C–3, Nesbitt Asset Recovery, Series C–4

E–21.
DOCKET# EF03–2011,000, United States Department of Energy—Bonneville Power Administration
E–22.
DOCKET# ER03–631,002, ISO New England, Inc.
E–23.
DOCKET# ER03–793,001, New England Power Company
E–24.
DOCKET# EC03–27,002, California Independent System Operator Corporation
E–25.
DOCKET# ER03–836,001, New York Independent System Operator, Inc.
E–26.
OMITTED
E–27.
DOCKET# ER01–3034,004, Duke Energy Oakland, LLC
E–28.
OMITTED
E–29.
DOCKET# EL01–50,004, KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc
E–30.
DOCKET# EC03–30,002, Illinois Power Company
OTHER#S ER03–284,003, Illinois Electric Transmission Company, LLC and Trans-Elect, Inc.
E–31.
DOCKET# PA02–2, *et al.*, 016, Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices
OTHER#S EL00–95, *et al.*, 090, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent Systems Operator and the California Power Exchange
EL00–98, *et al.*, 077, Investigation of Practices of the California Independent System Operator Corporation and the California Power Exchange
EL03–137, *et al.*, 003, American Electric Power Service Corporation,
EL03–180, *et al.*, 002, Enron Power Marketing, Inc., and Enron Energy Services Inc., *et al.*,
E–32.
OMITTED
E–33.
OMITTED
E–34.
DOCKET# ER03–1223, 002, Montana Megawatts I, LLC and NorthWestern Energy Division of NorthWestern Corporation
OTHER#S ER03–1223, 001, Montana Megawatts I, LLC and NorthWestern Energy Division of NorthWestern Corporation
E–35.
OMITTED
E–36.
DOCKET# ER04–335, 001, New England Power Pool, ER04–335, 002, New England Power Pool
E–37.
DOCKET# ER04–230, 002, New York Independent System Operator, Inc.
E–38.
DOCKET# EL04–89, 000, Salmon River Electric Cooperative, Inc.
OTHER#S TS04–254, 000, Salmon River Electric Cooperative, Inc. ER04–630, 000, Salmon River Electric Cooperative, Inc., ER04–630, 001, Salmon River Electric Cooperative, Inc.
E–39.
DOCKET# EL02–45, 000, California Independent System Operator Corporation
E–40.
DOCKET# EL04–61, 000, Reliant Energy Choctaw County LLC v. Entergy Services, Inc.
E–41.
DOCKET# EL04–51, 000, InterGen Services, Inc. on behalf of Cottonwood Energy Company, LP v. Entergy Services, Inc., and Entergy Gulf States, Inc.
E–42.
DOCKET# ER97–2358, 006, Pacific Gas and Electric Company
OTHER#S ER97–2355, 012, Southern California Edison Company, ER97–2364, 007, San Diego Gas & Electric Company, ER97–4235, 006, San Diego Gas & Electric Company, ER98–497, 006, San Diego Gas & Electric Company, ER98–2322, 006, Southern California Edison Company, ER98–2351, 005, Pacific Gas and Electric Company, ER98–2371 004, San Diego Gas & Electric Company
E–43.
DOCKET# EL03–193, 000, Modesto Irrigation District
E–44.
DOCKET# EL04–77, 000, Southwest Transmission Cooperative, Inc.
E–45.
DOCKET# ER01–2998, 002, Pacific Gas and Electric Company
OTHER#S ER01–2998, 003, Pacific Gas and Electric Company, EL02–64, 002, Northern California Power Agency v. Pacific Gas and Electric Company and the California Independent System Operator Corporation, EL02–64, 003, Northern California Power Agency v. Pacific Gas and Electric Company and the California Independent System Operator, ER02–358, 002, Pacific Gas and Electric Company, ER02–358, 003, Pacific Gas and Electric Company
E–46.
OMITTED
E–47.
OMITTED
E–48.
DOCKET# EC04–77, 000, Exelon New England Holdings, LLC, Boston Generating, LLC and EBG Holdings, LLC
E–49.
DOCKET# ER04–108, 001, American Transmission Company LLC, and Midwest Independent Transmission System Operator, Inc.
E–50.
DOCKET# ER04–664, 000, Alabama Power Company
E–51.
DOCKET# EL02–6, 001, Dynegy Midwest Generation, Inc. and Dynegy Power Marketing, Inc. v. Commonwealth Edison Company
OTHER#S EL03–32, 001, Illinois Power Company

Markets, Tariffs and Rates—Gas

G–1.
DOCKET# RM03–10, 001, Amendments to Blanket Sales Certificates
G–2.
DOCKET# PR04–6, 000, Cranberry Pipeline Corporation
G–3.
OMITTED
G–4.
OMITTED
G–5.
DOCKET# RP00–409, 004, Natural Gas Pipeline Company of America
OTHER#S RP00–631, 005, Natural Gas Pipeline Company of America
G–6.
DOCKET# IS04–179, 000, Texaco Petrochemical Pipeline LLC
G–7.
DOCKET# RP03–545, 005, Dominion Cove Point LNG, LP
OTHER#S RP03–545, 004, Dominion Cove Point LNG, LP
G–8.
OMITTED
G–9.
DOCKET# CE04–63, 001, Mark Brady
G–10.
DOCKET# RP00–107, 004, Williston Basin Interstate Pipeline Company
OTHER#S RP00–107, 003, Williston Basin Interstate Pipeline Company
G–11.
DOCKET# RP92–137, 053, Transcontinental Gas Pipe Line Corporation
G–12.
DOCKET# RP02–309, 002, Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corporation
G–13.
DOCKET# RP98–39, 035, Northern Natural Gas Company
G–14.
DOCKET# RP00–414, 003, Gas Transmission Northwest Corporation
OTHER#S RP01–15, 000, Gas Transmission Northwest Corporation, RP01–15, 004, Gas Transmission Northwest Corporation
G–15.
DOCKET# RP00–394, 000, KO Transmission Company

Energy Projects—Hydro

H–1.
DOCKET# P–460, 021, City of Tacoma, Washington
H–2.
DOCKET# P–2552, 065, FPL Energy Maine Hydro, LLC
H–3.
DOCKET# P–477, 024, Portland General Electric Company
H–4.
OMITTED
H–5.
DOCKET# P–4900, 071, Trafalgar Power, Inc.

Energy Projects—Certificates

C–1.

DOCKET# CP01–368, 004, Transcontinental Gas Pipe Line Corporation
OTHER#S CP01–369, 002, Williams Gas Processing-Gulf Coast Company, L.P.
C–2.
DOCKET# CP03–342, 000, Discovery Gas Transmission LLC,
OTHER#S CP03–342, 001, Discovery Gas Transmission LLC, CP03–343, 000, Discovery Producer Services LLC, CP03–343, 001, Discovery Producer Services LLC, CP04–50, 000, Texas Eastern Transmission, LP
C–3.
DOCKET# CP04–48, 000, Chandeleur Pipe Line Company
C–4.
DOCKET# CP01–67, 000, Southwest Gas Storage Company
C–5.
DOCKET# CP04–13, 000, Saltville Gas Storage Company, L.L.C.
OTHER#S CP04–14, 000, Saltville Gas Storage Company, L.L.C., CP04–15, 000, Saltville Gas Storage Company, L.L.C.
C–6.
DOCKET# CP88–105, 000, Yukon Pacific Company, L.P.
C–7.
DOCKET# CP04–105, 000, CMS Gas Transmission Company and Bluewater Gas Storage, L.L.C.
C–8.
DOCKET# CP04–31, 000, CenterPoint Energy Gas Transmission Company
C–9.
DOCKET# RP04–215, 000, Tennessee Gas Pipeline Company v. Columbia Gulf Transmission Company

The Capitol Connection offers the opportunity for remote listening and viewing of the meeting. It is available for a fee, live over the Internet, via C-Band Satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703–993–3100) as soon as possible or visit the Capitol Connection Web site at *http://www.capitolconnection.gmu.edu* and click on "FERC".

Magalie R. Salas,
Secretary.
[FR Doc. 04–10312 Filed 5–3–04; 11:31 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Meeting, Notice of Vote, Explanation of Action Closing Meeting and List of Persons to Attend

April 29, 2004.

The following notice of meeting is published pursuant to section 3(a) of the Government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.
DATE AND TIME: May 6, 2004, 9:30 a.m.
PLACE: Room 3M 4A/B, 888 First Street, NE., Washington, DC 20426.
STATUS: Closed.
MATTERS TO BE CONSIDERED: Non-public investigations and inquiries, enforcement related matters, and security of regulated facilities.
CONTACT PERSON FOR MORE INFORMATION: Magalie R. Salas, Secretary, Telephone (202) 502–8400.

Chairman Wood and Commissioners Brownell, Kelliher, and Kelly voted to hold a closed meeting on May 6, 2004. The certification of the General Counsel explaining the action closing the meeting is available for public inspection in the Commission's Public Reference Room at 888 First Street, NE., Washington, DC 20426.

The Chairman and the Commissioners, their assistants, the Commission's Secretary and her assistant, the General Counsel and members of her staff, and a stenographer are expected to attend the meeting. Other staff members from the Commission's program offices who will advise the Commissioners in the matters discussed will also be present.

Magalie R. Salas,
Secretary.
[FR Doc. 04–10313 Filed 5–3–04; 11:31 am]
BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0109; FRL–7355–2]

Data Acquisition for Anticipated Residue and Percent of Crop Treated; Renewal of Pesticide Information Collection Activities and Request for Comments

AGENCY: Environmental Protection Agency (EPA).
ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this notice announces that EPA is seeking public comment on the following Information Collection Request (ICR): Data Acquisition for Anticipated Residue and Percent of Crop Treated (PCT) (EPA ICR No. 1911.02, OMB Control No. 2070–0164). This is a request to renew an existing ICR that is currently approved and due to expire on September 30, 2004. The ICR describes the nature of the information collection activity and its expected burden and costs. Before submitting this ICR to the Office of Management and Budget (OMB) for review and approval under the PRA, EPA is soliciting comments on specific aspects of the collection.

DATES: Written comments, identified by the docket ID number OPP–2004–0109, must be received on or before July 6, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit III. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Nancy Vogel, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6475; fax number: (703) 305–5884; e-mail address: *vogel.nancy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

You may be potentially affected by this action if you are a business engaged in the manufacturing of pesticides and other agricultural chemicals. Potentially affected entities may include, but are not limited to:

- Pesticide and other agricultural chemical manufacturing (NAICS 325320), e.g., businesses engaged in the manufacture of pesticides and who file a petition asking the Agency to take a specific tolerance action.

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 above could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 3(c)(5) and the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408. The authority for the information collection activities contained in this ICR can be found in the FFDCA section 408(b)(2)(E) and (F), which authorizes the Agency to use anticipated or actual residue (ARs) data and PCT data to establish, modify, maintain, or revoke a tolerance for a pesticide. If you have any questions regarding the applicability of this action to a particular entity, consult the person

listed under **FOR FURTHER INFORMATION CONTACT**.

II. How Can I Get Copies of this Document and Other Related Information?

A. Docket

EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0109. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

B. Electronic Access

You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit II.A. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

III. How Can I Respond to this Action?

A. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit III.B. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0109. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0109. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit III.A. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200

Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0109.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2004–0109. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit II.A.

B. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

C. What Should I Consider when I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the collection activity.

7. Make sure to submit your comments by the deadline in this notice.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

D. What Information is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collections of information are 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 estimates of the burdens of the proposed collections of information.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated or electronic collection technologies or other forms of information technology, e.g., permitting electronic submission of responses.

IV. What Information Collection Activity or ICR Does this Action Apply to?

EPA is seeking comments on the following ICR:

Title: Data Acquisition for Anticipated Residue and PCT.

ICR numbers: EPA ICR No. 1911.02, OMB Control No. 2070–0164.

ICR status: This ICR is a renewal of an existing ICR that is currently approved by OMB and is due to expire September 30, 2004.

Abstract: This ICR will enable OPP to obtain information needed to re-evaluate the Agency's original tolerance decisions as mandated by the Food Quality Protection Act of 1996 (FQPA), which amended the two primary statutes regulating pesticides, i.e., the FFDCA and the FIFRA. Among other things, FQPA amended FFDCA to authorize the Agency to use ARs data and PCT data to establish, modify, maintain, or revoke a tolerance for a pesticide residue. The law also requires that tolerance decisions based on ARs or PCT data be verified to ensure that residues in or on food are not above the residue levels relied on for establishing the tolerance.

In order to conduct the required re-evaluation, a pesticide registrant may be required to submit specific data necessary to demonstrate that residues do not exceed the residue levels used to establish the tolerance.

V. What are EPA's Burden and Cost Estimates for this ICR?

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

The ICR provides a detailed explanation of this estimate, which is only briefly summarized in this notice. The annual public burden for this ICR is estimated to be 28,569 hours. The following is a summary of the estimates taken from the ICR:

Respondents/affected entities: Businesses engaged in the manufacture of pesticides who file a petition asking the Agency to take a specific tolerance action.

Estimated total number of potential respondents: 16.

Frequency of response: On occasion.

Estimated total/average number of responses for each respondent: 1.

Estimated total annual burden hours: 28,569.

Estimated total annual burden costs: $2,524,938.

VI. Are There Changes in the Estimates from the Last Approval?

The total annual respondent burden estimate for this ICR has decreased 1,238 hours, from 29,807 to 28,569, and the total respondent cost has decreased $248,928, from $2,773,866 to $2,524,938. These reductions are adjustments due to the fact that the Agency expects to issue fewer data call-ins under this program than originally estimated.

VII. What is the Next Step in the Process for this ICR?

EPA will consider the comments received and amend the ICR as

appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: April 22, 2004.

Margaret N. Schneider,

Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 04–9966 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0390; FRL–7337–8]

Pesticide Reregistration Performance Measures and Goals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's progress in meeting its performance measures and goals for pesticide reregistration during fiscal year 2003. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires EPA to publish information about EPA's annual achievements in this area. This notice discusses the integration of tolerance reassessment with the reregistration process, and describes the status of various regulatory activities associated with reregistration and tolerance reassessment. The notice gives total numbers of chemicals and products reregistered, tolerances reassessed, Data Call-Ins issued, and products registered under the "fast-track" provisions of FIFRA. Finally, this notice contains the schedule for completion of activities for specific chemicals during fiscal years 2004 through 2008.

DATES: This notice is not subject to a formal comment period. Nevertheless, EPA welcomes input from stakeholders and the general public. Written comments, identified by the docket ID number [OPP–2003–0390], should be received on or before July 6, 2004.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Carol P. Stangel, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone: (703) 308–8007, e-mail: stangel.carol@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Important Information

A. Does this Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to persons who are interested in the progress and status of EPA's pesticide reregistration and tolerance reassessment programs, 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 information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Additional Information or Copies of Support Documents?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2003–0390. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, CrystalMall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA internet under the "**Federal Register**" listings at*http://www.epa.gov/fedrgstr/.* To access information about pesticide reregistration, go to the home page for the Office of Pesticide Programs at www.epa.gov/pesticides and select "Reregistration" under "Regulating Pesticides," or go directly to*www.epa.gov/pesticides/reregistration/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or

delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment, and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

2. *EPA Dockets—i.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at http://www.epa.gov/edocket, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2003–0390. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP–2003–0390. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

3. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency (7502C), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP– 2003–0390.

4. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall#2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2003–0390. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI To the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

II. Background

EPA must establish and publish in the **Federal Register** its annual performance measures and goals for pesticide reregistration, tolerance reassessment, and expedited registration, under section 4(l) of FIFRA, as amended by the Food Quality Protection Act of 1996 (FQPA). Specifically, such measures and goals are to include:

- The status of reregistration.
- The number of products reregistered, canceled, or amended.
- The number and type of data requests or Data Call-In (DCI) notices under section 3(c)(2)(B) issued to support product reregistration by active ingredient.
- Progress in reducing the number of unreviewed, required reregistration studies.
- The aggregate status of tolerances reassessed.
- The number of applications for registration submitted under subsection (k)(3), expedited processing and review of similar applications, that were approved or disapproved.
- The future schedule for reregistrations in the current and succeeding fiscal year.
- The projected year of completion of the reregistrations under section 4.

FIFRA, as amended in 1988, authorizes EPA to conduct a comprehensive pesticide reregistration program--a complete review of the human health and environmental effects of older pesticides originally registered before November 1, 1984. Pesticides meeting today's scientific and regulatory standards may be declared "eligible" for reregistration. To be eligible, an older pesticide must have a substantially complete data base, and must not cause unreasonable adverse effects to human health or the environment when used according to Agency approved label directions and precautions.

In addition, all pesticides with food uses must meet the safety standard of section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA) 21 U.S.C.

346a, as amended by the Food Quality Protection Act (FQPA) of 1996. Under FFDCA, EPA must make a determination that pesticide residues remaining in or on food are "safe"; that is, "that there is reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue" from dietary and other sources. In determining allowable levels of pesticide residues in food, EPA must perform a more comprehensive assessment of each pesticide's risks, considering:

- Aggregate exposure (from food, drinking water, and residential uses).
- Cumulative effects from all pesticides sharing a common mechanism of toxicity.
- Possible increased susceptibility of infants and children; and
- Possible endocrine or estrogenic effects.

As amended by FQPA, FFDCA requires the reassessment of all existing tolerances (pesticide residue limits in food) and tolerance exemptions within 10 years, to ensure that they meet the safety standard of the law. EPA was directed to give priority to the review of those pesticides that appear to pose the greatest risk to public health, and to reassess 33% of the 9,721 existing tolerances and exemptions within 3 years (by August 3, 1999), 66% within 6 years (by August 3, 2002), and 100% in 10 years (by August 3, 2006).(Note: Although the total number of tolerances existing on August 3, 1996, and subject to FQPA reassessment was initially reported as 9,728, that number has been corrected to 9,721, based on the Agency's Tolerance Reassessment Tracking System.)

EPA is meeting the FFDCA's tolerance reassessment requirements through reregistration and several other program activities. In making reregistration eligibility decisions, the Agency also is completing much of tolerance reassessment, which is helping us meet the time frames mandated by the new law. EPA reassessed the first 33% of all food tolerances by August 3, 1999, and the second 33% by August 3, 2002. EPA has focused particularly on priority Group 1 pesticides, those identified as posing the greatest potential risks. Over half of the universe of tolerances to be reassessed are included in this category, including tolerances for the organophosphate (OP), carbamate, organochlorine, and B2 (probable human) carcinogen pesticides, the Agency's highest priority for review. Although EPA has directed most of its resources toward this group, a number of Group 1 pesticides are nevertheless being reassessed in the third 33% owing to the challenging issues they present. EPA's approach to tolerance reassessment under FFDCA, including the three priority Groups, is described fully in the Agency's document, "Raw and Processed Food Schedule for Pesticide Tolerance Reassessment" (62 FR 42020, August 4, 1997) (FRL–5734–6). In conducting the pesticide reregistration and tolerance reassessment programs at present, EPA is developing measures that show results in terms of outcomes, as well as traditional outputs, as directed by the Office of Management and Budget (OMB).

III. FQPA and Program Accountability

One of the hallmarks of the FQPA amendments to the FFDCA is enhanced accountability. Through this summary of performance measures and goals for pesticide reregistration, tolerance reassessment, and expedited registration, EPA describes progress made during the past year in each of the program areas included in FIFRA section 4(l).

A. Status of Reregistration

During fiscal year (FY) 2003 (from October 1, 2002, through September 30, 2003), EPA made significant progress in completing risk assessments and risk management decisions for pesticide reregistration (See Table 1).

TABLE 1.—REREGISTRATION/RISK MANAGEMENT DECISIONS COMPLETED: FY 2003 AND TOTAL

FY 2003: 42 Decisions	Total, End of FY 2003
13 REDs Dinocap (Voluntary Cancellation) Diuron Fenthion (Voluntary Cancellation)[2] Fenvalerate (Voluntary Cancellation) Imazalil MGK Repellent 326 (Dipropyl isocinchomeronate) Molinate (Voluntary Cancellation) Oxadiazon Propanil Sodium acifluorfen Thiophanate-methyl Triethylene glycol Ziram (part of Dimethyldithiocarbamate salts)	227 REDs
3 IREDs Atrazine[1,3] Carbaryl[1,4] Methyl Parathion[2]	23 IREDs

TABLE 1.—REREGISTRATION/RISK MANAGEMENT DECISIONS COMPLETED: FY 2003 AND TOTAL—Continued

FY 2003: 42 Decisions	Total, End of FY 2003
13 TREDs *Bacillus popilliae* and *Bacillus lentimorbus* Biochemical volatile attractants Chitin 4-CPA CRYAC 1,4-Dimethyl-naphthalene Farnesol Fenridazone potassium (Voluntary Cancellation and Tolerance Revocation) Lactofen Mustard oil Neem oil Potassium salts of fatty acids Promalin	58 TREDs and Inert Tolerance Exemption Reassessment Decisions
13 Inert Tolerance Exemption Reassessment Decisions Aluminum hydroxide Aluminum sulfate Ascorbic acid Barium sulfate Beeswax Benzoic acid Carnauba wax Fatty acids (some) Manganese carbonate Potassium sorbate Sodium benzoate Sorbic acid Sorbitol	

[1]Subject to NRDC consent decree
[2]Organophosphate (OP) pesticide
[3]Triazine pesticide
[4]Carbamate pesticide

The Agency's decisions are embodied in Reregistration Eligibility Decision (RED) documents, Interim Reregistration Eligibility Decisions (IREDs), and Reports on FQPA Tolerance Reassessment Progress and Interim Risk Management Decisions (TREDs).

1. *REDs.* Through the reregistration program, EPA is reviewing current scientific data for older pesticides (those initially registered before November 1984), reassessing their effects on human health and the environment, and requiring risk mitigation measures as necessary. Pesticides that have sufficient supporting data and whose risks can be successfully mitigated may be declared "eligible" for reregistration. EPA presents these pesticide findings in a RED document.

i. *Overall RED progress.* EPA's overall progress at the end of FY 2003 in completing Reregistration Eligibility Decisions (REDs) is summarized in Table 2.

TABLE 2.—OVERALL RED PROGRESS, END OF FY 2003

REDs completed	227 (37%)
Cases canceled	231 (38%)
REDs to be completed	154 (25%)
Total reregistration cases	612 (100%)

ii. *Profile of completed REDs.* A profile of the 227 REDs completed by the end of FY 2003 is presented in Table 3.

TABLE 3.—PROFILE OF 227 REDS COMPLETED, END OF FY 2003

Pesticide active ingredients	326
Pesticide products	9,650+
REDs with food uses	117
Post-FQPA REDs	86
Post-FQPA REDs with food uses*	64

*EPA is revisiting tolerances associated with the 53 food use REDs that were completed before FQPA was enacted to ensure that they meet the safety standard of the new law, as set forth in the Agency's August 4, 1997, Schedule for Pesticide Tolerance Reassessment.

iii. *Risk reduction in REDs.* Reducing pesticide risks is an important aspect of the reregistration program. In developing REDs, EPA works with stakeholders including pesticide registrants, growers and other pesticide users, and environmental and public health interests, as well as the States, USDA, and other Federal agencies and others to develop voluntary measures or regulatory controls needed to effectively reduce risks of concern. Almost every RED includes some measures or modifications to reduce risks. The options for such risk reduction are extensive and include voluntary cancellation of pesticide products or deletion of uses; declaring certain uses ineligible or not yet eligible (and then proceeding with follow-up action to cancel the uses or require additional supporting data); restricting use of products to certified applicators; limiting the amount or frequency of use; improving use directions and precautions; adding more protective clothing and equipment requirements; requiring special packaging or engineering controls; requiring no-treatment buffer zones; employing ground water, surface water, or other environmental and ecological safeguards; and other measures.

2. *Interim REDs or IREDs.* EPA issues IREDs for pesticides that are undergoing reregistration, require a reregistration eligibility decision, and also must be included in a cumulative assessment under FQPA because they are part of a group of pesticides that share a common mechanism of toxicity. An IRED is issued for each individual pesticide in the cumulative group when EPA completes the pesticide's risk assessment and interim risk management decision. An IRED may include measures to reduce food, drinking water, residential, occupational, and/or ecological risks, to gain the benefit of these changes before the final RED can be issued following the Agency's consideration of cumulative risks. For example, EPA generally has not considered individual OP pesticide decisions to be completed REDs or tolerance reassessments. Instead, the Agency is issuing IREDs for these chemicals at this time. EPA will complete the risk assessments and may issue REDs for 23 OP pesticides with IREDs, once the Agency completes a cumulative assessment of the OPs.

3. *Tolerance reassessment "TREDs."* EPA issues Reports on FFDCA Tolerance Reassessment Progress and Interim Risk Management Decisions, known as TREDs, for pesticides that require tolerance reassessment decisions under FFDCA, but do not require a reregistration eligibility decision at present because:

- The pesticide was first registered after November 1, 1984, and is considered a "new" active ingredient, not subject to reregistration (most FY 2003 TREDs are in this category);
- EPA completed a RED for the pesticide before FQPA was enacted (FY 2003 TREDs *Bacillus popilliae* and 4-CPA are in this post-RED category); or
- The pesticide is not registered for use in the U.S. but tolerances are established that allow crops treated with the pesticide to be imported from other countries (e.g., mevinphos).

During FY 2003, in addition to completing 13 TREDs, EPA also completed tolerance reassessment decisions for 13 pesticide inert ingredients that are exempted from the tolerance requirement. Almost 1,000 of the 9,721 tolerance reassessment decisions required by the amended FFDCA are for such inert ingredient tolerance exemptions. EPA has reassessed 377 of these inert ingredient tolerance exemptions to date, and plans to complete the reassessment of all the inert ingredient tolerance exemptions by August 2006.

As with IREDs, EPA will not complete risk assessment and risk management for pesticides subject to TREDs that are part of a cumulative group until cumulative risks have been considered for the group.

4. *Goals for FY 2004 and future years.* EPA's major pesticide reregistration and tolerance reassessment goals for FY 2004 and future years are as follows. In addition to achieving these traditional output-oriented goals, EPA also is working to develop measures that show results in terms of outcomes, as directed by OMB.

i. *Complete individual pesticide risk management decisions.* EPA's goal in conducting the reregistration and tolerance reassessment program is to complete about 20–40 Reregistration Eligibility Decisions (REDs) and Interim REDs each year during fiscal years 2004 through 2006, giving priority to pesticides with associated tolerances, and to complete about 20 REDs in FY 2007 and in FY 2008 for pesticides with no food uses or tolerances. EPA's schedule for completing these decisions appears near the end of this document.

ii. *Complete 100% of tolerance reassessment decisions.* EPA is continuing to reassess tolerances within time frames set forth in FFDCA as amended by FQPA, giving priority to those food use pesticides that appear to pose the greatest risk. Integration of the reregistration and tolerance reassessment programs has added complexity to the reregistration process for food use pesticides. The Agency successfully reached its first two tolerance reassessment milestones by completing over 33% of all tolerance reassessment decisions by August 3, 1999, and over 66% by August 3, 2002. EPA is working toward meeting the final FQPA tolerance reassessment goal: To complete 100% of all required tolerance reassessment decisions by August 3, 2006.

iii. *Evaluate cumulative risks.* Once EPA completes individual risk assessments for the OPs, carbamates and others, the Agency will make cumulative risk findings for each of these common mechanism groups of pesticides. For further information, see EPA's cumulative risk website, *http://www.epa.gov/pesticides/cumulative/.*

B. Product Reregistration; Numbers of Products Reregistered, Canceled, and Amended

At the end of the reregistration process, after EPA has issued a RED and declared a pesticide reregistration case eligible for reregistration, individual end-use products that contain pesticide active ingredients included in the case still must be reregistered. This concluding part of the reregistration process is called "product reregistration."

In issuing a completed RED document, EPA sends registrants a Data Call-In (DCI) notice requesting any product-specific data and specific revised labeling needed to complete reregistration for each of the individual pesticide products covered by the RED. Based on the results of EPA's review of these data and labeling, products found to meet FIFRA and FFDCA standards may be reregistered.

A variety of outcomes are possible for pesticide products completing this final phase of the reregistration process. Ideally, in response to the DCI notice accompanying the RED document, the pesticide producer, or registrant, will submit the required product-specific data and revised labeling, which EPA will review and find acceptable. At that point, the Agency may reregister the pesticide product. If, however, the product contains multiple active ingredients, the Agency instead issues an amendment to the product's registration, incorporating the labeling changes specified in the RED; a product with multiple active ingredients may not be fully reregistered until the last active ingredient in its formulation is eligible for reregistration. In other situations, the Agency may temporarily suspend a product's registration if the registrant has not submitted required product-specific studies within the time frame specified. The Agency may cancel a product's registration because the registrant did not pay the required registration maintenance fee. Alternatively, the registrant may request a voluntary cancellation of their end-use product registration.

1. *Product reregistration actions in FY 2003.* EPA counts each of the post-RED product outcomes described above as a product reregistration action. A single pesticide product may be the subject of several product reregistration actions within the same year. For example, a product's registration initially may be amended, then the product may be reregistered, and later the product may be voluntarily canceled, all within the same year. During FY 2003, EPA completed the product reregistration actions detailed in Table 4.

TABLE 4.—PRODUCT REREGISTRATION ACTIONS COMPLETED DURING FY 2003

Product reregistration actions	53
Product amendment actions	40
Product cancellation actions	213

TABLE 4.—PRODUCT REREGISTRATION ACTIONS COMPLETED DURING FY 2003—Continued

Product suspension actions	5
Total actions	311

2. *Status of the product reregistration universe.* The status of the universe of pesticide products subject to reregistration at the end of FY 2003 is shown in Table 5 below. This overall status information is not "cumulative"--it is not derived from summing up a series of annual actions. Adding annual actions would result in a larger overall number since each individual product is subject to multipleactions--it can be amended, reregistered, and/or canceled, over time. Instead, the "big picture" status information in Table 5 should be considered a snapshot in time. As registrants and EPA make marketing and regulatory decisions in the future, the status of individual products may change, and numbers in this table are expected to fluctuate.

TABLE 5.—STATUS OF THE UNIVERSE OF PRODUCTS SUBJECT TO PRODUCT REREGISTRATION, FOR FY 2003 (AS OF SEPTEMBER 30, 2003)

Products reregistered	1,690
Products amended	385
Products canceled	4,019
Products sent for suspension	17
Total products with actions completed	6,111
Products with actions pending	3,545
Total products in product reregistration universe	9,656

The universe of 9,656 products in product reregistration at the end of FY 2003 represented an increase of 1,039 products from the FY 2002 universe of 8,617 products. The increase consists of 493 products associated with FY 2003 REDs, and 516 products associated with IREDs, plus 30 products that were added as a result of DCI activities and processing for several previously issued REDs and IREDs.

At the end of FY 2003, 3,545 products had product reregistration decisions pending. Some pending products await science reviews, label reviews, or reregistration decisions by EPA. Others are not yet ready for product reregistration actions; they are associated with more recently completed REDs, and their product-specific data are not yet due to be submitted to or reviewed by the Agency. EPA's goal is to complete 450 product reregistration actions during fiscal year 2004.

C. Number and Type of DCIs to Support Product Reregistration by Active Ingredient

1. *DCIs for REDs.* The number and type of Data Call-In requests or DCIs that EPA is preparing to issue under FIFRA section 3(c)(2)(B) to support product reregistration for pesticide active ingredients included in FY 2003 REDs are shown in Table 6. OMB clearance under the Paperwork Reduction Act is required to issue the DCIs in REDs and IREDs.

TABLE 6.—DCIS PREPARED TO SUPPORT PRODUCT REREGISTRATION FOR FY 2003 REDS

Case Name	Case Number	Number of Products Covered by the RED[1]	Number of Product Chemistry Studies Required[2]	Number of Acute Toxicology Studies Required[3]	Number of Efficacy Studies Required
Dinocap (Voluntary Cancellation)	2200	0	N/A	N/A	N/A
Diuron	0046	101	31	Acute toxicity batching has not been finalized.	0
Fenthion (Voluntary Cancellation)	0290	6	N/A	N/A	N/A
Fenvalerate (Voluntary Cancellation)	2280	54	N/A	N/A	N/A
Imazalil	2325	16	31	72 (1 batch/11 products not batched)	0
MGK-326 (Dipropyl isocinchomeronate)	2215	92	31	Acute toxicity batching has not been finalized.	0
Molinate (Voluntary Cancellation)	2435	13	N/A	N/A	N/A
Oxadiazon	2485	53	31	216 (5 batches/31 products not batched)	0
Propanil	0226	42	31	162 (9 batches/18 products not batched)	0
Sodium acifluorfen	2605	10	31	54 (1 batch/8 products not batched)	0

TABLE 6.—DCIS PREPARED TO SUPPORT PRODUCT REREGISTRATION FOR FY 2003 REDS—Continued

Case Name	Case Number	Number of Products Covered by the RED[1]	Number of Product Chemistry Studies Required[2]	Number of Acute Toxicology Studies Required[3]	Number of Efficacy Studies Required
Thiophanate-methyl	2680	67	31	162 (6 batches/21 products not batched)	0
Triethylene glycol	3146	18	34	72 (4 batches/8 products not batched)	0
Ziram	2180	21	31	48 (4 batches/4 products not batched)	0

[1]The number of registered products containing a pesticide active ingredient can change over time. The product total that appears in the RED document (counted when the RED is signed) may be different than the number of products that EPA is tracking for product reregistration (counted later, when the RED is issued). This table reflects the final number of products associated with each RED, as they are being tracked for product reregistration.

[2]This column shows the number of product chemistry studies that are required for each product covered by the RED.

[3]In an effort to reduce the time, resources, and number of animals needed to fulfill acute toxicity data requirements, EPA "batches" products that can be considered similar from an acute toxicity standpoint. For example, one batch could contain five products. In this instance, if six acute toxicology studies usually were required per product, only six studies (rather than 30 studies) would be required for the entire batch. Factors considered in the sorting process include each product's active and inert ingredients (e.g., identity, percent composition, and biological activity), type of formulation (e.g., emulsifiable concentrate, aerosol, wettable powder, granular), and labeling (e.g., signal word, use classification, precautionary labeling). The Agency does not describe batched products as "substantially similar," because all products within a batch may not be considered chemically similar or have identical use patterns.(Note: FIFRA section 24(c) or Special Local Need (SLN) registrations are not included in the acute toxicity batchings because they are supported by a valid parent product (section 3) registration.)

2. *DCIs for IREDs.* The number and type of data requests or DCIs that EPA is preparing to issue to support product reregistration for pesticide active ingredients included in FY 2003 Interim REDs (IREDs) are shown in Table 7.

TABLE 7.—DCIS PREPARED TO SUPPORT PRODUCT REREGISTRATION FOR FY 2003 IREDS

Case Name	Case Number	Number of Products Covered by the IRED[1]	Number of Product Chemistry Studies Required[2]	Number of Acute Toxicology Studies Required[3]	Number of Efficacy Studies Required
Atrazine	0062	174	22	294 (14 batches/35 products not batched)	0
Carbaryl	0080	314	31	852 (37 batches/105 products not batched)	5
Methyl parathion	0153	28	31	36 (3 batches/3 products not batched)	0

[1]The number of registered products containing a pesticide active ingredient can change over time. The product total that appears in the RED document (counted when the RED is signed) may be different than the number of products that EPA is tracking for product reregistration (counted later, when the RED is issued). This table reflects the final number of products associated with each RED, as they are being tracked for product reregistration.

[2]This column shows the number of product chemistry studies that are required for each product covered by the RED.

[3]In an effort to reduce the time, resources, and number of animals needed to fulfill acute toxicity data requirements, EPA "batches" products that can be considered similar from an acute toxicity standpoint. For example, one batch could contain five products. In this instance, if six acute toxicology studies usually were required per product, only six studies (rather than 30 studies) would be required for the entire batch. Factors considered in the sorting process include each product's active and inert ingredients (e.g., identity, percent composition, and biological activity), type of formulation (e.g., emulsifiable concentrate, aerosol, wettable powder, granular), and labeling (e.g., signal word, use classification, precautionary labeling). The Agency does not describe batched products as "substantially similar," because all products within a batch may not be considered chemically similar or have identical use patterns.(Note: FIFRA section 24(c) or Special Local Need (SLN) registrations are not included in the acute toxicity batchings because they are supported by a valid parent product (section 3) registration.)

3. *DCIs not needed for TREDs.* The Agency does not issue product-specific data requests or DCIs for pesticides included in tolerance reassessment decisions or TREDs because, at present, these pesticides do not require product reregistration decisions; they are subject to tolerance reassessment only.

D. Progress in Reducing the Number of Unreviewed, Required Reregistration Studies

EPA is making progress in reviewing scientific studies submitted by pesticide registrants in support of pesticides undergoing reregistration (See Table 8).

TABLE 8.—REVIEW STATUS OF STUDIES SUBMITTED FOR PESTICIDE REREGISTRATION, END OF FY 2003

Pesticide Reregistration Group or List, per FIFRA Section 4(c)(2)	Studies Reviewed + Extraneous[1]	Studies Awaiting Review	Total Studies Received
List A	11,190 + 583 = 11,773 (86.8%)	1,784 (13.2%)	13,557
List B	6,500 + 1,028 = 7,528 (81.2%)	1,738 (18.8%)	9,266
List C	2,059 + 334 = 2,393 (83.8%)	462 (16.2%)	2,855
List D	1,221 + 133 = 1,354 (85.6%)	228 (14.4%)	1,582
Total Lists A - D	20,970 + 2,078 = 23,048 (84.55%)	4,212 (15.45%)	27,260

[1]Extraneous studies is a term used to classify those studies that are not needed because the guideline or data requirement has been satisfied by other studies or has changed.

Studies reviewed by EPA appear to have increased (or the study "backlog" appears to have decreased) significantly during FY 2003. At the end of the fiscal year, nearly 85% of all studies received by the Agency in support of reregistration had been reviewed, compared to 80% at the end of FY 2002. This improvement may have been partly a result of EPA's transition to a new information system, OPPIN. In converting to OPPIN, the Agency cleaned up records used to prepare the annual status of studies report. Duplicates as well as bad and/or erroneous data were removed from the data base, resulting in a lower total number of studies received and a greater percent of studies reviewed. EPA has a high degree of confidence in the new OPPIN data base, which will be used from now on to generate the annual status of studies reports.

E. Aggregate Status of Tolerances Reassessed

During FY 2003, EPA completed 119 tolerance reassessments and ended the fiscal year with a total of 6,626 tolerance reassessment decisions to date, addressing over 68% of the 9,721 tolerances that require reassessment (See Table 9). Sixty percent of all tolerance reassessment decisions completed so far are for pesticides in priority Group 1.

EPA reassessed over 33% of all food tolerances by August 3, 1999, and completed over 66% of all required tolerance reassessment decisions by August 3, 2002, meeting two important statutory deadlines established by the FQPA. EPA's general schedule for tolerance reassessment (62 FR 42020, August 4, 1997) identified three groups of pesticides to be reviewed; this grouping continues to reflect the Agency's overall scheduling priorities. In completing tolerance reassessment, EPA continues to give priority to pesticides in Group 1.

1. *Aggregate accomplishments through reregistration and other programs.* EPA is accomplishing tolerance reassessment through the registration and reregistration programs; by revoking tolerances for pesticides that have been canceled (many as a result of reregistration); by reevaluating pesticides with pre-FQPA REDs, and through other decisions not directly related to registration or reregistration, described further below. EPA is using the Tolerance Reassessment Tracking System (TORTS) to compile this updated information and report on the status of tolerance reassessment (See Table 9).

TABLE 9.—TOLERANCE REASSESSMENTS COMPLETED POST-FQPA BY FISCAL YEAR, THROUGH FY 2003*

Tolerances Reassessed Through...	During Late FY 96	During FY 1997	During FY 1998	During FY 1999	During FY 2000	During FY 2001	During FY 2002	During FY 2003	Total, End of FY 2003
Reregistration/REDs	25	339	278	359	44	46	231	79	1,401
Tolerance Reassessments/ TREDs	0	0	0	0	0	0	776	14	790
Registration	0	224	308	340	55	216	200	0	1,343
Tolerance revocations	3	0	810	513	22	35	545	0	1,928
Other decisions	0	1	0	233	0	0	904	26	1,164
Total tolerances reassessed	28	564	1,396	1,445	121	297	2,656	119	6,626

*Includes corrected counts for some previous years.

i. *Reregistration/REDs.* EPA is using the reregistration program to accomplish much of tolerance reassessment. For each of the tolerance reassessment decisions made through REDs since enactment of the FQPA, the Agency has made the finding as to whether there is a reasonable certainty of no harm, as required by FFDCA. Many tolerances reassessed through reregistration remain the same while others may be raised, lowered, or revoked.

ii. *Tolerance reassessments/TREDs.* Tolerances initially evaluated through REDs that were completed before FQPA was enacted in August 1996 now are being reassessed to ensure that they meet the new FFDCA safety standard. EPA issues these post-RED tolerance reassessment decisions as TREDs. The Agency also issues TREDs summarizing tolerance reassessment decisions for some developing REDs, for new pesticide active ingredients not subject

to reregistration, and for pesticides with import tolerances only. Tolerance reassessments for pesticides that are not part of a cumulative group may be counted at present and are included in the FY 2003 accomplishments.Tolerance reassessments for pesticides that are part of a cumulative group are not included in the Agency's lists of accomplishments. These tolerances will be considered again and their reassessment will be completed after EPA completes a cumulative risk evaluation for the group.

iii. *Registration.* Like older pesticides, all new pesticide registrations must meet the safety standard of FFDCA. Many of the registration applications EPA receives are for new uses of pesticides already registered for other uses. To reach a decision on a proposed new food use of an already registered pesticide, EPA must reassess the aggregate risk of the the existing tolerances, as well as the proposed new tolerances, to make sure there is reasonable certainty that no harm will result to the public from aggregate exposure from all uses.

iv. *Tolerance revocations.* Revoked tolerances represent uses of many different pesticide active ingredients that have been canceled in the past. Some pesticides were canceled due to the Agency's risk concerns. Others were canceled voluntarily by their manufacturers, based on lack of support for reregistration. Tolerance revocations are important even if there are no domestic uses of a pesticide because residues in or on imported commodities treated with the chemical could still present dietary risks that may exceed the FFDCA "reasonable certainty of no harm" standard, either individually or cumulatively with other substances that share a common mechanism of toxicity.

v. *Other reassessment decisions.* In addition to the types of reassessment actions described above, a total of 1,164 additional tolerance reassessment decisions have been made, some for inert ingredient tolerance exemptions, through actions not directly related to registration or reregistration. A list of these other tolerance reassessment decisions with their **Federal Register** citations is available in the docket for this **Federal Register** notice.

2. *Accomplishments for priority pesticides.* During FY 2003, EPA completed tolerance reassessment decisions for many high priority pesticides in review, including OPs, carbamates, organochlorines, and carcinogens (See Table 10).

TABLE 10.—TOLERANCE REASSESSMENTS COMPLETED FOR PRIORITY PESTICIDES

Pesticide Class	Tolerances to be Reassessed	Reassessed by End of FY 2003
Carbamates	545	303 (55.6%)
Carcinogens	2,008	1,301 (64.79%)
High hazard inerts	5	3 (60%)
Organochlorines	253	253 (100%)
Organophosphates	1,691	1,127 (66.65%)
Other	5,219	3,639 (69.73%)
Total	9,721	6,626 (68.16%)

3. *Tolerance reassessment and the organophosphates.* EPA developed an approach for assessing cumulative risk for the OP pesticides as a group, as required by FFDCA, and applied this methodology in conducting an OP cumulative risk assessment. The Agency issued preliminary and revised OP cumulative risk assessment documents in December 2001 and June 2002, available on EPA's website at*http://www.epa.gov/pesticides/cumulative.*

Through this assessment of the OP pesticides, EPA has evaluated several hundred OP tolerances and found that most require no modification to meet the new FFDCA safety standard. The Agency's regulatory actions on individual OP pesticides during the past few years have substantially reduced the risks of these pesticides. EPA completed a methyl parathion IRED in FY 2003 and plans to complete IREDs for the three remaining individual OP pesticides (DDVP, dimethoate, and malathion) in FY 2005.

Most of the reregistration and tolerance reassessment decisions that EPA has made for the OP pesticides will not be considered complete until after the Agency concludes its cumulative evaluation of the OPs. The results of individual OP assessments (IRED and TRED documents) include significant risk mitigation measures, however, and any resulting tolerance revocations are counted as completed tolerance reassessments. In addition, some OP tolerances that make at most a minimal or negligible contribution to the cumulative risk from OP pesticides were counted as reassessed during FY 2002. Once EPA completes a cumulative evaluation of the OPs, the Agency will reconsider individual OP IREDs and TREDs, and may issue final REDs and tolerance reassessments for these pesticides.

F. Applications for Registration Requiring Expedited Processing; Numbers Approved and Disapproved

By law, EPA must expedite its processing of certain types of applications for pesticide product registration, i.e., applications for end use products that would be identical or substantially similar to a currently registered product; amendments to current product registrations that do not require review of scientific data; and products for public health pesticide uses. During FY 2003, EPA considered and approved the numbers of applications for registration requiring expedited processing (also known as "fast track" applications) shown in Table 11.

TABLE 11.—FAST TRACK APPLICATIONS APPROVED IN FY 2003

Me-too product registrations/Fast track	417

TABLE 11.—FAST TRACK APPLICATIONS APPROVED IN FY 2003—Continued

Amendments/Fast track	5,193
Total applications processed by expedited means	5,610

For those applications not approved, the Agency generally notifies the registrant of any deficiencies in the application that need to be corrected or addressed before the application can be approved. Applications may have been withdrawn after discussions with the Agency, but none were formally "disapproved" during FY 2003.

On a financial accounting basis, EPA devoted over 28 full-time equivalents (FTEs) in FY 2003 to reviewing and processing applications for fast track me-too product registrations and label amendments. The Agency spent approximately $3 million in FY 2003 in direct costs (i.e., time on task, not including administrative expenses, computer systems, management overhead, and other indirect costs) on expedited processing and reviews.

G. Future Schedule for Reregistrations

EPA plans to complete tolerance reassessment by August 3, 2006, as required by FFDCA, and also to complete reregistration eligibility decisions for pesticides with food uses by that date. REDs for pesticides that have no food uses or tolerances will be completed by October 3, 2008. The Agency's schedule for completing these decisions is as follows. This schedule also will be available on EPA's website at*http://www.epa.gov/pesticides/reregistration.*

1. *RED, IRED, and TRED Schedules for FY 2004, FY 2005, and FY 2006.* Lists 1, 2, and 3 contain pesticides scheduled for Reregistration Eligibility Decisions (REDs), Interim REDs (IREDs), and Reports on FQPA Tolerance Reassessment Progress and Risk Management Decisions (TREDs) in FY 2004, FY 2005, and FY 2006. Although these lists may change due to the dynamic nature of the review process, EPA is committed to meeting the reregistration and tolerance reassessment deadlines. Any pesticides for which decisions are not completed during the current fiscal year will be rescheduled for decisions the following year.

List 1.—FY 2004 RED, IRED, and TRED Schedule

REDs

Benfluralin
Benzisothiazolin-3-one (BIT)
Carboxin
Cycloate
Dihalodialkyldantoins
Ethoxyquin
MCPA
Naphthalene acetic acid
Naptalam
Omadine salts
Phenol and salts
PHMB
Pine oils
Propylene/dipropylene glycol
Sabadilla alkaloids
Sulfonated oleic acid
Thiram

IREDs

Atrazine revised IRED (due and completed 10-31-03)
Formetanate HCl

TREDs

Amitraz
Bacillus thuringiensis var. San Diego (completed)
Boric Acid Group
Carbon dioxide (completed)
Chlorimuron ethyl
DCPA or dacthal
Desmedipham
Dimethenamid
Flumetsulam
Fluridone
Limonene
Nitrogen (completed)
Oil of lemon
Oil of orange
Oryzalin
Putrescent whole egg solids
Thifensulfuron methyl
Tribenuron methyl
Trifluralin

List 2—FY 2005 RED, IRED, and TRED Schedule

REDs

2 Phenylphenol and salts
2,4-D
2,4-DB
Ametryn
Aquashade
Azadioxabicyclo-octane
Benzoic acid
Cacodylic acid
Chlorine dioxide
Chloroneb
Chlorsulfuron
Chromated arsenicals (CCA)
Coal tar/creosote
Dimethipin
Dimethyldithiocarbamate salts (rest of case) (Ferbam)
Endothall
Ethofumesate
Fluometuron
Inorganic chlorates
Iodine
Mancozeb
Maneb
Metam sodium/metam potassium
Methanearsonic acid, salts (MSMA, DSMA, CAMA)
Methyl bromide
Methyl isothiocyanate (MITC)
Metiram
Napropamide
Nitrapyrin
PCNB
Pentachlorophenol
Phenmedipham
Phytophtora palmivora
Pyrazon
Sodium fluoride
Thidiazuron

IREDs

Dichlorvos (DDVP)
Dimethoate
Malathion

TREDs

Burkholderia cepacia
Cyhexatin
Ethephon
Fluazifop-p-butyl
Flumiclorac-pentyl
Imazethebenz
Maleic hydrazide
Methyl eugenol
Nicosulfuron
Sulfuric acid monourea
Tanol derivatives

List 3.—FY 2006 RED, IRED, and TRED Schedule

REDs

Aliphatic solvents
Aromatic solvents
Chloropicrin
Copper and oxides
Copper compounds
Copper sulfate
Cypermethrin
Dicamba
Dichloran (DCNA)
Dodine
Ethylene oxide
Fluvalinate
Formaldehyde
Imazapyr
Inorganic polysulfides
Inorganic sulfites
MCPB
Metaldehyde
MGK-264
Naphthenate salts
Permethrin
Piperonyl butoxide
Propiconazole
Propylene oxide
Pyrethrins
Resmethrin
Rotenone
Salicylic acid
Sethoxydim
TCMB
Triadimefon

IREDs

Aldicarb
Carbofuran
Simazine

TREDs

Acetochlor
Ammonia

Azadirachitin
Benzaldehyde
Bitertanol
Bromine
Ethalfluralin
Fomesafen
Imazaquin
Menthol
Oxytetracycline
Procymidone
Propazine
Sodium cyanide
Streptomycin
Tetradifon
Triadimenol
Tridemorph

2. *Post-2006 REDs.* REDs for pesticides with no associated tolerances will be completed in FY 2007 and FY 2008, unless decisions for these pesticides can be completed sooner. Lists 4 and 5 contain pesticides scheduled for REDs in FY 2007 and FY 2008.

List 4.—FY 2007 RED Schedule

2,4-DP
4-t-Amylphenol
Acrolein
Aliphatic alcohols
Aliphatic esters
Allethrins
Amical 48
Antimycin A
Bioban-p-1487
Busan 77
Chlorflurenol
Copper salts
Dazomet
Dikegulac sodium
Glutaraldehyde
Groton
Irgasan
MCPP
Octhilinone
TBT-containing compounds
Trichloromelamine

List 5.—FY 2008 RED Schedule

4-Amionpyradine
ADBAC
Aliphatic alkyl quaternaries
Alkyl trimethylenediamines
Alkylbenzene sulfonates
Bromonitrostyrene
Flumetralin
Mefluidide
Methoxychlor
Naphthalene
Nicotine
p-Dichlorobenzene
Polypropylene glycol
Prometon
Siduron
Sulfometuron methyl
Sumithrin
Tetramethrin
Triforine
Trimethoxysilyl quats

H. Projected Year of Completion of Reregistrations

EPA generally is conducting reregistration in conjunction with tolerance reassessment, which FFDCA mandates be completed by August 2006. EPA plans to meet the statutory deadline for completing tolerance reassessment, and in so doing, to complete reregistration eligibility decisions for pesticides with tolerances. The Agency expects to complete remaining reregistration eligibility decisions for pesticides with no food uses or tolerances during FY 2007 and FY 2008.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 22, 2004.

Margaret Schneider,

Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 04–10213 Filed 5–4–04; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0105; FRL–7354–4]

Bacillus pumilus Strain QST 2808; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket ID number OPP–2004–0105, must be received on or before June 4, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Susanne Cerrelli, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8077; e-mail address: *cerrelli.susanne@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer.

Potentially affected entities may include, but are not limited to:

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

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

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0105. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although, a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although, not all docket materials may be available electronically, you may still access any of the publicly available

docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also, include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0105. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID number OPP–2004–0105. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2004–0105.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID number OPP–2004–0105. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior

notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 27, 2004.

Phil Hutton,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by AgraQuest, Inc. and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

AgraQuest, Inc.

PP 4F6826

EPA has received a pesticide petition (PP 4F6826) from AgraQuest, Inc., 1530 Drew Ave., Davis, CA 95616, proposing pursuant to section 408(d) of FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of Sonata™ ASO, which contains the QST 2808 strain of *Bacillus pumilus*, to control various plant diseases such as downy mildew, powdery mildew, *Phytophthera*, *Sclerotinia*, *Cercospora*, and/or rust on the following vegetable crop groups: Brassica, bulb, cucurbits, fruiting, leafy, legume, and root and tuber; on the following fruit crop groups: pome and stone; on the grain, cereal, group; and the following individual crops: grape, grasses grown for seed, hop, mint, peanuts, strawberry, sweet corn, tobacco, field grown roses, and certain trees. The product is applied as a foliar spray alone, in alternating spray programs, or in tank mixes with other registered crop protection products, up to and including the day of harvest. Sonata™ ASO may be applied with spray equipment commonly used for making ground or aerial applications. Thorough coverage is essential for optimum disease control.

B. Product Identity/Chemistry

1. *Identity of the pesticide and corresponding residues.* Sonata™ ASO contains the QST 2808 strain of *Bacillus pumilus* as the active ingredient. *Bacillus pumilus* strain QST 2808 is a ubiquitous, naturally occurring, non-pathogenic microorganism. It is commonly recovered from water, soil, air, and decomposing plant residue. *Bacillus pumilus* produces proteases and other enzymes that enable it to degrade a variety of natural substrates and contribute to nutrient recycling. *Bacillus pumilus* prevents spore germination by formation of a physical barrier and subsequently colonizes fungal spores. QST 2808 Technical is used to formulate Sonata™ ASO. Sonata™ ASO is applied at a rate of 0.5 to 2 gallons per acre, except for the treatment of sudden oak death syndrome where the rate range is 1 to 5 gallons per acre.

2. *Magnitude of residue at the time of harvest and method used to determine the residue.* AgraQuest, Inc. is submitting a petition requesting that EPA establish an exemption from the requirement of a tolerance for the QST strain of *Bacillus pumilus*, therefore, this section is not applicable.

3. *A statement of why an analytical method for detecting and measuring the levels of the pesticide residue are not needed.* AgraQuest, Inc. is submitting a petition requesting that EPA establish an exemption from the requirement of a tolerance for the QST strain of *Bacillus pumilus*, therefore, an analytical method for residues is not applicable.

C. Mammalian Toxicological Profile

The active ingredient *Bacillus pumilus* strain QST 2808 has been evaluated for toxicity through oral, dermal, pulmonary, intravenous and eye routes of exposure. The results of the studies have indicated there are no significant human health risks. The acute oral toxicity/pathogenicity LD_{50} in rats was greater than 4.1×10^9colony forming units/grams (cfu/g). The acute dermal lethal dose $(LD)_{50}$ in rats was greater than 2,000 milligrams/kilogram (mg/kg) (Toxicity Category III). The acute pulmonary toxicity/pathogenicity LD_{50} in rats was greater than 1.6×10^8 cfu per animal. The acute intravenous toxicity/pathogenicity LD_{50} in rats was greater than 1.6×10^8 cfu per animal. No pathogenic or infective effects were observed in the studies.

Slight eye irritation in rabbits was observed at a dose of 0.1 milliliter (mL) (Toxicity Category IV) and minimal skin irritation in rabbits was observed at a dose of 0.5 mL (Toxicity Category IV). The dermal sensitization study with QST 2808 Technical in Guinea pigs showed that it is not a sensitizer. Since its discovery, no incidents of hypersensitivity have been reported by researchers, manufacturers or users of *Bacillus pumilus* strain QST 2808.

Acute toxicology studies for the end-use product, Sonata™ AS, showed a toxicity profile similar to that of the technical material. The acute oral toxicity LD_{50} in rats was greater than 5,000 mg/kg (Toxicity Category IV). The acute dermal toxicity LD_{50} in rats was greater than 5,000 mg/kg (Toxicity Category IV). The acute inhalation toxicity LD_{50} in rats was greater than 1.06 milligrams/per liter (mg/L) (Toxicity Category III). In the acute eye irritation study with rabbits, Sonata™ AS was classified as a nonirritant by both the EPA and EU classification systems (Toxicity Category IV) at a dose of 0.1 mL. In the acute dermal irritation study with rabbits, Sonata™ AS was

classified as a mild or slight irritant by the EPA classification system (Toxicity Category IV) and as a nonirritant by the EU classification system at a dose of 0.5 mL. The dermal sensitization study in Guinea pigs showed that it is not a sensitizer. No incidents of hypersensitivity have been reported by researchers, manufacturers, or users of Sonata™ AS or Sonata ASO. The intentionally added inert ingredients together comprise less than 3% of the Sonata™ AS or Sonata ASO formulations. Their individual amounts range from 0.1% to 0.9%. Obviously, any specific toxicological property of any or all of these inert ingredients had no effect upon the overall toxicity of Sonata™ AS compared with that of the QST 2808 Technical. Sonata ASO is simply an all-organic formulation version of Sonata™ AS. The inert ingredients in Sonata ASO are all from EPA's list 4 and thus are considered even more benign than those in Sonata AS. Therefore, the registration data requirements for Sonata ASO will be fulfilled by bridging to the toxicity study results for Sonata™ AS, per the Data Matrix submitted with the registration application for Sonata ASO. Copies of the Material Safety Data Sheets for the added inert ingredients for Sonata™ AS were provided in MRID No. 45257201, and for Sonata ASO in MRID No. 46029501.

D. Aggregate Exposure

Sonata ASO is proposed for use to control various plant diseases on agricultural crops.

1. *Dietary exposure.* Dietary exposure is not expected from the use of this microbial pesticide as proposed. The lack of acute oral toxicity/pathogenicity and the ubiquitous nature of the organism support the exemption from the requirement of a tolerance for this active ingredient.

i. *Food.* Dietary exposure from use of *Bacillus pumilus* strain QST 2808, as proposed, is minimal. Residues of *Bacillus pumilus* strain QST 2808 are not expected on agricultural commodities. In a study conducted to determine the longevity of *Bacillus pumilus* residues on pepper leaf surfaces under field conditions, the results showed that the number of colony forming units of *Bacillus pumilus* decreased significantly over time in the first 5 days. In addition, the microbial pesticide can be removed from food by peeling, washing, cooking, and processing.

ii. *Drinking water.* Exposure to humans from residues of *Bacillus pumilus* strain QST 2808 in consumed drinking water would be unlikely. *Bacillus pumilus* strain QST 2808 is a naturally occurring microorganism known to exist in terrestrial habitats. Although, it may be found in water, it is not known to thrive in aquatic environments.

2. *Non-dietary exposure.* The potential for non-dietary exposure to the general population, including infants and children, is unlikely as the proposed use sites are agricultural settings. In addition, non-dietary exposures would not be expected to pose any quantifiable risk due to a lack of residues of toxicological concern. Personal protective equipment (PPE) mitigates the potential for exposure to applicators and handlers of the proposed products, when used in agricultural settings.

E. Cumulative Exposure

There is no indication of mammalian toxicity of *Bacillus pumilus* and no information to indicate that toxic effects would be cumulative. Therefore, consideration of a common mode of action is not appropriate. In addition, it is not expected that, when used as proposed, Sonata ASO would result in residues that would remain in human food items.

F. Safety Determination

1. *U.S. population. Bacillus pumilus* strain QST 2808 is not pathogenic or infective to mammals. There have been no reports of toxins associated with the organism, and acute toxicity/pathogenicity studies have shown that *Bacillus pumilus* strain QST 2808 is non-toxic, non-pathogenic, and non-irritating. Residues of *Bacillus pumilus* strain QST 2808 are not expected on agricultural commodities, and therefore, exposure to the general U.S. population, from the proposed uses, is not anticipated.

2. *Infants and children.* As mentioned above, residues of *Bacillus pumilus* strain QST 2808 are not expected on agricultural commodities. There is a reasonable certainty of no harm for infants and children from exposure to *Bacillus pumilus* strain QST 2808 from the proposed uses.

G. Effects on the Immune and Endocrine Systems

Bacillus pumilus strain QST 2808 is a naturally occurring, non-pathogenic microorganism. There is no evidence to suggest that *Bacillus pumilus* strain QST 2808 functions in a manner similar to any known hormone, or that it acts as an endocrine disrupter.

H. Existing Tolerances

On June 18, 2003, EPA granted a temporary exemption from the requirement of a tolerance for *Bacillus pumilus* strain QST 2808 in or on all agricultural commodities in conjunction with the issuance of an Experimental Use Permit for Sonata™ AS (EPA Reg. No. 69592-EUP-1). This exemption will expire June 30, 2006.

I. International Tolerances

There is no Codex alimentarius commission maximum residue level for *Bacillus pumilus* strain QST 2808.

[FR Doc. 04–10102 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0106; FRL–7355–1]

Imidacloprid; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket ID number OPP–2004–0106, must be received on or before June 4, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Dani Daniel, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5409; e-mail address: *daniel.dani@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 111)
- Animal production (NAICS 112)

- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

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

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0106. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0106. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0106. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and

made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0106.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2004–0106. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of FFDCA, 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 26, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Gustafson LLC

4F6825

EPA has received a pesticide petition (4F6825) from Gustafson LLC, 1400 Preston Road, Suite 400, Plano, TX 75093 proposing, pursuant to section 408(d) of FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of imidacloprid, 1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine in or on the raw agricultural commodity soybean, seed at 1.0 parts per million (ppm) and the processed commodity soybean, meal at 2.5 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism.* The nature of the imidacloprid residue in plants and livestock is adequately understood. The residues of concern are combined residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all calculated as imidacloprid.

2. *Analytical method.* The analytical method is a common moiety method for imidacloprid and its metabolites containing the 6-chloropyridinyl moiety using a permanganate oxidation, silyl derivatization, and capillary gas chromatography/mass spectrometry (GC-MS) selective ion monitoring. This method has successfully passed a petition method validation in EPA labs. There is a confirmatory method specifically for imidacloprid and several metabolites utilizing GC/MS and high performance liquid chromotography/ ultraviolet (HPLC-UV) which has been validated by EPA as well. Imidacloprid and its metabolites are stable for at least 24 months in the commodities when frozen.

3. *Magnitude of residues.* Gustafson conducted three residue crop field trials to evaluate the quantity of imidacloprid expected in soybeans from application of Gaucho. Trials were conducted in three states. Imidacloprid residues in soybean seed were quantitated by gas chromatography using a mass selective detector. The limit of quantitation (LOQ) was 0.05 ppm. The average field result was 0.277 ppm. In a 10x processing study with soybean, the average residue in soybean meal was 0.947 ppm. The concentration factor for soybean meal is 2.2x.

B. Toxicological Profile

1. *Acute toxicity.* The acute oral lethal dose (LD_{50}) values for imidacloprid technical ranged from 424 milligrams/kilogram (mg/kg) in the male rat and >450 mg/kg in the female rat. The acute dermal LD_{50} was >5,000 mg/kg in the rat. The 4–hour rat inhalation lethal concentration (LC_{50}) was greater 5.33 mg/L. Imidacloprid was not irritating to rabbit skin or eyes. Imidacloprid did not cause skin sensitization in guinea pigs. In an acute neurotoxicity study the LOEL = 42 milligrams/kilogram body weight/day (mg/kg bwt/day).

2. *Genotoxicty.* Mutagenicity studies as shown below have demonstrated that imidacloprid is non-mutagenic both *in vivo* and *in vitro.*

3.*Reproductive and developmental toxicity.* In a developmental toxicity study with Sprague-Dawley rats, groups of pregnant animals (25/group) received oral administration of imidacloprid (94.2%) at 0, 10, 30, or 100 mg/kg bwt/day during gestation days 6 through 16. Maternal toxicity was manifested as decreased body weight gain at all dose levels and reduced food consumption at 100 mg/kg bwt/day. No treatment-related effects were seen in any of the reproductive parameters (i.e., Cesarean section evaluation). At 100 mg/kg bwt/day, developmental toxicity manifested as wavy ribs (fetus =7/149 in treated vs. 2/158 in controls and litters, 4/25 vs. 1/25). For maternal toxicity, the lowest observed effect level (LOEL) was 10 mg/kg bwt/day (LDT) based on decreased body weight gain; a no observed adverse effect level (NOAEL) was not established. For developmental toxicity, the NOAEL was 30 mg/kg bwt/day and the LOEL was 100 mg/kg bwt/day based on increased wavy ribs (MRID No. 42256338).

In a developmental toxicity study with Chinchilla rabbits, groups of 16 pregnant does were given oral doses of imidacloprid (94.2%) at 0, 8, 24, or 72 mg/kg bwt/day during gestation days 6 through 18. For maternal toxicity, the NOAEL was 24 mg/kg bwt/day and the LOEL was 72 mg/kg bwt/day based on mortality, decreased body weight gain, increased resorptions, and increased abortions. For developmental toxicity, the NOAEL was 24 mg/kg bwt/day and the LOEL was 72 mg/kg bwt/day based on decreased fetal body weight, increased resorptions, and increased skeletal abnormalities (MRID No. 42256339).

In a 2-generation reproductive toxicity study, imidacloprid (95.3%) was administered to Wistar/Han rats at dietary levels of 0, 100, 250, or 700 ppm (0, 7.3, 18.3, or 52.0 mg/kg bwt/day for males and 0, 8.0, 20.5, or 57.4 mg/kg bwt/day for females) (MRID No. 42256340, Doc. No. 010537). For parental/systemic/reproductive toxicity, the NOAEL was 250 ppm (18.3 mg/kg bwt/day) and the LOEL was 750 ppm (52 mg/kg bwt/day), based on decreases in body weight in both sexes in both generations. Based on these factors, the EPA/OPP/HED Hazard Identification Assessment Review Committee (HIARC) recommended that the Data Evaluation Record should be revised to indicate the parental/systemic/reproductive NOAEL and LOEL to be 250 and 700 ppm, respectively, based upon the body weight decrements observed in both sexes in both generations.

4. *Subchronic toxicity.* In a dermal toxicity study, groups of five male and five female New Zealand White rabbits received repeated dermal applications of imidacloprid (95%) at 1,000 milligrams/kilogram (mg/kg) body weight/day (bwt/day) (Limit Dose), 6 hours/day, 5 days/week for 3 weeks. No dermal or systemic toxicity was seen. For systemic and dermal toxicity, the NOAEL was greater 1,000 mg/kg bwt/day; a LOEL was not established (MRID No. 42256329).

In an oral toxicity study, groups of Fischer 344 rats (12/sex/dose) were fed diets containing imidacloprid (98.8%) at 0, 150, 1,000, or 3,000 ppm (0, 9.3, 63.3, or 196 mg/kg bwt/day in males and 0, 10.5, 69.3 or 213 mg/kg bwt/day in females, respectively) for 90 days. No treatment-related effects were seen at 150 ppm. Treatment-related effects included decreases in body weight gain during the first 4 weeks of the study at 1,000 ppm (22% in males and 18% in females) and 3,000 ppm (50% in males and 25% in females) with an associated decrease in forelimb grip strength especially in males. The NOAEL was 150 ppm (9.3 and 10.5 mg/kg bwt/day in males and females, respectively) and the LOEL was 1,000 ppm (63.3 and 69.3 mg/kg bwt/day in males and females, respectively) (MRID No. 43286401).

In a rat inhalation study (28–day study in which rats were exposed 6 hours/day, 5 days/week for 4 weeks), the NOAEL for imidacloprid was 5.5 mg/m^3 (MRID No. 42273001).

5.*Chronic toxicity.* In a chronic toxicity study, groups of beagle dogs (4/sex/dose) were fed diets containing imidacloprid (94.9%) at 0, 200 or 1,250/2,500 ppm (0, 6.1, 15 or 41/72 mg/kg bwt/day, respectively) for 52 weeks. The 1,250 ppm dose was increased to 2,500 ppm from week 17 onwards. The threshold NOAEL was 1,250 ppm (41 mg/kg bwt/day). The LOEL was 2,500 ppm (72 mg/kg bwt/day) based on increased cytochrome-P-450 levels in both sexes and was considered to be a threshold dose. Due to the lack of toxicity at 1,250 ppm, a LOEL was not established in this study; following the dose increase to the 2,500 ppm level, toxicity was observed, thus making 1,250 ppm the threshold NOAEL and 2,500 ppm the threshold LOEL (MRID No. 42273002).

6. *Animal metabolism.* The metabolism of NTN 33893 (imidacloprid) in rats was reported in seven studies. These data show that imidacloprid was rapidly absorbed and eliminated in the excreta (90% of the dose within 24 hours), demonstrating no biologically significant differences between sexes, dose levels, or route of administration. Elimination was mainly renal (70%–80% of the dose) and fecal (17%–25%). The major part of the fecal activity originated in the bile. Total body accumulation after 48 hours consisted of 0.5% of the radioactivity with the liver, kidney, lung, skin and plasma being the major sites of accumulation. Therefore, bioaccumulation of imidacloprid is low in rats. Maximum plasma concentration was reached between 1.1 and 2.5 hours. Two major routes of biotransformation were proposed for imidacloprid. The first route included an oxidative cleavage of the parent compound rendering 6-chloronicotinic acid and its glycine conjugate. Dechlorination of this metabolite formed the 6-hydroxynicotinic acid and its mercapturic acid derivative. The second route included the hydroxylation followed by elimination of water of the parent compound rendering NTN 35884. A comparison between [methylene-14C]-imidacloprid and [imidazolidine-4,5-14C]-imidacloprid showed that while the rate of excretion was similar, the renal portion was higher with the imidazolidine-labeled compound. In addition, accumulation in tissues was generally higher with the imidazolidine-labeled compound.

A comparison between imidacloprid and one of its metabolites, WAK 3839, showed that the total elimination was the same for both compounds. The proposed metabolic pathways for these two compounds were different. WAK 3839 was formed following pretreatment (repeated dosing) of imidacloprid.

7. *Endocrine disruption.* The toxicology data base for imidacloprid is current and complete. Studies in this data base include evaluation of the potential effects on reproduction and development, and an evaluation of the pathology of the endocrine organs following short-term or long-term exposure. These studies revealed no

primary endocrine effects due to imidacloprid.

C. Aggregate Exposure

1. *Dietary exposure.* Assessments were conducted to evaluate potential risks due to chronic and acute dietary exposure of the U.S. population and selected population subgroups to residues of imidacloprid. These analyses cover all registered crops including rotational crops and soybean uses, and section 18 uses on blueberries, cranberries, table beets, strawberries, turnips. Novigen Sciences, Inc.'s Dietary Exposure Evaluation Model (DEEM™, Version 7.81), which is licensed to Bayer CropScience, was used to estimate the chronic and acute dietary exposure (Tier 3) on behalf of Gustafson LLC. This software uses the food consumption data from the 1994–1998 USDA Continuing Surveys of Food Intake by Individuals (CSFII 1994–1998).

The endpoint for acute dietary risk assessments is based on neurotoxicity characterized by decreases in motor or locomotor activity in female rats at 42 mg/kg bwt/day (LOEL) from an acute neurotoxicity study. Based on an uncertainty factor of 10x for interspecies and 10x for intraspecies the acute reference dose (aRfD) = 0.42 mg/kg bwt/day. EPA has determined that an additional uncertainty factor (UF) for FQPA (reduced to 3x) applies to all population subgroups for acute risk. Application of the additional 3x safety factor results in an acute population adjusted dose (aPAD) 0.14 mg/kg bwt/day or a MOE of 300.

For chronic dietary analyses, EPA has established the reference dose (RfD) for imidacloprid at 0.057 mg/kg/day based on a NOAEL of 5.7 mg/kg bwt/day from a rat chronic toxicity carcinogenicity study and uncertainty factors of 10x for interspecies and 10x for intraspecies. A chronic population adjusted dose (cPAD) of 0.057 mg/kg bwt/day was determined.

Results from the acute and chronic dietary exposure analyses described below demonstrate a reasonable certainty that no harm to the overall U.S. population or any population subgroup will result from the use of imidacloprid on currently registered and pending uses.

i. *Food.* Acute and chronic (Tier 3) risk assessments were made using the results of field trials conducted at maximum label application rates and the shortest pre-harvest intervals. For some of the vegetable crops, these residue data were collected at 1.5x or greater than the maximum label rate of 0.5 lb ai/A per season. In addition, no adjustments were made to account for dissipation of residues during storage, transportation from the field to the consumer, washing or peeling. Therefore, the actual dietary exposure will be less than that presented here.

For the chronic analysis, mean field trial residues were calculated. For the acute Monte Carlo analysis, the entire distribution of residue field trial data was used for the "non-blended" and "partially blended" foods as determined by EPA's HED SOP 99.6. For the foods considered as "blended" by EPA'S HED SOP 99.6, mean field trial residue data were used. As allowed in EPA's draft guidance for submission of probabilistic human health exposure assessments one half LOD/LOQ values were used for all non-detected values (values below the sensitivity of the method).

a. *Acute.* Bayer CropScience's acute Monte Carlo dietary exposure assessment estimated percent of the aPAD and corresponding margins of exposure (MOE) for the overall U.S. population (all seasons), and various subpopulations. In this analysis, the exposure for the total U.S. population was equal to 7.8% of the aPAD at the 99.9th percentile. The most highly exposed population subgroup, children (1–2 years), had an exposure equal to 20.9% of the aPAD at the 99.9th percentile. Therefore, the acute dietary exposure estimates are below EPA's level of concern for the overall U.S. population as well as the various subpopulations.

b. *Chronic.* Bayer CropScience's chronic dietary exposure estimated the percent of the chronic population adjusted dose (cPAD) for the overall U.S. population (all seasons) and various subpopulations. In this analysis, the exposure for the total U.S. population was equal to 0.5% of the cPAD. The most highly exposed population subgroup, children (1–2 years), had an exposure equal to 1.5% of the cPAD. Therefore, the chronic exposure estimates are below EPA's level of concern for the overall U.S. population as well as the various subpopulations.

ii. *Drinking water.* EPA, as published in the **Federal Register** (66 FR 18554) (FRL–6777–6), calculated acute and chronic drinking water levels of concerns (DWLOCs) and compared them with the EECs for surface water and ground water. Based on this comparison, EPA determined that acute exposure and chronic exposure would not be expected to exceed the aPAD and cPAD, respectively.

2. *Non-dietary exposure*—i. *Residential turf.* Bayer CropScience has conducted an exposure study to address the potential exposures of adults and children from contact with imidacloprid treated turf. The population considered to have the greatest potential exposure from contact with pesticide-treated turf soon after pesticides are applied are young children. Margins of safety (MOS) of 7,587–41,546 for 10–year old children and 6,859–45,249 for 5–year old children were estimated by comparing dermal exposure doses to the imidacloprid no observable effect level of 1,000 mg/kg/day established in a 15–day dermal toxicity study in rabbits. The estimated safe residue levels of imidacloprid on treated turf for 10–year old children ranged from 5.6–38.2 g/cm^2 and for 5–year old children from 5.1–33.5 g/cm^2. This compares with the average imidacloprid transferable residue level of 0.080 g/cm^2 present immediately after the sprays have dried. These data indicate that children can safely contact imidacloprid-treated turf as soon after application as the spray has dried.

ii. *Termiticide.* Imidacloprid is registered as a termiticide. Due to the nature of the treatment for termites, exposure would be limited to that from inhalation and was evaluated by EPA's Occupational and Residential Exposure Branch (OREB) and Bayer. Data indicate that the Margins of Safety for the worst case exposures for adults and infants occupying a treated building who are exposed continuously (24 hours/day) are 8.0×10^7 and 2.4×10^8, respectively; and exposure can thus be considered negligible.

iii. *Tobacco smoke.* Studies have been conducted to determine residues in tobacco and the resulting smoke following treatment. Residues of imidacloprid in cured tobacco following treatment were a maximum of 31 ppm (7 ppm in fresh leaves). When this tobacco was burned in a pyrolysis study only 2% percent of the initial residue was recovered in the resulting smoke (main stream plus side stream). This would result in an inhalation exposure to imidacloprid from smoking of approximately 0.0005 mg per cigarette. Using the measured subacute rat inhalation NOEL of 5.5 mg/m^3, it is apparent that exposure to imidacloprid from smoking (direct and/or indirect exposure) would not be significant.

iv. *Pet treatment.* Human exposure from the use of imidacloprid to treat dogs and cats for fleas has been addressed by EPA's Occupational and Exposure Branch (OREB) who have concluded that due to the fact that imidacloprid is not an inhalation or dermal toxicant and that while dermal absorption data are not available,

imidacloprid is not considered to present a hazard via the dermal route.

D. Cumulative Effects

Imidacloprid is a chloronicotinyl insecticide. At this time, EPA has not made a determination that imidacloprid and other substances that may have a common mechanism of toxicity would have cumulative effects. Therefore, for these tolerance petitions, it is assumed that imidacloprid does not have a common mechanism of toxicity with other substances and only the potential risks of imidacloprid in its aggregate exposure are considered.

E. Safety Determination

1. *U.S. population.* EPA has considered data from developmental toxicity studies in the rat and rabbit and a 2-generation reproduction study in the rat. These studies are discussed under section A (Toxicology Profile) above. The developmental toxicity data demonstrated no increased sensitivity of rats or rabbits to *in utero* exposure to imidacloprid. In addition, the multi-generation reproductive toxicity study did not identify any increased sensitivity of rats to *in utero* or postnatal exposure. Parental NOAELs were lower or equivalent to developmental or offspring NOAELs. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure during gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

Based on the exposure assessments described above and on the completeness and reliability of the toxicity data, it can be concluded that the dietary exposure estimates from all label and pending uses of imidacloprid are 7.8% of the aPAD at the 99.9th percentile and 0.5% of the cPAD for the U.S. population. Thus, it can be concluded that there is a reasonable certainty that no harm will result from aggregate exposure to imidacloprid residues.

2. *Infants and children.* Based on the exposure assessments described above for the safety determination of the U.S. population and on the completeness and reliability of the toxicity data, it can be concluded that the dietary exposure estimates from all label and pending uses of imidacloprid are 20.9% of the aPAD at the 99.9th percentile and 1.5% of the cPAD for the most sensitive population subgroup, children 1–2 years. Thus, it can be concluded that there is a reasonable certainty that no harm will result from aggregate exposure to imidacloprid residues.

F. International Tolerances

No CODEX maximum residue levels have been established for residues of imidacloprid on soybean.

[FR Doc. 04–10103 Filed 5–4–04; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0063; FRL–7354–8]

Esfenvalerate; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket ID number OPP–2004–0063, must be received on or before June 4, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Shaja R. Brothers, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–3194; e-mail address: *brothers.shaja@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0063. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public

docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also, include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0063. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID number OPP–2004–0063. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2004–0063.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID number OPP–2004–0063. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 20, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petitions is printed below as required by FFDCA section 408(d)(3). The summary of the petitions was prepared by Interregional Research Project Number 4 (IR-4) and represents the view of the petitioner. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous mateial, or the summary unintentionally made the reader conclude that the findings reflected EPA's position and not the position of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Interregional Research Project Number 4 (IR-4)

PP 0E3912, PP 9E3810, PP 9E3813, PP 9E5075, and PP 9E6061

EPA has received pesticide petitions PP 0E3912, PP 9E3810, PP 9E3813, PP 9E5075, and PP 9E6061 from Interregional Research Project Number 4 (IR-4), 681 U.S. Highway #1 South, North Brunswick, NJ 08902–3390 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR 180.533, by establishing tolerances for residues of the insecticide, esfenvalerate ((S)-cyano-(3-phenoxyphenyl)methyl(S)-4-chloro-alpha-(1-methylethyl)benzeneacetate) in or on the following raw agricultural commodities:

1. PP 0E3912 proposes the establishment of a tolerance for cardoon at 1.0 part per million (ppm). Registration will be limited to California based on the geographical representation of the residue data submitted to EPA.

2. PP 9E3810 proposes the establishment of tolerances for cabbage, chinese, bok choy at 1.0 ppm. Registration will be limited to areas east of the Mississippi River based on the geographical representation of the residue data submitted to EPA.

3. PP 9E3813 proposes the establishment of a tolerance for sweet potato at 0.05 ppm.

4. PP 9E5075 proposes the establishment of a tolerance for canola, seed at 0.3 ppm.

5. PP 9E6061 proposes the establishment of a tolerance for Brussels sprouts at 0.2 ppm for regional registration only.

EPA has determined that the petitions contain data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petitions. Additional data may be needed before EPA rules on the petitions. This notice includes a summary of the petitions prepared by DuPont Crop Protection, (formerly DuPont Agricultural products) P.O. Box 30, Newark, DE 19714–0030.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism and chemical nature of residues of fenvalerate in plants are adequately understood. The fate of fenvalerate has been extensively studied using radioactive tracers in plant metabolism/nature of the residue studies. These studies have demonstrated that the parent compound is the only residue of toxicological significance. EPA has concluded that the qualitative nature of the residue is the same for both fenvalerate and esfenvalerate.

2. *Analytical method.* There is a practical analytical method utilizing electron-capture gas chromatography with nitrogen phosphorous detection available for enforcement with a limit of detection that allows monitoring of food with residues at or above tolerance levels. The limit of detection for updated method is the same as that of the current Pesticide Analytical Manual (PAM) II, which is 0.01 ppm.

3. *Magnitude of residues.* Fenvalerate is a racemic mixture of four isomers about 25% each. Technical Asana the S,S-isomer enriched formulation, esfenvalerate, has been the only fenvalerate formulation sold in the U.S. for agricultural use. Since the S,S-isomer is the insecticidally active isomer, the use rate for Asana is 4 times lower than that for pydrin. A petition is pending (PP 4F4329), to convert tolerances still to be expressed as the sum of all isomers based on the use rates for Asana. Bridging residue studies have shown Asana residues to be 3–4 times lower than pydrin residues.

Field trials were conducted on each commodity (cardoon; cabbage, Chinese, bok choy; sweet potato; canola, seed; and brussels sprouts) in the requested geographical regions. Results from these trials support the proposed tolerances.

B. Toxicological Profile

An assessment of the toxic effects caused by esfenvalerate is discussed in Unit III.A. and Unit III.B. of the **Federal Register** dated March 1, 2001 (66 FR 16926) (FRL–6774–5).

1. *Animal metabolism.* In animal studies, after oral dosing with radioactive fenvalerate, the majority of the administered radioactivity was eliminated in the initial 24–hours. The metabolic pathway involved cleavage of the ester linkage followed by hydroxylation, oxidation, and conjugation of the acid and alcohol moieties.

2. *Metabolite toxicology.* The parent molecule is the only moiety of toxicological significance appropriate for regulation in plant and animal commodities.

C. Aggregate Exposure

1. *Dietary exposure.* Tolerances have been established for the residues of fenvalerate/esfenvalerate, in or on a variety of agricultural commodities. For purposes of assessing dietary exposure, chronic and acute dietary assessments have been conducted using all existing tolerances for esfenvalerate. The

following crops with pending petitions have been included in the assessment: Brussels sprouts; cabbage, Chinese, bok choy; canola; cardoon; sweet potato, and pistachio. In addition, previously pending or intended uses that have been withdrawn leaf lettuce, kale, passion fruit are also, included in the dietary exposure assessment.

i. *Food—a. Chronic.* A chronic dietary exposure assessment was conducted using Novigen's Dietary Exposure Estimate Model (DEEM™). Anticipated residues and adjustment for percent crop treated were used in the chronic dietary risk assessment. The percentages of the reference dose (RfD) utilized by the most sensitive subpopulation, children 1–6 years, was 2.0% based on a daily dietary exposure of 0.000134 milligrams/kilogram body weight/day (mg/kg bwt/day). Chronic exposure for the overall U.S. population was 0.9% of the RfD based on a dietary exposure of 0.000058 mg/kg bwt/day. EPA has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health.

b. *Acute exposure.* Potential acute exposures from food commodities were estimated using a Tier 3 (Monte Carlo) Analysis, appropriate processing factors for processed food, and distribution analysis. This analysis used data from field trial studies and pesticide monitoring programs to estimate exposure, and federal and market survey information to derive the percent of crop treated. These data are considered reliable, and used the upper end estimate of percent crop treated in order to not underestimate any significant subpopulation. Regional consumption information was taken into account.

ii. *Drinking water.* Esfenvalerate is immobile in soil, and will not leach into ground water. Due to the insolubility and lipophilic nature of esfenvalerate, any residues in surface water will rapidly and tightly bind to soil particles and remain with sediment, therefore, not contributing to potential dietary exposure from drinking water.

Surface water concentrations for pyrethroids were estimated using PRZM3, and Exposure Analysis Modeling System (EXAMS) using standard EPA cotton runoff and Mississippi pond scenarios. The maximum concentration predicted in the simulated pond was 0.052 parts per billion (ppb). Concentrations in actual drinking water would be much lower than the levels predicted in the hypothetical, small, stagnant farm pond model since drinking water derived from surface water would be treated before consumption.

Chronic drinking water exposure has been estimated to be 0.000001 mg/kg/day for both the U.S. general population, and for non-nursing infants. Therefore, DuPont believes that there is a reasonable certainty of no harm from drinking water.

2. *Non-dietary exposure.* Esfenvalerate is registered for non-crop uses including spray treatments in and around commercial and residential areas, treatments for control of ectoparasites on pets, home care products including foggers, pressurized sprays, crack and crevice treatments, lawn and garden sprays, and pet and pet bedding sprays. For the non-agricultural products, the very low amounts of active ingredient they contain, combined with the low vapor pressure (1.5×10^{-9} mm Mercury at 25 °C) and low dermal penetration, would result in minimal inhalation and dermal exposure.

To assess risk from nonfood short-term and intermediate-term exposure, EPA has selected a toxicological endpoint of 2.0 mg/kg/day, the NOAEL from the rat and rabbit developmental studies. For dermal penetration/absorption, EPA selected 25% dermal absorption based on the weight-of-evidence available for structurally related pyrethroids. For inhalation exposure, EPA used the oral NOAEL of 2.0 mg/kg/day, and assumed 100% absorption by inhalation.

Individual non-dietary risk exposure analyses were conducted using a flea infestation scenario that included pet spray, carpet and room treatment, and lawn care, respectively. The total potential short-term and intermediate-term aggregate non-dietary exposure including lawn, carpet, and pet uses are: 0.000023 mg/kg/day for adults, 0.00129 mg/kg/day for children 1–6 years old, and 0.00138 mg/kg/day for infants less than 1–year old.

EPA concluded in a final rule published in the **Federal Register** of November 26, 1997 (62 FR 63019) (FRL–5754–6) that the potential non-dietary exposure for esfenvalerate is associated with substantial margins of safety, and that there was reasonable certainty that no harm will result from aggregate exposure to esfenvalerate residues.

D. Cumulative Effects

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

EPA does not have at this time available data to determine whether esfenvalerate has a common method of toxicity with other substances, or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, esfenvalerate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that esfenvalerate has a common mechanism of toxicity with other substances.

E. Safety Determination

1. *U.S. population.* Based on the chronic dietary exposure assessment, it is concluded that exposure to esfenvalerate, including the proposed uses in food will utilize 0.9% of the RfD for the U.S. general population. There is generally no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. The margin of exposure (MOE) for the general population was 472 at the 99.9th percentile of exposure, based on a daily exposure estimate of 0.004229 mg/kg bwt/day. Therefore, there is a reasonable certainty that no harm to the U.S. population will result from chronic dietary, acute dietary, non-dietary, or aggregate exposure to esfenvalerate residues.

2. *Infants and children.* FFDCA section 408 provides that EPA may apply an additional safety factor for infants and children in the case of threshold effects to account for prenatal and postnatal effects, and the completeness of the toxicity data base. An extra 3X safety factor has been assessed for esfenvalerate due to a data gap.

A chronic dietary exposure assessment found the percentages of the RfD utilized by the most sensitive subpopulation to be 2.0% for children 1–6 years old based on a dietary exposure of 0.000134 mg/kg bwt/day. The most sensitive subpopulation, children 1–6 years, had acute dietary MOE of 378 at the 99.9th percentile of exposure. Nursing infants had a MOE of 750 at the 99.9th percentile of exposure. Non-nursing infants had a MOE of 761 at the 99.9th percentile of exposure. Therefore, there is a reasonable certainty that no harm to infants and children will result from chronic dietary, acute

dietary, non-dietary, or aggregate exposure to esfenvalerate residues.

F. International Tolerances

Codex maximum residue levels (MRLs) have been established for residues of fenvalerate on a number of crops that also have U.S. tolerances. There are some minimal differences between the section 408 tolerances, and certain Codex MRL values for specific commodities. These differences could be caused by differences in methods to establish tolerances, calculate animal feed, dietary exposure, and as a result of different agricultural practices. Therefore, some harmonization of these maximum residue levels may be required.

[FR Doc. 04–9722 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0064; FRL–7354–9]

Indoxacarb; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket ID number OPP–2004–0064, must be received on or before June 4, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Shaja R. Brothers, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–3194; e-mail address: *brothers.shaja@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0064. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper

receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0064. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to*opp-docket@epa.gov*, Attention: Docket ID number OPP–2004–0064. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2004–0064.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID number OPP–2004–0064. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 15, 2004.

Betty Shackleford,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous material, or the summary

unintentionally made the reader conclude that the findings reflected EPA's position and not the position of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Interregional Research Number 4 (IR-4)

PP 2E6482

EPA has received a pesticide petition 2E6482 from IR–4, 681 U.S. Highway #1 South, North Brunswick, NJ 08902–3390 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR 180.564(a) by revoking Brassica, head and stem, subgroup at 5.0 parts per million (ppm), and establishing tolerances for residues of the insecticide, indoxacarb, (S)-methyl 7-chloro-2,5-dihydro-2-(methoxycarbonyl)([4-trifluoromethoxy)phenyl amino carbonyl indeno 1,2e 1,3,4 oxadiazine-4a3H)- carboxylate] and its R-enantiomer [R-methyl 7-chloro-2,5-dihydro-2-methoxycarbonyl)[4-trifluoromethoxy) phenyl] amino carbonyl indeno 1,2-e 1,3,4 oxadiazine-4a3H)-carboxylate] in or on the raw agricultural commodities (RACs) vegetable, Brassica, leafy, group 5 at 12 ppm, and turnip at 12 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition. This notice includes a summary of the petition prepared by du Pont de Nemours and Company, Crop Protection, Wilmington, DE, 19898.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism of indoxacarb in plants is adequately understood to support these tolerances. Plant metabolism studies in cotton, lettuce, grapes and tomatoes showed no significant metabolites. The only significant residue was parent compound.

2. *Analytical method.* The plant residue enforcement method detects and quantitates indoxacarb in various matrices including lettuce, tomato, pepper, cabbage, broccoli, cauliflower, apple, pear, grape, cottonseed, tomato, mustard greens, and apple processed commodity samples by gas chromatography mass spectrometry detection (GC-MSD). The limit of quantitation (LOQ) of the method allows monitoring of crops with indoxacarb residues at or above the levels proposed in these tolerances.

3. *Magnitude of residues.* The residue study for mustard greens is as follows: Residue studies were conducted at a total of five field sites. All studies were done using Avaunt Insecticide containing 30% active ingredient 300 g DPX KN128 per kg, (w/w). Four broadcast applications of Avaunt Insecticide were made at each test site at a maximum rate of 0.067 lb a.i. DPX-KN128/acre/application maximum seasonal use rate of 0.267 lb DPX-KN128/(acre). Applications were made approximately 3 days apart. Residues were measured as the combination of DPX-KN128 and IN-KN127 enantiomers not resolved by the analytical method. Maximum residues of KN128/KN127 in individual duplicate samples were 9.8 ppm at a PHI of 3 days range 1.2, 9.8 ppm. Residues for head and stem Brassica are already established based on previously submitted data for cabbage, broccoli, and cauliflower.

B. Toxicological Profile.

An assessment of the toxic effects caused by indoxacarb is discussed in Unit III.A. and Unit III.B. of the **Federal Register** dated July 2, 2003 (68 FR 737765) (FRL–7310–7).

C. Aggregate Exposure

1. *Dietary exposure.* Chronic dietary exposure resulting from the currently approved use of indoxacarb on apples, broccoli, cabbage, cauliflower, cotton, cranberry (current section 18 use), peach (current EUP use), pears, peppers, sweet corn, tomatoes, alfalfa, lettuce, peanuts, potatoes, soybeans, and the proposed uses on grapes, cherries (proposed EUP use), crop group 5 - Brassica (cole) leafty vegetables group, and turnip, tops (greens) are well within acceptable limits for all population subgroups. Tolerances for indoxacarb are pending to support agricultural use on grapes, and temporary tolerances for indoxacarb are pending to support agricultural use on cherries. Tolerances are also proposed to support agricultural uses for crop group 5, Brassica (cole) leafy vegetables group, and turnip, tops (greens). The established tolerance 5 ppm for Brassica, head and stem, subgroup 5A is being revoked.

i. *Food—Chronic dietary exposure assessment.* The Chronic Module of the Dietary Exposure Evaluation Model ((DEEM), Exponent, Inc. formerly Novigen Sciences, Inc., 1997 Version 7.72) was used to conduct the assessment with the reference dose (RfD) of 0.02 milligrams/kilogram/day (mg/kg/day). The analysis used overall mean field trial values, processing factors, and projected peak percent crop treated (PCT) values. Secondary residues in milk, meat, and poultry products were also included in the analysis. The chronic dietary exposure to indoxacarb is 0.000089 mg/kg/day, and utilizes 0.4% of the RfD for the overall U.S. population. The exposure of the most highly exposed subgroup in the population, children age 1-6 years, is 0.000238 mg/kg/day, and utilizes 1.2% of the RfD.

2. *Acute dietary exposure.* The Tier 3 analysis used distributions of field trial residue data adjusted for projected peak PCT. Secondary residues in milk, meat and poultry products were also included in the analysis.

ii. *Drinking water.* Indoxacarb is highly unlikely to contaminate ground water resources due to its immobility in soil, low water solubility, high soil sorption, and moderate soil half-life. Based on the EPA's Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Groundwater (SCI-GROW) models the estimated environmental concentrations (EECs) of indoxacarb and its R-enantiomer for acute exposures are estimated to be 6.84 parts per billion (ppb) for surface water and 0.0025 ppb for ground water. The EECs for chronic exposures are estimated to be 0.316 ppb for surface water and 0.0025 ppb for ground water.

2. *Non-dietary exposure.* Indoxacarb products are not labeled for residential non-food uses, thereby eliminating the potential for residential exposure. Non-occupational, non-dietary exposure for DPX-MP062 has not been estimated because the proposed products are limited to commercial crop production. Therefore, the potential for non-occupational exposure is insignificant.

D. Cumulative Effects

EPA's consideration of a common mechanism of toxicity is not necessary at this time because there is no indication that toxic effects of indoxacarb would be cumulative with those of any other chemical compounds. Oxadiazine chemistry is new, and indoxacarb has a novel mode of action compared to currently registered active ingredients.

E. Safety Determination

1. *U.S. population.* Dietary and occupational exposure will be the major routes of exposure to the U.S. population. The chronic dietary exposure to indoxacarb is 0.000089 mg/kg/day, which utilizes 0.4% of the RfD

for the overall U.S. population, using mean field trial values, processing factors, and projected peak PCT values. The percent of the acute population adjusted dose (aPAD) 7.3% for the overall U.S. population shows that an adequate margin of safety exists. Using only pesticide handlers exposure database (PHED) data levels A and B (those with a high level of confidence), the margin of exposures for occupational exposure are 650 for mixer/loaders and 1,351 for airblast applicators (worst-case). Based on the completeness and reliability of the toxicity data and the conservative exposure assessments, there is a reasonable certainty that no harm will result from the aggregate exposure of residues of indoxacarb including all anticipated dietary exposure and all other non-occupational exposures. There are residential uses of indoxacarb pending; however, the potential exposure calculation is considered extremely minimal. Drinking water levels of comparison (DWLOCs), theoretical upper allowable limits on the pesticide's concentration in drinking water, were calculated to be much higher than the EECs. The chronic DWLOCs ranged from 198 to 697 ppb. The acute DWLOCs ranged from 440 to 3,890 ppb. Thus, the estimated levels of indoxacarb in drinking water are well below the DWLOC.

2. *Infants and children.* Chronic dietary exposure of the most highly exposed subgroup in the population, children age 1–6 years, is 0.000238 mg/kg/day 1.2% of the reference dose (RfD). For infants non-nursing, (1 year), the exposure accounts for 0.3% of the RfD. For acute exposure at the 99.9th percentile based on a Tier 3 assessment, the exposure was 0.013973 mg/kg/day (11.6% aPAD) for children 1–6 years, and 0.026036 mg/kg/day (21.7% aPAD) for non-nursing infants. Based on the completeness and reliability of the toxicity data, the lack of toxicological endpoints of special concern, the lack of any indication that children are more sensitive than adults to indoxacarb, and the conservative exposure assessment, there is a reasonable certainty that no harm will result to infants and children from the aggregate exposure of residues of indoxacarb, including all anticipated dietary exposure, and all other non-occupational exposures. Accordingly, there is no need to apply an additional safety factor for infants and children.

F. International Tolerances

To date, no international tolerances exist for indoxacarb.

[FR Doc. 04–9723 Filed 5–4–04; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0116; FRL–7356–3]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted or denied emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions or denials were granted during the period January 1, 2004 to March 31, 2004, to control unforseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT: See each emergency exemption or denial for the name of a contact person. The following information applies to all contact persons: Team Leader, Emergency Response Team, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9366.

SUPPLEMENTARY INFORMATION: EPA has granted or denied emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: Crisis, public health, quarantine, or specific. EPA has also listed denied emergency exemption requests in this notice.

I. General Information

A. Does this Action Apply to Me?

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

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

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

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0116. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

II. Background

Under FIFRA section 18, EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A "specific exemption" authorizes use of a pesticide against specific pests,

on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.

2. "Quarantine" and "public health" exemptions are a particular form of specific exemption issued for quarantine or public health purposes. These are rarely requested.

3. A "crisis exemption" is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that the proposed pesticide use is likely to result in "a reasonable certainty of no harm" to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues, EPA establishes a time-limited tolerance meeting the "reasonable certainty of no harm standard" of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document: EPA identifies the State or Federal agency granted the exemption or denial, the type of exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions and Denials

A. U. S. States and Territories

Alabama

Department of Agriculture and Industries

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)

EPA authorized the use of diuron in catfish ponds to control blue-green algae (*Oscillatoria chalybea* (*cyanobacteria*); March 19, 2004, to November 30, 2004. Contact: (Libby Pemberton)

Arizona

Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2004 to February 1, 2005. Contact: (Barbara Madden)

Arkansas

State Plant Board

Specific: EPA authorized the use of thymol in beehives to control varroa mites; February 5, 2004 to November 8, 2004. Contact: (Stacey Groce)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)

California

Environmental Protection Agency, Department of Pesticide Regulation

Crisis: On February 18, 2004, for the use of abamectin on avocado to control avocado thrip (*Scirtothrips perseae*). This program is expected to end on December 1, 2004. Contact: (Libby Pemberton)

On March 25, 2004, for the use of oxytetracycline on apples (Pink Lady variety only) to control fire blight. This program is expected to end on August 1, 2004. Contact: (Barbara Madden)

Specific: EPA authorized the use of pyriproxyfen on celery to control silverleaf whitefly (*Bemisia argentifolii*) and the greenhouse whitefly (*Trialeurodes vaporariorum*); January 6, 2004, to January 6, 2005. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)

EPA authorized the use of maneb on walnuts to control walnut blight; March 1, 2004 to June 15, 2004. Contact: (Linda Arrington)

EPA authorized the use of avermectin on avocado to control thrips (*Scirtothrips perseae*); March 5, 2004, to December 1, 2004. Contact: (Libby Pemberton)

EPA authorized the use of oxytetracycline on apples (Pink Lady variety only) to control fire blight; March 26, 2004, to August 1, 2004. Contact: (Barbara Madden)

Colorado

Department of Agriculture

Specific: EPA authorized the use of thymol in beehives to control varroa mites; February 5, 2004 to November 8, 2004. Contact: (Stacey Groce)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)

EPA authorized the use of tetraconazole on sugarbeet to control *Cercospora* leaf spot; March 11, 2004 to September 30, 2004. (Andrea Conrath).

EPA authorized the use of difenoconazole on sweet corn seed to control damping-off and die-back diseases; March 19, 2004 to March 19, 2005. Contact: (Andrea Conrath)

EPA authorized the use of lambda-cyhalothrin on barley to control Russian wheat aphid and cereal leaf beetle; April 15, 2004 to July 15, 2004. Contact: (Andrew Ertman)

EPA authorized the use of tebuconazole on sunflowers to control rust; July 1, 2004 to August 25, 2004. Contact: (Linda Arrington)

Connecticut

Department of Environmental Protection

Specific: EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; March 19, 2004 to June 30, 2004. Contact: (Andrea Conrath)

EPA authorized the use of thymol in beehives to control varroa mites; March 19, 2004 to November 8, 2004. Contact: (Stacey Groce)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 31, 2004 to February 1, 2005. Contact: (Barbara Madden)

Delaware

Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 4, 2004 to February 1, 2005. Contact: (Barbara Madden)

EPA authorized the use of terbacil in watermelons to control annual broadleaf weeds (annual morning-glory); March 26, 2004 to June 15, 2004. Contact: (Stacey Groce)

Florida

Department of Agriculture and Consumer Services

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; January 19, 2004 to January 18, 2005. Contact: (Barbara Madden)

EPA authorized the use of pyriproxyfen on legumes to control whiteflies; February 7, 2004, to February 7, 2005. (Andrea Conrath).

EPA authorized the use of thiophanate methyl on citrus to control post-bloom fruit drop; February 27, 2004 to February 27, 2005. (Andrea Conrath).

EPA authorized the use of fenbuconazole on grapefruit to control greasy spot; March 17, 2004 to October 1, 2004. Contact: (Andrea Conrath)

EPA authorized the use of thiophanate-methyl on fruiting vegetable group 1 (tomatoes, peppers and egg plant) to control white mold; March 31, 2004 to March 31, 2005. Contact: (Andrea Conrath)

Georgia

Department of Agriculture
Specific: EPA authorized the use of fenbuconazole on blueberries to control mummyberry disease; February 5, 2004 to July 1, 2004. (Andrea Conrath).
EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)

Idaho

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; February 5, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of thiabendazole on lentils to control *Ascochyta* blight; February 12, 2004 to June 1, 2004. (Andrea Conrath).
EPA authorized the use of difenoconazole on sweet corn seed to control damping-off and die-back diseases; March 19, 2004 to March 19, 2005. Contact: (Andrea Conrath)
EPA authorized the use of carfentrazone-ethyl on hops to control hop suckers to indirectly control powdery mildew; March 20, 2004 to August 15, 2004. Contact: (Barbara Madden)
EPA authorized the use of oxytetracycline on apples to control fire blight); March 26, 2004, to August 1, 2004. Contact: (Barbara Madden)
EPA authorized the use of myclobutanil on hops to control powdery mildew; May 1, 2004 to September 1, 2004. Contact: (Barbara Madden)
EPA authorized the use of lambda-cyhalothrin on barley to control Russian wheat aphids, cereal leaf beetles, armyworms, and cutworms; May 1, 2004 to July 30, 2004. Contact: (Andrew Ertman)

Illinois

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 8, 2004 to November 8, 2004. Contact: (Stacey Groce)

Indiana

Office of Indiana State Chemist
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 31, 2004 to November 8, 2004. Contact: (Stacey Groce)

Iowa

Department of Agriculture and Land Stewardship
Specific: EPA authorized the use of imidacloprid on soybean seed to control bean leaf beetles and soybean aphids; February 6, 2004 to March 31, 2004. Contact: (Andrew Ertman)
EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 4, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 8, 2004 to November 8, 2004. Contact: (Stacey Groce)

Kansas

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2004 to February 1, 2005. Contact: (Barbara Madden)

Kentucky

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; February 24, 2004 to November 8, 2004. Contact: (Stacey Groce)

Louisiana

Department of Agriculture and Forestry
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of s-metolachlor on sweet potatoes to control broadleaf weeds; April 1, 2004 to July 15, 2004. Contact: (Andrew Ertman)

Maine

Department of Agriculture, Food, and Rural Resources
Specific: EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; March 19, 2004 to June 15, 2004. Contact: (Andrea Conrath)

Maryland

Department of Agriculture
Specific: EPA authorized the use of thymol in beehives to control varroa mites; February 24, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of terbacil in watermelons to control annual broadleaf weeds (annual morning-glory); March 26, 2004 to June 28, 2004. Contact: (Stacey Groce)

Massachusetts

Massachusetts Department of Food and Agriculture
Specific: EPA authorized the use of thymol in beehives to control varroa mites; March 15, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of propyzamide on cranberries to control dodder; March 19, 2004 to June 15, 2004. Contact: (Andrew Ertman)

Michigan

Michigan Department of Agriculture
Specific: EPA authorized the use of thymol in beehives to control varroa mites; February 24, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of fenbuconazole on blueberries to control mummyberry disease; March 5, 2004 to September 1, 2004. (Andrea Conrath).
EPA authorized the use of oxytetracycline on apples to control (fire blight); March 26, 2004, to June 30, 2004. Contact: (Barbara Madden)
EPA authorized the use of thiophanate-methyl on blueberries to control various fungal diseases; April 1, 2004 to September 30, 2004. Contact: (Andrea Conrath)

Minnesota

Department of Agriculture
Quarantine: EPA authorized the use of quarantine on soybeans to control soybean rust; effective from the time when soybean rust is introduced to the U.S., to March 1, 2007. Contact: (Andrew Ertman)
Specific: EPA authorized the use of tetraconazole on sugarbeet to control *Cercospora* leaf spot; March 11, 2004 to September 30, 2004. (Andrea Conrath)
EPA authorized the use of thymol in beehives to control varroa mites; March 15, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of lambda-cyhalothrin on wild rice fo control rice worms; August 1, 2004 to September 10, 2004. Contact: (Andrew Ertman)

Mississippi

Department of Agriculture and Commerce
Crisis: On March 12, 2004, for the use of fenbuconazole on blueberries to control Mummy berry disease. This program is expected to end on August 31, 2004. Contact: (Barbara Madden)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 8, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of diuron in catfish ponds to control blue-green algae (*Oscillatoria chalybea* (*cyanobacteria*); March 19, 2004, to November 1, 2004. Contact: (Libby Pemberton)

Missouri

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 19, 2004 to November 8, 2004. Contact: (Stacey Groce)

Montana

Department of Agriculture
Specific: EPA authorized the use of tetraconazole on sugarbeet to control *Cercospora* leaf spot; March 11, 2004 to September 30, 2004. (Andrea Conrath).
EPA authorized the use of lambda-cyhalothrin on barley to control Russian wheat aphids, cereal leaf beetles and cutworms; April 1, 2004 to July 30, 2004. Contact: (Andrew Ertman)

Nebraska

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 4, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 8, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of tetraconazole on sugarbeet to control*Cercospora* leaf spot; March 11, 2004 to September 30, 2004. (Andrea Conrath).

New Jersey

Department of Environmental Protection
Specific: EPA authorized the use of propyzamide on cranberries to control dodder; April 30, 2004 to December 15, 2004. Contact: (Andrew Ertman)

New Mexico

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)

New York

Department of Environmental Conservation
Specific: EPA authorized the use of fenbuconazole on blueberries to control mummyberry disease; February 5, 2004 to June 30, 2004. (Andrea Conrath)
EPA authorized the use of thymol in beehives to control varroa mites; March 31, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of lambda-cyhalothrin on alfalfa/clover/grass mixed stand to control potato leafhopper; June 1, 2004 to August 31, 2004. Contact: (Linda Arrington)

North Carolina

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of fenbuconazole on blueberries to control mummyberry disease; February 24, 2004 to August 31, 2004. (Andrea Conrath).
EPA authorized the use of thymol in beehives to control varroa mites; March 15, 2004 to November 8, 2004. Contact: (Stacey Groce)

North Dakota

Department of Agriculture
Specific: EPA authorized the use of thiabendazole on lentils to control *Ascochyta* blight; February 12, 2004 to June 1, 2004. (Andrea Conrath).
EPA authorized the use of tetraconazole on sugarbeet to control *Cercospora* leaf spot; March 11, 2004 to September 30, 2004. (Andrea Conrath).
EPA authorized the use of sulfentrazone on flax to control kochia; April 1, 2004 to June 30, 2004. Contact: (Andrew Ertman)

Ohio

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thiophanate-methyl on fruiting vegetable group 1 (tomatoes and peppers) to control white mold; March 17, 2004 to September 30, 2004. Contact: (Andrea Conrath)

Oklahoma

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)

Oregon

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; February 5, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of propiconazole on hazelnuts (filberts) for controls of eastern filbert blight; February 12, 2004 to May 30, 2004. (Andrea Conrath).
EPA authorized the use of thiabendazole on lentils to control *Ascochyta* blight; February 12, 2004 to June 1, 2004. (Andrea Conrath).
EPA authorized the use of fenbuconazole on blueberries to control mummyberry disease; February 24, 2004 to May 31, 2004. (Andrea Conrath).
EPA authorized the use of carfentrazone-ethyl on hops to control hop suckers to indirectly control powdery mildew; March 20, 2004 to August 15, 2004. Contact: (Barbara Madden)
EPA authorized the use of two unregistered pheromones, (*Z,E*)-3,13-octadecadienyl and (*Z,Z*)-3,13-octadecadienyl on hybrid poplars grown for pulp and saw timber to control western poplar clearwing moths; March 26, 2004 to October 1, 2004. Contact: (Barbara Madden)
EPA authorized the use of oxytetracycline on apples to control fire blight; March 26, 2004, to August 1, 2004. Contact: (Barbara Madden)
EPA authorized the use of sulfentrazone on strawberries to control broadleaf weeds; March 26, 2004 to February 28, 2005. Contact: (Andrew Ertman)
EPA authorized the use of bifenthrin on orchardgrass grown for seed to control the orchardgrass billbug; March 30, 2004 to November 15, 2004. Contact: (Andrea Conrath)
EPA authorized the use of ethoprop on baby hops to control Garden symphylans; March 30, 2004 to May 31, 2004. Contact: (Barbara Madden)
EPA authorized the use of myclobutanil on hops to control powdery mildew; May 1, 2004 to September 1, 2004. Contact: (Barbara Madden)

Pennsylvania

Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 25, 2004 to November 8, 2004. Contact: (Stacey Groce)

Rhode Island

Department of Environmental Management
Specific: EPA authorized the use of propyzamide on cranberries to control dodder; March 19, 2004 to June 15, 2004. Contact: (Andrew Ertman)

South Carolina

Clemson University
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; March 19, 2004 to August 31, 2004. Contact: (Andrea Conrath)

South Dakota

Department of Agriculture
Quarantine: EPA authorized the use of quarantine on soybeans to control soybean rust; effective from the time when soybean rust is introduced to the U.S., to March 1, 2007. Contact: (Andrew Ertman)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of sulfentrazone on flax to control ALS-resistant kochia; May 16, 2004 to June 30, 2004. Contact: (Andrew Ertman)

Tennessee

Department of Agriculture
Specific: EPA authorized the use of thymol in beehives to control varroa mites; March 15, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)

Texas

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 17, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of diuron in catfish ponds to control blue-green algae (*Oscillatoria chalybea* (*cyanobacteria*); March 19, 2004, to November 1, 2004. Contact: (Libby Pemberton)
EPA authorized the use of thymol in beehives to control varroa mites; March 19, 2004 to November 8, 2004. Contact: (Stacey Groce)

Utah

Department of Agriculture
Specific: EPA authorized the use of thymol in beehives to control varroa mites; March 19, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of diflubenzuron on alfalfa hay to control grasshoppers and Mormon crickets; May 1, 2004 to October 31, 2004. Contact: (Linda Arrington)

Vermont

Department of Agriculture
Specific: EPA authorized the use of thymol in beehives to control varroa mites; March 8, 2004 to November 8, 2004. Contact: (Stacey Groce)

Virginia

Department of Agriculture and Consumer Services
Specific: EPA authorized the use of thiophanate-methyl on tomatoes to control timber rot; March 17, 2004 to September 30, 2004. Contact: (Andrea Conrath)
EPA authorized the use of terbacil in watermelons to control annual broadleaf weeds (annual morning-glory); March 26, 2004 to July 10, 2004. Contact: (Stacey Groce)

Washington

Department of Agriculture
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; February 5, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of thiabendazole on lentils to control *Ascochyta* blight; February 12, 2004 to June 1, 2004. (Andrea Conrath).
EPA authorized the use of fenbuconazole on blueberries to control mummyberry disease; February 24, 2004 to June 10, 2004. (Andrea Conrath).
EPA authorized the use of sulfentrazone on strawberries to control broadleaf weeds; March 17, 2004 to February 28, 2005. Contact: (Andrew Ertman)
EPA authorized the use of carfentrazone-ethyl on hops to control hop suckers to indirectly control powdery mildew; March 20, 2004 to August 15, 2004. Contact: (Barbara Madden)
EPA authorized the use of two unregistered pheromones, (*Z,E*)-3,13-octadecadienyl and (*Z,Z*)-3,13-octadecadienyl on hybrid poplars grown for pulp and saw timber to control western poplar clearwing moths; March 26, 2004 to October 1, 2004. Contact: (Barbara Madden)
EPA authorized the use of oxytetracycline on apples to control fire blight; March 26, 2004, to August 1, 2004. Contact: (Barbara Madden)
EPA authorized the use of myclobutanil on hops to control powdery mildew; May 1, 2004 to September 1, 2004. Contact: (Barbara Madden)

Wisconsin

Department of Agriculture, Trade, and Consumer Protection
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 18, 2004 to February 1, 2005. Contact: (Barbara Madden)
EPA authorized the use of thymol in beehives to control varroa mites; March 31, 2004 to November 8, 2004. Contact: (Stacey Groce)
EPA authorized the use of sulfentrazone on strawberries to control broadleaf weeds; June 20, 2004 to December 15, 2004. Contact: (Andrew Ertman)

B. Federal Departments and Agencies

Agriculture Department

Animal and Plant Health Inspector Service
Crisis: On March 4, 2004, for the use of methyl bromide on avocados; bananas; plantains; blackberries; raspberries; cucurbit seeds, edible (shelled/unshelled); cottonseed; cucurbit vegetables; gherkins; fresh ginger tops; fresh herbs and spices; kiwi; leafy vegetables; longan; lychee; mint; opuntia; rambutan; root and tuber vegetables; dasheen; and snow peas to control various exotic pests. This program is expected to end on March 3, 2005. Contact: (Libby Pemberton)
Quarantine: EPA authorized the use of permethrin on reptiles to control tropical exotic tick species; January 15, 2004, to January 15, 2007. Contact: (Libby Pemberton)

List of Subjects

Environmental protection, Pesticides and pest.

Dated: April 23, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 04–10215 Filed 5–4–04; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0123; FRL–7357–1]

Experimental Use Permit; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application 432–EUP–I from Bayer Environmental Science requesting an experimental use permit (EUP) for Imidacloprid. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments, identified by docket ID number OPP–2004–0123, must be received on or before June 4, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Dani Daniel, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5409; e-mail address: *daniel.dani@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 an agricultural producer, food manufacturer, or pesticide manufacturer. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0123. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your

comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP–2004–0123. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0123. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0123.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2004–0123. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

432–EUP–I. Bayer Environmental Science, 95 Chestnut Ridge Road, Montvale, NJ 07645. This application proposes the use of a fly spot bait to control populations of the domestic house fly (Musca domestica) on the periphery of refuse containers such as, dumpsters, pig cattle barns, and dairy or poultry houses. Treated areas will not be used to grow edible plants for food or feed purposes. In addition, treatment will not be made directly onto animals nor their food or feed. The program is proposed in the States of California, Florida, Georgia, Indiana, Mississippi, North Carolina, and South Carolina.

III. What Action is the Agency Taking?

Following the review of the Bayer Environmental Science application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

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

The Agency's authority for taking this action is under 7 U.S.C. 136c.

List of Subjects

Environmental protection, Experimental use permits.

Dated: April 20, 2004.

Betty Shackleford,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 04–9874 Filed 5–4–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

DATE AND TIME: Tuesday, May 11, 2004 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Int nal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, May 13, 2004 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCLOSED:

Correction and Approval of Minutes.

Advisory Opinion 2004–13: Allyson Schwartz for Congress by Ken Morley, Campaign Manager.

Political Committee Status—Final Rules.

Routine Administrative Matters.

FOR FURTHER INFORMATION: Mr. Robert Biersack, Acting Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 04–10386 Filed 5–3–04; 3:17 pm]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW., Room 940. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 010050–013.

Title: U.S. Flag Discussion Agreement.

Parties: American President Lines, Ltd.; A.P. Moller-Maersk A/S; Farrell Lines Inc.; Lykes Lines Limited, LLC; and P&O Nedlloyd Limited.

Synopsis: The amendment adds Farrell Lines, Lykes Lines, and P&O Nedlloyd as parties to the agreement.

Agreement No.: 010979–040.

Title: Caribbean Shipowners Association.

Parties: Bernuth Lines, Ltd.; CMA CGM, S.A.; Crowley Liner Services, Inc.; Interline Connection, N.V.; Lykes Lines Limited; Seaboard Marine Ltd.; Seafreight Line, Ltd.; Sea Star Line, LLC; TMM Lines, LLC; Tropical Shipping and Construction Co., Ltd.; and Zim Israel Navigation Co., Ltd.

Synopsis: The amendment adds authority to discuss and share data on trade projections, clarifies authority regarding discussion of vessel capacity in the trade, revises the members' service contract authority under the agreement, provides for the polling of members by email, revises the delegations of authority under the agreement, deletes obsolete language, and makes a number of technical changes.

Agreement No.: 010982–036.

Title: Florida-Bahamas Shipowner and Operators Association.

Parties: Atlantic Caribbean Line, Inc.; Caicos Cargo Ltd.; Crowley Liner Services, Inc.; G&G Marine, Inc.; Pioneer Shipping Ltd.; Seaboard Marine, Ltd.; and Tropical Shipping and Construction Co., Ltd.

Synopsis: The amendment clarifies that the members are not authorized to discuss specific individual service contracts, adds authority to exchange information relating to uniform or differential rates, and makes minor technical changes to the agreement.

Agreement No.: 011880.

Title: Hanjin/U.S. Lines Limited Slot Charter Agreement.

Parties: Hanjin Shipping Co., Ltd. and U.S. Lines Limited.

Synopsis: The agreement authorizes Hanjin to sell slots to U.S. Lines in the trade between China and the United States Pacific Coast.

Dated: April 30, 2004.

By Order of the Federal Maritime Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–10222 Filed 5–4–04; 8:45 am]

BILLING CODE 6730–01–U

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR 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:

Intertainer Line, Inc. 5839 Bender Road, Humble, TX 77396, Officer: Gustavo Kolmel, President, (Qualifying Individual),

ATA Logistics Inc. 10722 South La Cienaga Blvd., Inglewood, CA 90304, Officers: Simon Cheng, Chief Operations Officer, (Qualifying Individual), Denny W. Chang, President.

UMAC Express Forwarders North America Inc. dba UMAC Express Cargo, 10518 South Tacoma Way, Suite C, Lakewood, WA 98499, Officers: Jesus C. Domingo, Chairman, (Qualifying Individual), Librado Francisco, President.

Standard Shippers, Inc., 3116 Clarendon Road, Brooklyn, NY 11226, Officers: Gideon Yorke, President, (Qualifying Individual), Vlada Joseph, Vice President.

Zimex Logistics, Inc., 460 E. Carson Plaza Dr., Suite 219, Carson, CA 90746, Officers: Wendy Jin. Vice President, (Qualifying Individual), Young Hyo Kim, President.

Sealink International, Inc., 20939 Anza Ave., Suite 267, Torrance, CA 90503, Officers: Ronald M. Morgan, Chief Operations Officer, (Qualifying Individual), Nooroddin Fazal, President.

Pegasus International, Inc., 181 S. Franklin Avenue, Suite 608, Valley Stream, NY 11581, Officer: James Wang, President, (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

Bekins Independence Forwarders, Inc., dba Bekins International, 330 Mannheim Road, Hillside, IL 60162, Officers: Jack Griffin, Senior Vice President, (Qualifying Individual), Larry Marzullo, President.

U.S. Logistics Inc., 20 Jerusalem Ave., Hicksville, NY 11580, Officers: John J. Jacobsen, Jr., Vice President, (Qualifying Individual), Carole A. Murray, President.

Export Logistics, LLC, 11222 S. La Cienega Blvd., Suite 375, Inglewood, CA 90304, Officer: Vivian Gonzalez, Sole Manager, (Qualifying Individual).

Ace Transportation Systems, dba D. Cheung International, 436 N. Canal Street, Unit 14, So. San Francisco, CA 94080, Daniel H. Cheung, Sole Proprietor.

Trident Maritime Transportation, 13831 Southwest 59th Street, Suite 208–B, Miami, FL 33138, Officers: Freddy Zelaya, Vice President, (Qualifying Individual), Rodrigo Zawadski, President.

Auto Export Group LLC, 130 McCormick Avenue, Suite 108, Costa Mesa, CA 92626, Officers: Dmytro I. Prokopenko, Active Partner, (Qualifying Individual), Oleg Shkoda, Active Partner.

Ocean Freight Forwarder—Ocean Transportation Intermediary, Applicants:

Akamai Freight Services, LLC, 4734 North Tenth Place, Phoenix, AR 85014, Officer: Joseph Horbaczewski Member, (Qualifying

Individual).

Alas Cargo LLC, 548 E. Sepulveda Blvd., Suite D, Carson, CA 90745, Officers: Peter Syhongpan, Operating Manager, (Qualifying Individual), Yolanda Syhongpan, Secretary.

Kronos Shipping Inc., dba Kronos International, Shippers, 2520 S. State Street, Chicago, IL 60616, Officer: Nick Mourikis, President, (Qualifying Individual).

True North Relocations, LLC, 157 Yesler Way, Suite 505, Seattle, WA 98104, Officers: Heather Anne Engel, President, (Qualifying Individual), Michael J. Raney, Vice President.

Varko International Corp., 7700 NW 73rd Court, Medley, FL 33166, Officers: Ida A. Valdes, Officer, (Qualifying Individual), Carlos Vales, President.

Dated: April 30, 2004.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–10221 Filed 5–4–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 19, 2004.

A. Federal Reserve Bank of Cleveland (Nadine W. Wallman, Assistant Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

Susan J. Neff, Robert D. Neff, Jennifer S. Markwell, Heather J.H. Neff, all of Morehead, Kentucky, and Ryan D. Neff, Lexington, Kentucky; to retain voting shares of Citizens Bancorp, Inc., Morehead, Kentucky, and thereby indirectly retain voting shares of Consumers National Bank, Morehead, Kentucky.

B. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Old Post Road, L.P., Madison, Georgia; Floyd C. Newton, Jr., Madison, Georgia; Floyd C. Newton, III, Atlanta, Georgia; Godfrey H. Newton, Atlanta, Georgia; and Jennie S. Newton, Atlanta, Georgia; to acquire voting shares of Madison Bank Corporation, and thereby indirectly acquire voting shares of Bank of Madison, Madison, Georgia.

Board of Governors of the Federal Reserve System, April 29, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–10155 Filed 5–4–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 28, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30303:

1. Alabama National BanCorporation, Birmingham, Alabama; to acquire 100 percent of the voting shares of Coquina Bank, Ormond Beach, Florida.

2. SunSouth Bancshares, Inc., Dothan, Alabama; to become a bank holding company by acquiring 100 percent of the voting shares of SunSouth Bank, Dothan, Alabama.

Board of Governors of the Federal Reserve System, April 29, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–10156 Filed 5–4–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04088]

Planning Effective Approaches to the Delivery of Adolescent Immunization Services; Notice of Availability of Funds Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for immunization projects was published in the **Federal Register** March 30, 2004, Volume 69, Number 61, pages 16545–16549. The notice is amended as follows:

Page 16545 third column, and page 16548 first column, change Letter of Intent (LOI) Deadline to May 7, 2004.

Page 16546, third column, section III.1. Eligible Applicants, add "State governments" to the bulleted list.

Dated: April 29, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10173 Filed 5–4–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04118]

Monitoring Atypical HIV Strains Among Persons Newly Diagnosed With HIV Using Dried Blood Spots vs. Diagnostic Sera; Notice of Availability of Funds-Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for Monitoring Atypical HIV Strains Among Persons Newly Diagnosed With HIV Using Dried Blood Spots vs. Diagnostic Sera was published in the **Federal Register**, Tuesday, April 20, 2004, Volume 69, Number 76, pages 21117–21121. The notice is amended as follows: This program has been cancelled.

Dated: April 28, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control And Prevention.

[FR Doc. 04–10168 Filed 5–4–04; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04089]

Factors Associated With Uptake of Immunization Clinical Standards; Notice of Availability of Funds Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for immunization projects was published in the **Federal Register** March 30, 2004, Volume 69, Number 61, pages 16560–16564. The notice is amended as follows:

Page 16560, second column, and page 16562, second column, change Letter of Intent (LOI) Deadline to May 7, 2004.

Page 16561, second column, section III.1. Eligible Applicants, add "State governments" to the bulleted list.

Dated: April 29, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10169 Filed 5–4–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04090]

Increasing Influenza Vaccination of Long Term Care Facility Staff; Notice of Availability of Funds Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for immunization projects was published in the **Federal Register** March 30, 2004, Volume 69, Number 61, pages 16564–16568. The notice is amended as follows:

Page 16564, second column, and page 16566, second column, change Letter of Intent (LOI) Deadline to May 7, 2004.

Page 16565, second column, section III.1. Eligible Applicants, add "State governments" to the bulleted list.

Dated: April 29, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10171 Filed 5–4–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04075]

National Trauma Information and Exchange Program; Notice of Availability of Funds-Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for a National Trauma Information and Exchange Program was published in the **Federal Register**, Tuesday, April 13, 2004, Volume 69, Number 71, pages 19425–19428. The notice is amended as follows: This program has been cancelled. It will be republished with revisions at a later date.

Dated: April 28, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control And Prevention.

[FR Doc. 04–10172 Filed 5–4–04; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04091]

Evaluation of Parents Claiming Exemptions to School Entry Immunization Requirements; Notice of Availability of Funds Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for immunization projects was published in the **Federal Register** March 30, 2004, Volume 69, Number 61, pages 16568–16572. The notice is amended as follows:

Page 16568, second column, and page 16570, third column, change Letter of Intent (LOI) Deadline to May 7, 2004.

Page 16569, third column, section III.1. Eligible Applicants, add "State governments" to the bulleted list.

Dated: April 29, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10170 Filed 5–4–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04092]

Economic Studies of Vaccines and Immunization Policies, Programs, and Practices; Notice of Availability of Funds Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for cooperative agreements for immunization projects was published in the **Federal Register** March 30, 2004, Volume 69, Number 61, pages 16572–16576. The notice is amended as follows:

Page 16572, third column, and page 16574, third column, change Letter of Intent (LOI) Deadline to May 7, 2004.

Page 16573, third column, section III.1. Eligible Applicants, add "State governments" to the bulleted list.

Dated: April 29, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10174 Filed 5–4–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Grants and Cooperative Agreements; Notice of Availability

Federal Agency Name: Administration for Children and Families, Office of Community Services.

Funding Opportunity: CSBG T/TA Program—Executive Leadership Training.

Announcement Type: Competitive Grant-Initial.

Funding Opportunity Number: HHS–2004–ACF–OCS–ET–0020.

CFDA Number: 93.570.

Due Date for Applications: The due date for receipt of applications is June 21, 2004.

I. Funding Opportunity Description

The Office of Community Services (OCS) within the Administration for Children and Families (ACF) announces that competing applications will be accepted for a new grant pursuant to the Secretary's authority under section 674(b) of the Community Services Block Grant (CSBG) Act, as amended, by the Community Opportunities, Accountability, and Training and Educational Services (COATES) Human Services Reauthorization Act of 1998, (Pub. L. 105–285).

The proposed grant will fund two national leadership initiatives to build the capacity of State and local CSBG executives to think and act "strategically" in their overall direction of agency programs. These grants will support national community action Goal 5: "Agencies increase their capacity to achieve results."

Definitions of Terms

The following definitions apply:

At-Risk Agencies refers to CSBG eligible entities in crises. The problem(s) to be addressed must be of a complex or pervasive nature that cannot be adequately addressed through existing local or State resources.

Capacity-building refers to activities that assist Community Action Agencies (CAAs) and other eligible entities to improve or enhance their overall or specific capability to plan, deliver, manage and evaluate programs efficiently and effectively to produce intended results for low-income individuals. This may include upgrading internal financial management or computer systems, establishing new external linkages with other organizations, improving board functioning, adding or refining a program component or replicating techniques or programs piloted in another local community, or making other cost effective improvements.

Community in relationship to broad representation refers to any group of individuals who share common distinguishing characteristics including residency, for example, the "low-income" community, or the "religious" community or the "professional" community. The individual members of these "communities" may or may not reside in a specific neighborhood, county or school district but the local service provider may be implementing programs and strategies that will have a measurable affect on them. Community in this context is viewed within the framework of both community conditions and systems, *i.e.*, (1) public policies, formal written and unstated norms adhered to by the general population; (2) service and support systems, economic opportunity in the labor market and capital stakeholders; (3) civic participation; and (4) an equity as it relates to the economic and social distribution of power.

Community Services Network (CSN) refers to the various organizations involved in planning and implementing programs funded through the Community Services Block Grant or providing training, technical assistance or support to them. The network includes local Community Action Agencies and other eligible entities; State CSBG offices and their national association; CAA State, regional and national associations; and related organizations which collaborate and participate with Community Action Agencies and other eligible entities in their efforts on behalf of low-income people.

Eligible applicants described in this announcement shall be eligible entities, organizations, (including faith based) or associations with demonstrated expertise in providing training to individuals and organizations on methods of effectively addressing the needs of low-income families and communities. *See* description of Eligible Entities below.

Eligible entity means any organization that was officially designated as a Community Action Agency (CAA) or a community action program under Section 673(1) of the Community Services Block Grant Act, as amended by the Human Services Amendments of 1994 (Pub. L. 103–252), and meets all the requirements under Sections 673(1)(A)(I), and 676A of the CSBG Act, as amended by the COATES Human Services Reauthorization Act of 1998. All eligible entities are current recipients of Community Services Block Grant funds, including migrant and seasonal farm worker organizations that received CSBG funding in the previous fiscal year.

Local service providers are local public or private non-profit agencies that receive Community Services Block Grant funds from States to provide services to, or undertake activities on behalf of, low-income people.

Nationwide refers to the scope of the technical assistance, training, data collection, or other capacity-building projects to be undertaken with grant funds. Nationwide projects must provide for the implementation of technical assistance, training or data collection for all or a significant number of States, and the local service providers who administer CSBG funds.

Non-profit Organization refers to an organization, including faith-based, which has "demonstrated experience in providing training to individuals and organizations on methods of effectively addressing the needs of low-income families and communities." Acceptable documentation for eligible non-profit status is limited to: (1) A copy of a current, valid Internal Revenue service tax exemption certificate; (2) a copy of the applicant organization's listing in the Internal Revenue Service's most recent list of tax-exempt organizations described in section 501(c)(3) of the IRS code; and/or (3) articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

Outcome Measures are definable changes in the status or condition of individuals, families, organizations, or communities as a result of program services, activities, or collaborations.

Performance Measurement is a tool used to objectively assess how a program is accomplishing its mission through the delivery of products, services, and activities.

Program technology exchange refers to the process of sharing expert technical and programmatic information, models, strategies and approaches among the various partners in the Community Services Network. This may be done through written case studies, guides, seminars, technical assistance, and other mechanisms.

Regional Networks refers to CAA State Associations within a region.

Results-Oriented Management and Accountability (ROMA) System: ROMA is a system, which provides a framework for focusing on results for local agencies funded by the Community Services Block Grant Program. It involves setting goals and strategies and developing plans and

techniques that focus on a result-oriented performance based model for management.

State means all of the 50 States and the District of Columbia. Except where specifically noted, for purposes of this program announcement, it also includes specified Territories.

State CSBG Lead Agency (SCLA) is the lead agency designated by the Governor of the State to develop the State CSBG application and to administer the CSBG Program.

Statewide refers to training and technical assistance activities and other capacity building activities undertaken with grant funds that will have significant impact, *i.e.* activities should impact at least 50 percent of the eligible entities in a State.

Technical assistance is an activity, generally utilizing the services of an expert (often a peer), aimed at enhancing capacity, improving programs and systems, or solving specific problems. Such services may be provided proactively to improve systems or as an intervention to solve specific problems.

Territories refer to the Commonwealth of Puerto Rico and American Samoa for the purpose of this announcement.

Training is an educational activity or event which is designed to impart knowledge, understanding, or increase the development of skills. Such training activities may be in the form of assembled events such as workshops, seminars, conferences or programs of self-instructional activities.

Priority Area

Community Action Goal 5: "Agencies Increase their Capacity to Achieve Results"; Executive Leadership Training.

Program Purpose, Scope and Focus

OCS will fund two national leadership initiatives to build the capacity of State and local CSBG executives to think and act "strategically" in their overall direction of agency programs.

Successful applicants for these two national executive leadership grants must have a history of providing effective executive leadership and development training within the Community Services Network. Their curriculum must demonstrate an understanding of, and commitment to, broad program renewal concepts embodied in ROMA, including a fundamental change of approach from managing discrete programs and services to organizing efforts to achieve broad and major improvements in the lives of low-income people and communities.

Applicants must describe in their applications a proposed training curriculum that focuses on, but is not limited to:

1. Using performance-based management concepts as the basis for "visionary, transformational" thinking about community needs and resources, agency mission, program design, organization and relationship of services and activities, work with program participants and others in the community, measurement and reporting of results, role and function of agency governing boards and advisory groups;

2. Setting specific performance targets related to family and community outcomes across all agency programs and services;

3. Organizing programs and services within agencies, and establishing working partnerships with other organizations and service providers, to achieve family and community results;

4. Measuring and reporting outcomes; and

5. Using performance information as an advocacy tool at the local, State and national levels.

Successful applicants will be expected to address the leadership training needs of States and CSBG eligible entities. Each of the two successful applicants must have the capacity to train 200 applicants in 2–4 day training sessions at a reasonable unit cost per participant.

II. Award Information

Funding Instrument Type: Grant.

Category of Funding Activity: ISS Income Security and Social Services.

Anticipated Total Priority Area Funding: $ 280,000 in FY2004.

Anticipated Number of Awards: Two.

Ceiling on Amount of Individual Awards: $ 180,000 per budget period.

An application that exceeds the upper value of the dollar range specified will be considered "non-responsive" and be returned to the applicant without further review.

Floor on Amount of Individual Awards: $100,000 per budget period.

Average Projected Award Amount: $140,000 per budget period.

Project Periods for Award: This announcement is inviting applications for project periods up to two years. Awards, on a competitive basis, will be for a one-year budget period, although project may be for two years. Applications for continuation grants beyond the one-year budget period but within the two-year project period will be entertained in subsequent years on a noncompetitive basis, subject to availability of funds, satisfactory progress of the grantee and a determination that continued funding would be in the best interest of the Government.

III. Eligibility Information

1. Eligible Applicants

Community Services Block Grant eligible entities, State Community Action Associations including faith-based organizations, nonprofit organizations having 501(c)(3) status, and nonprofits that do not have 501(c)(3) status.

Additional Information on Eligibility

As prescribed by the Community Services Block Grant Act (Pub. L. 105–285, Section 678(c)(2), eligible applicants are eligible entities (*see* definitions), organizations, or associations with demonstrated expertise in providing training to individuals and organizations on methods of effectively addressing the needs of low-income families and communities.

Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission. The non-profit agency can accomplish this by providing a reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; a copy of a currently valid IRS tax exemption certificate; a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status; or any of the items referenced above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants" at *www.acf.hhs.gov/programs/ofs/forms.htm.*

2. Cost Sharing or Matching

None.

3. Other

On June 27, 2003, the Office of Management and Budget published in

the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires all Federal grant applicants to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com.*

IV. Application and Submission Information

1. Address To Request Application Package

Office of Community Services Operations Center, Attn: Dr. Margaret Washnitzer, 1815 Fort Meyer Drive, Suite 300, Arlington, Virginia 22209: Telephone: (800) 281–9519:

2. Content and Form of Application Submission

An original and two copies of the complete application are required. The original and the 2 copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative of the applicant organization, have original signatures, and be submitted unbound. Applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget and Social Security Numbers. The copies may include summary salary information.

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *www.Grants.gov* apply site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to us.

Please note the following if you plan to submit your application electronically via Grants. Gov:

- Electronic submission is voluntary.
- When you enter the Grants. Gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants. Gov.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation.requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *www.Grants.gov.* You must search for the downloadable application package by the CFDA number.

Application Content

Each application must include the following components:

(a) *Table of Contents*

(b) *Abstract of the Proposed Project*—very brief, not to exceed 250 words, that would be suitable for use in an announcement that the application has been selected for a grant award and which identifies the type of project, the target population and the major elements of the work plan.

(c) *Completed Standard Form 424*—that has been signed by an Official of the organization applying for the grant who has authority to obligate the organization legally.

(d) *Standard Form 424A*—Budget Information-Non-Construction Programs.

(e) *Narrative Budget Justification*—for each object class category required under Section B, Standard Form 424A.

(f) *Project Narrative*—A narrative that addresses issues described in the "Application Review Information" and the "Review and Selection Criteria" sections of this announcement.

Application Format

Each application should include one signed original application and two additional copies of the same application.

Submit application materials on white 8½ x 11 inch paper only. Do not use colored, oversized or folded materials.

Please do not include organizational brochures or other promotional materials, slides, films, clips, etc.

The font size may be no smaller than 12 pitch and the margins must be at least one inch on all sides.

Number all application pages sequentially throughout the package, beginning with the abstract of the proposed project as page number one.

Please present application materials either in loose-leaf notebooks or in folders with pages two-hole punched at the top center and fastened separately with a slide paper fastener.

Page Limitation

The application package including sections for the Table of Contents, Project Abstract, Project and Budget Narratives must not exceed 30 pages. The page limitation does not include the following attachments and appendices: Standard Forms for Assurances, Certifications, Disclosures and appendices. The page limitation also does not apply to any supplemental documents as required in this announcement.

Required Standard Forms

Applicants requesting financial assistance for a non-construction project must sign and return Standard Form 424B, Assurances: Non-Construction Programs with their applications.

Applicants must provide a Certification Regarding Lobbying. Prior to receiving an award in excess of $100,000, applicants shall furnish an executed copy of the lobbying certification. Applicants must sign and return the certification with their application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back a certification form.

Applicants must make the appropriate certification of their compliance with the requirements of the Pro-Children Act of 1994 as outlined in Certification Regarding Environmental Tobacco Smoke. By signing and submitting the

applications, applicants are providing the certification and need not mail back a certification form.

Additional Requirements

(a) The application must contain a signed Standard Form 424, Application for Federal Assistance, a Standard Form 424–A, Budget Information, and signed Standard Form 424–B, Assurance—Non-Construction Programs, completed according to instructions provided in this Program Announcement. The Forms SF–424 and SF–424B must be signed by an official of the organization applying for the grant who has authority to obligate the organization legally. The applicant's legal name as required on the SF–424 (Item 5) must match that listed as corresponding to the Employer Identification Number (Item 6);

(b) The application must include a project narrative that meets the requirements set forth in this announcement;

(c) The application must contain documentation of the applicant's tax-exempt status as indicated in the "Funding Opportunity Description" section of this announcement;

Private, non-profit organizations are encouraged to submit with their applications the survey located under "Grant Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applicants." The forms are located on the web at *www.acf.hhs.gov/programs/ofs/forms.htm.*

Project Summary Abstract: Provide a one page (or less) summary of the project description with reference to the funding request.

Full Project Description Requirements: Describe the project clearly in 30 pages or less (not counting supplemental documentation, letters of support or agreements) using the following outline and guidelines. Applicants are required to submit a Full Project Description and must prepare the project description statement in accordance with the following instructions. The pages of the project description must be numbered and are limited to 30 typed pages starting on page 1 with the "Objectives and Need for Assistance". The description must be double-spaced, printed on only one side, with at least one inch margins. Pages over the 30 page limit will be removed from the competition and will not be reviewed.

It is in the applicant's best interest to ensure that the project description is easy to read, logically developed in accordance with the evaluation criteria and adheres to the page limitation. In addition, applicants should be mindful of the importance of preparing and submitting applications using language, terms, concepts and descriptions that are generally known by the Community Services Block Grant (CSBG) network.

The maximum number of pages for supplemental documentation is 10 pages. The supplemental documentation, subject to the 10-page limit, must be numbered and might include brief resumes, position descriptions, proof of non-profit status, news clippings, press releases, etc. Supplemental documentation over the 10-page limit will not be reviewed.

Applicants must include letters of support or agreement, if appropriate or applicable, in reference to the project description. Letters of support are not counted as part of the 30-page project description limit or the 10-page supplemental documentation limit. All applications must comply with the following requirements as noted:

3. Submission Dates and Times

The closing time and date for receipt of applications is 4:30 p.m. Eastern Standard Time (EST) on June 21, 2004. Mailed or hand carried applications received after 4:30 p.m. on the closing date will be classified as late.

Deadline: Mailed applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date at the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services' Operations Center, 1815 North Fort Meyer Drive, Suite 300, Arlington, Virginia 22209, Attention: Barbara Ziegler Johnson. Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

Applications hand carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., Eastern Standard Time (EST), at the U.S. Department of Health and Human Services (HHS), Administration for Children and Families, Office of Community Services' Operations Center, 1815 North Fort Meyer Drive, Suite 300, Arlington, Virginia 22209, between Monday and Friday (excluding federal holidays). This address must appear on the envelope/package containing the application with the note: "Attention: Barbara Ziegler Johnson." Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

Late applications: Applications which do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

Extension of deadlines: ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, *etc.*) occur, or when there are widespread disruptions of mails service. Determinations to extend or waive deadline requirements rest with the Chief Grants Management Officer.

ACF will not send acknowledgements of receipt of application materials.

What to submit	Required content	Required form or format	When to submit
Table of Contents	As described above	Consistent with guidance in "Application Format" section of this announcement.	By application due date.
Abstract of Proposed Project	Brief abstract that identifies the type of project, the target population and the major elements of the proposed project.	Consistent with guidance in "Application Format" section of this announcement.	By application due date.
Completed Standard Form 424	As described above and per required form.	May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.
Completed Standard Form 424A	As described above and per required form.	May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.

What to submit	Required content	Required form or format	When to submit
Narrative Budget Justification	As described above	Consistent with guidance in "Application Format" section of this announcement.	By application due date.
Project Narrative	A narrative that addresses issues described in the "Application Review Information" and the "Review and Selection Criteria" sections of this announcement.	Consistent with guidance in "Application Format" section of this announcement.	By application due date.
Certification regarding lobbying	As described above and per required form.	May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.
Certification regarding environmental tobacco smoke.	As described above and per required form.	May be found on *http://acf.hhs.gov/programs/ofs/forms.htm.*	By application due date.

Additional Forms: Private-non-profit organizations may submit with their applications the additional survey located under "Grant Related Documents and Forms" titled "Survey for Private, Non-Profit Grant Applications".

What to submit	Required content	Required form or format	When to submit
Survey for Private, Non-Profit Grant Applicants.	Per required form	May be found on: *http://www.acf.hhs.gov/programs/ofs/form.htm.*	By application due date.

4. Intergovernmental Review

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, "Intergovernmental Review of Federal Programs," and 45 CFR Part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs. As of October 1, 2003, the following jurisdictions have elected not to participate in the Executive Order process. Applicants from these jurisdictions or for projects administered by federally-recognized Indian Tribes need take no action in regard to E.O. 12372:

All States and Territories except Alabama, Alaska, Arizona, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington, Wyoming and Palau have elected to participate in the Executive Order process and have established Single Points of Contact (SPOCs). Applicants from these twenty-seven jurisdictions need take no action.

Although the jurisdictions listed above no longer participate in the process, entities which have met the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. All remaining jurisdictions participate in the Executive Order process and have established SPOCs. Applicants from participating jurisdictions should contact their SPOCs as soon as possible to alert them of the prospective applications and receive instructions. Applicants must submit any required material to the SPOCs as soon as possible so that the program office can obtain and review SPOC comments as part of the award process. The applicant must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2), a SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards.

SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the "accommodate or explain" rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Mail Stop 6C–462, Washington, DC 20447.

A list of the Single Points of Contact for each State and Territory is included with the application materials for this announcement.

5. Funding Restrictions

Sub-Contracting or Delegating Projects

OCS will not fund any project where the role of the applicant is primarily to serve as a conduit for funds to organizations other than the applicant. The applicant must have a substantive role in the implementation of the project for which funding is requested. This prohibition does not bar the making of sub-grants or sub-contracting for specific services or activities that are needed to conduct the project.

Number of Projects in Application

Each application may include only one proposed project.

6. Other Submission Requirements

Submission by Mail: An Applicant must provide an original application with all attachments, signed by an authorized representative and two complete copies. The application must be received at the address below by 4:30 p.m. Eastern Standard Time (EST) on or before June 21, 2004. Applications should be mailed to: U.S. Department of Health and Human Services (HHS), Administration for Children and Families, Office of Community Services' Operations Center, 1815 North Fort Meyer Drive, Suite 300, Arlington, Virginia 22209, Attn: Barbara Ziegler Johnson.

For Hand Delivery: Applicants must provide an original application with all attachments, signed by an authorized representative and two complete copies. The Application must be received at the address below by 4:30 p.m. Eastern Standard Time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m., Monday through Friday. Applications may be delivered to: Department of Health and Human Services (HHS), Administration for Children and Families, Office of Community Services Operations Center, 1815 North Fort Meyer Drive, Suite 300, Arlington, Virginia 22209 Attention: Barbara Ziegler Johnson. It is strongly recommended that applicants obtain documentation that the application was hand delivered on or before the closing date. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

V. Application Review Information

1. Criteria

Paperwork Reduction Act of 1995 (Pub. L. 104–13)

Under the Paperwork Reduction Act of 1995, Public Law 104–13, the Department is required to submit to the Office of Management and Budget (OMB) for review and approval of any reporting and record keeping requirements in regulations including program announcements. This program announcement does not contain information collection requirements beyond those approved for ACF grant applications under the Program Narrative Statement by OMB Approval Number 0970–0139.

The project description is approved under OMB Control Number 0970–0139. 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.

Public reporting burden for this collection is estimated to average 25 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection of information.

Instructions: ACF Uniform Project Description (UPD)

The following are instructions and guidelines on how to prepare the "project summary/abstract" and "Full Project Description" sections of the application. Under the evaluation criteria section, note that each criterion is preceded by the generic evaluation requirement under the ACF Uniform Project Description (UPD). The UPD was approved by the Office of Management and Budget (OMB), control Number 0970–0139, expiration date 12/31/2003. The generic UPD requirement is followed by the evaluation criterion specific to the Community Services Block Grant legislation.

Purpose

The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, all information requested through each specific evaluation criteria should be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions and the specified evaluation criteria. The instructions give a broad overview of what your project description should include while the evaluation criteria expands and clarifies more program-specific information that is needed.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived. For example, describe the population to be served by the program and the number of new jobs that will be targeted to the target population. Explain how the project will reach the targeted population, how it will benefit participants including how it will support individuals to become more economically self-sufficient.

Approach

Outline a plan of action which describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors which might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reasons for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technical innovations, reductions in cost or time or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in, for example such terms as the "number of people served." When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any "collection of information that is conducted or sponsored by ACF."

List organizations, cooperating entities, consultants, or other key individuals who will work on the

project along with a short description of the nature of their effort or contribution.

Evaluation

Provide a narrative addressing how the results of the project and the conduct of the project will be evaluated. In addressing the evaluation of results, state how you will determine the extent to which the project has achieved its stated objectives and the extent to which the accomplishment of objectives can be attributed to the project. Discuss the criteria to be used to evaluate results, and explain the methodology that will be used to determine if the needs identified and discussed are being met and if the project results and benefits are being achieved. With respect to the conduct of the project, define the procedures to be employed to determine whether the project is being conducted in a manner consistent with the work plan presented and discuss the impact of the project's various activities on the project's effectiveness.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. Any non-profit organization submitting an application must submit proof of its non-profit status in its application at the time of submission.

The non-profit agency can accomplish this by providing a copy of the applicant's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in Section 501(c)(3) of the IRS code, or by providing a copy of the currently valid IRS tax exemption certificate, or by providing a copy of the articles of incorporation bearing the seal of the State in which the corporation or association is domiciled.

Budget and Budget Justification

Provide line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. The detailed budget must also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

2. Evaluation Criteria

Evaluation Criterion I: Approach (Maximum: 35 Points)

Factors:

(1) The work program is results-oriented, approximately related to the legislative mandate and specifically related to the priority area under which funds are being requested. Application addresses the following: Specific outcomes to be achieved; performance targets that the project is committed to achieving, including a discussion of and how the project will verify the achievement of these targets; critical milestones which must be achieved if results are to be gained; organizational support, the level of support from the applicant organization; past performance in similar work; and specific resources contributed to the project that are critical to success.

(2) The application defines the comprehensive nature of the project and methods that will be used to ensure that the results can be used to address a statewide or nationwide project as defined by the description of the particular priority area.

Evaluation Criterion II: Organizational Profiles (Maximum: 25 Points)

Factors:

(1) The application demonstrates that it has experience and a successful record of accomplishment relevant to the specific activities it proposes to accomplish.

(2) If the application proposes to provide training and technical assistance, it details its abilities to provide those services on a nationwide basis. If applicable, information provided by the applicant also addresses related achievements and competence of each cooperating or sponsoring organization.

(3) The application fully describes, for example in a resume, the experience and skills of the proposed project director and primary staff showing specific qualifications and professional experiences relevant to the successful implementation of the proposed project.

(4) The application describes how it will involve partners in the Community Services Network in its activities. Where appropriate, applicant describes how it will interface with other related organizations.

(5) If subcontracts are proposed, the application documents the willingness and capacity of the subcontracting organization(s) to participate as described.

Evaluation Criterion III: Objectives and Need for Assistance (Maximum: 20 Points)

Factors:

(1) The application documents that the proposed project addresses vital needs related to the program purposes and provides statistics and other data and information in support of its contention.

(2) The application provides current supporting documentation or other testimonies regarding needs from State CSBG Directors, CAAs and local service providers and/or State and Regional organizations of CAAs and other local service providers.

Evaluation Criterion IV: Results or Benefits Expected (Maximum: 15 Points)

Factors:

(1) The application describes how the project will assure long-term program and management improvements for State CSBG offices, CAA State and/or regional associations, CAAs and/or other local providers of CSBG services and activities.

(2) The application indicates the types and amounts of public and/or private resources it will mobilize, how those resources will directly benefit the project, and how the project will ultimately benefit low-income individuals and families.

(3) If the application proposes a project with a training and technical assistance focus, the application indicates the number of organizations and/or staff that will benefit from those services.

(4) If the application proposes a project with data collection focus, the application describes the mechanism it will use to collect data, how it can assure collections from a significant number of States, and the number of States willing to submit data to the applicant.

(5) If the application proposes to develop a symposium series or other policy-related project(s), the application identifies the number and types of beneficiaries.

(6) The application describes methods of securing participant feedback and evaluations of activities.

Criterion V: Budget and Budget Justification (Maximum: 5 Points)

Factors:

(1) The resources requested are reasonable and adequate to accomplish the project.

(2) Total costs are reasonable and consistent with anticipated results.

2. Review and Selection Process

Initial OCS Screening

Each application submitted to OCS will be screened to determine whether it was received by the closing date and time.

Applications received by the closing date and time will be screened for completeness and conformity with the following requirements. Only complete applications that meet the requirements listed below will be reviewed and evaluated competitively. Other applications will be returned to the applicants with a notation that they were unacceptable and will not be reviewed.

All applications must comply with the following requirements except as noted:

OCS Evaluation of Applications

Applications that pass the initial OCS screening will be reviewed and rated by a panel based on the program elements and review criteria presented in relevant sections of this program announcement. The review criteria are designed to enable the review panel to assess the quality of a proposed project and determine the likelihood of its success. The criteria are closely related to each other and are considered as a whole in judging the overall quality of an application. The review panel awards points only to applications that are responsive to the program elements and relevant review criteria within the context of this program announcement.

The OCS Director and program staff use the reviewer scores when considering competing applications. Reviewer scores will weigh heavily in funding decisions, but will not be the only factors considered.

Applications generally will be considered in order of the average scores assigned by the review panel. Because other important factors are taken into consideration, highly ranked applications are not guaranteed funding. These other considerations include, for example: The timely and proper completion by the applicant of projects funded with OCS funds granted in the last five (5) years; comments of reviewers and government officials; staff evaluation and input; amount and duration of the grant requested and the proposed project's consistency and harmony with OCS goals and policy; geographic distribution of applications; previous program performance of applicants; compliance with grant terms under previous HHS grants, including the actual dedication to program of mobilized resources as set forth in project applications; audit reports; investigative reports; and applicant's progress in resolving any final audit disallowance on previous OCS or other Federal agency grants.

VI. Award Administration Information

1. Award Notices

Following approval of the application selected for funding, ACF will mail a written notice of project approval and authority to draw down project funds. The official award document is the Financial Assistance Award that specifies the amount of Federal funds approved for use in the project, the project and budget period for which support is provided and the terms and conditions of the award. The Financial Assistance Award is signed and issued via postal mail by an authorized Grants Officer.

ACF will notify unsuccessful applicants after the award is issued to the successful applicant.

2. Administrative and National Policy Requirements

Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental).

3. Reporting

All grantees are required to submit semi-annual program reports and semi-annual expenditure reports (SF–269) with final reports due 90 days after the project end date. A suggested format for the program report will be sent to all grantees after the awards are made.

VII. Agency Contacts

Program Office Contact

Dr. Margaret Washnitzer, Department of Health and Human Services (HHS), Administration for Children and Families, Office of Community Services Operations Center, 1815 Fort Meyer Drive, Suite 300, Arlington, Virginia 22209, E-mail: *OCS@lcgnet.com,* Phone: 1–800–281–9519.

Grants Management Office Contact

Barbara Ziegler Johnson, Team Leader, Office of Grants Management, Division of Discretionary Grants, Department of Health and Human Services (HHS), Administration for Children and Families, Office of Community Services Operations Center, 1815 Fort Meyer Drive, Suite 300, Arlington, Virginia 22209, E-mail: *OCS@lcgnet.com,* Phone: 1–800–281–9519.

VIII. Other Information

Additional information about this program and its purpose can be located on the following Web site: *http://www.acf.hhs.gov/programs/ocs.*

Dated: April 28, 2004.

Clarence H. Carter,

Director, Office of Community Services.

[FR Doc. 04–10086 Filed 5–4–04; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0159]

Scherlng Corp. et al.; Withdrawal of Approval of 92 New Drug Applications and 49 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of 92 new drug applications (NDAs) and 49 abbreviated new drug applications (ANDAs). The holders of the applications notified the agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: June 4, 2004

FOR FURTHER INFORMATION CONTACT: Florine P. Purdie, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION: The holders of the applications listed in the table in this document have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications. The applicants have also, by their requests, waived their opportunity for a hearing.

Application No.	Drug	Applicant
NDA 5–292	Estinyl (ethinyl estradiol) Tablets	Schering Corp., 2000 Galloping Hill Rd., Kenilworth, NJ 07033
NDA 5–795	Furacin (nitrofurazone)	Shire Pharmaceutical Development, Inc., 1801 Research Blvd., suite 600, Rockville, MD 20850
NDA 6–110	Dienestrol (dienestrol) Cream	Ortho-McNeil Pharmaceutical, Inc., c/o Johnson & Johnson Research & Development, L.L.C., 920 Highway 202, P.O. Box 300, Raritan, NJ 08869#ndash;0602
NDA 6–800	Paradione (paramethadione)	Abbott Laboratories, D-491/AP30–1E, 200 Abbott Park Rd., Abbott Park, IL 60064–6157
NDA 7–110	Cortone Acetate (cortisone acetate injectable suspension USP) Injectable Suspension	Merck & Co., Inc., Sumneytown Pike, BLA–20, P.O. Box 4, West Point, PA 19486
NDA 7–707	Phenurone (phenacemide) Tablets	Abbott Laboratories
NDA 7–750	Cortone Acetate (cortisone acetate tablet USP) Tablets	Merck & Co., Inc.
NDA 8–328	Spectrocin	Bristol-Myers Squibb Co., P.O. Box 4000, Princeton, NJ 08543–4000
NDA 8–604	Phenergan VC Syrup (promethazine hydrochloride (HCl) and phenylephrine HCl) and Phenergan Expectorant (promethazine HCl, ipecac, and potassium guaiacolsulfonate)	Wyeth Pharmaceuticals, P.O. Box 8299, Philadelphia, PA 19101–8299
NDA 8–857	Phenergan Injection (promethazine HCl)	Do.
NDA 9–298	Amm-I-Dent (sodium lauroyl sarcosinate/urea/ammonium phosphate) Toothpaste and Tooth Powder	Block Drug Co., Inc., 257 Cornelison Ave., Jersey City, NJ 07302
NDA 10–039	Avlosulfon (dapsone) Tablets	Wyeth Pharmaceuticals
NDA 10–727	Peri-Colace Capsules (30 milligrams (mg) casanthranol/100 mg docusate sodium) and Syrup (30 mg casanthranol/60 mg docusate sodium per 15 milliliters (mL))	Shire Pharmaceutical Development, Inc.
NDA 10–775	Trilafon (perphenazine) Tablets	Schering Corp.
NDA 10–858	Enzactin (triacetin) Cream	Wyeth Consumer Healthcare, Five Giralda Farms, Madison, NJ 07940–0871
NDA 10–971	PMB (conjugated estrogens USP with meprobamate) Tablets	Wyeth Pharmaceuticals
NDA 11–140	Enzactin (triacetin) Powder	Wyeth Consumer Healthcare
NDA 11–460	Lanesta (chlorindanol) Vaginal Gel	Sanofi-Synphelabo, Inc., 90 Park Ave., New York, NY 10016
NDA 11–860	Humorsol (demecarium bromide) Ophthalmic Solution	Merck & Co., Inc.
NDA 11–977	Decadron Ophthalmic Ointment (dexamethasone sodium phosphate ophthalmic ointment)	Do.
NDA 12–052	Hydrocortone (hydrocortisone sodium phosphate injection USP) Injection, 50 mg/mL	Do.
NDA 12–071	Decadron (dexamethasone sodium phosphate injection USP) Injection, 4 mg/mL and 24 mg/mL	Do.
NDA 12–095	Orinase (sterile tolbutamide sodium) Diagnostic Sterile Powder for Injection	Pharmacia & Upjohn Co., 7000 Portage Rd., Kalamazoo, MI 49001–0199

Application No.	Drug	Applicant
NDA 12–283	Hygroton (chlorthalidone) Tablets, 25 mg, 50 mg, and 100 mg	Aventis Pharmaceuticals, Inc., Mail Stop BX2 - 209G, 200 Crossing Blvd., Bridgewater, NJ 08807–0890
NDA 12–359	Salutensin and Salutensin-DEMI (hydroflumethiazide and reserpine) Tablets	Shire Laboratories, Inc., c/o Shire Pharmaceutical Development, Inc., 1801 Research Blvd., suite 600, Rockville, MD 20850
NDA 12–376	Decadron (dexamethasone) Elixir, 0.5 mg/5 mL	Merck & Co. Inc.
NDA 12–594	Metahydrin (trichlormethiazide) Tablets, 2 mg and 4 mg	Aventis Pharmaceuticals, Inc.
NDA 12–657	Celestone (betamethasone tablets USP) Tablets	Schering Corp.
NDA 12–972	Metatensin (trichlormethiazide and reserpine) Tablets, 2 mg/0.1 mg and 4 mg/0.1 mg	Aventis Pharmaceuticals, Inc.
NDA 14–116	Johnson #Johnson First Aid Spray (dequainium acetate and cetylpyridinium chloride)	Johnson & Johnson Consumer Products Co., 199 Grandview Rd., Sillman, NJ 08558
NDA 14–122	Protopam (pralidoxime chloride) Tablets	Wyeth Pharmaceuticals
NDA 14–127	Xylocaine (lidocaine) 5% Solution	AstraZeneca LP, 1800 Concord Pike, P.O. Box 8355, Wilmington, DE 19803–8355
NDA 14–713	Etrafon (perphenazine and amitriptyline HCl) and Etrafon Forte Tablets	Schering Corp.
NDA 15–103	Regroton (chlorthalidone, 50 mg and reserpine, 0.25 mg) and Demi-Regroton (chlorthalidone, 25 mg and reserpine, 0.125 mg) Tablets	Aventis Pharmaceuticals, Inc.
NDA 16–034	Vontrol (diphenidol HCl) Injection	GlaxoSmithKline, One Franklin Plaza, P.O. Box 7929, Philadelphia, PA 19101–7929
NDA 16–035	Vontrol (diphenidol pamoate) Suspension	Do.
NDA 16–036	Vontrol (diphenidol) Suppositories	Do.
NDA 16–087	Valium (diazepam) Injection	Roche Laboratories, Inc., 340 Kingsland St., Nutley, NJ 07110–1199
NDA 16–110	Prolixin (fluphenazine enanthate) Injection, 25 mg/mL	Apothecon, c/o Bristol-Myers Co., P.O. Box 4500, Princeton, NJ 08543–4500
NDA 16–618	Pondimin (fenfluramine HCl) Tablets and Ponderex (fenfluramine HCl) Capsules	A.H. Robins Co., c/o Wyeth Pharmaceuticals, P.O. Box 8299, Philadelphia, PA 19101–8299
NDA 16–647	Quinaglute (quinidine gluconate) Dura-Tabs	Berlex Laboratories, Inc., 340 Changebridge Rd., P.O. Box 1000, Montville, NJ 07045–1000
NDA 16–786	Ovral 28 (norgestrel/ethinyl estradiol) and Ferrous Fumarate Tablets	Wyeth Pharmaceuticals
NDA 16–803	Bronkaid (epinephrine inhalation aerosol) Mist	Bayer Consumer Care Division, 36 Columbia Rd., P.O. Box 1910, Morristown, NJ 07962–1910
NDA 16–849	Selsun Blue Shampoo	Ross Laboratories, 625 Cleveland Ave., Columbus, OH 43215–1754
NDA 16–883	Antiminth (pyrantel pamoate) Oral Suspension	Pfizer Consumer Healthcare, 201 Tabor Rd., Morris Plains, NJ 07950
NDA 16–912	Larodopa (levadopa) Tablets and Capsules	Hoffman-La Roche, Inc., 340 Kingsland St., Nutley, NJ 07110–1199

Application No.	Drug	Applicant
NDA 16–985	Gleem (sodium fluoride) Dentrifice	Proctor & Gamble Pharmaceuticals, Inc., Oral Care Products Division, 8700 Mason-Montgomery Rd., Mason, OH 45040
NDA 17–020	Panwarfin (warfarin sodium tablets USP) Tablets, 2 mg, 2.5 mg, 5 mg, 7.5 mg, 10 mg, and 25 mg	Abbott Laboratories
NDA 17–389	Dial 2 (pyrithione zinc) Dandruff Shampoo	Armour-Dial, Inc., 15101 N. Scottsdale Rd., Scottsdale, AZ 85260
NDA 17–535	Lorelco (probucol) Tablets	Aventis Pharmaceuticals, Inc.
NDA 17–536	Diprosone (betamethasone dipropionate) Cream, 0.05%	Schering Corp.
NDA 17–684	Pyrolite (technetium Tc-99m pyro- and trimeta-phosphates kit)	CIS-US, Inc., 10 De Angelo Dr., Bedford, MA 01730
NDA 17–710	Nalfon (fenoprofen calcium) Tablets	Dista Products Ltd., c/o Eli Lilly and Co., Lilly Corporate Center, Indianapolis, IN 46285
NDA 17–736	Paxipam (halazepam) Tablets, 20 mg and 40 mg	Schering Corp.
NDA 17–853	Proventil (albuterol sulfate) Tablets, 2 mg and 4 mg	Do.
NDA 17–895	Janimine (imipramine HCl) Tablets	Abbott Laboratories
NDA 17–952	Trimpex (trimethoprim) Tablets	Hoffman-La Roche, Inc.
NDA 18–306	NasalCrom (cromolyn sodium) Nasal Solution	Pharmacia Consumer Healthcare, 100 Route 206 North, Peapack, NJ 07977
NDA 18–521	Vancenase (beclomethasone dipropionate) Nasal Inhaler	Schering Corp.
NDA 18–584	Beconase (beclomethasone dipropionate) Inhalation Aerosol	GlaxoSmithKline, P.O. Box 13398, Five Moore Dr., Research Triangle Park, NC 27709
NDA 18–587	Wytensin (guanabenz acetate) Tablets, 4 mg, 8 mg, and 16 mg	Wyeth Pharmaceuticals
NDA 18–592	Monistat 5 (miconazole nitrate) Tampons, 100 mg	Personal Products Co., 199 Grandview Rd., Skillman, NJ 08558
NDA 19–059	Inderide LA (propranolol HCl and hydrochlorothiazide) Capsules, 80 mg/50 mg, 120 mg/50 mg, and 160 mg/50 mg	Ayerst Pharmaceuticals, c/o Wyeth Ayerst Laboratories, P.O. Box 8299, Philadelphia, PA 19101–8299
NDA 19–279	Dimetane DX (brompheniramine maleate/ pseudoephedrine HCl/dextromethorphan HBr) Cough Syrup	A.H. Robins Co., c/o Wyeth Pharmaceuticals
NDA 19–428	Pseudoephedrine HCl and Chlorpheniramine Maleate Extended-Release Capsules	Central Pharmaceuticals, c/o Schwarz Pharma, Inc., P.O. Box 2038, Milwaukee, WI 53201
NDA 19–757	Chibroxin (norfloxacin) Sterile Ophthalmic Solution, 0.3%	Merck &Co., Inc.
NDA 19–858	Cipro (ciprofloxacin) in Sodium Chloride	Bayer Corp.
NDA 20–055	Glyburide (micronized) Tablets	Aventis Pharmaceuticals, Inc.
NDA 20–058	Thioplex (thiotepa) For Injection)	Immunex Corp., 51 University St., Seattle, WA 98101–2936
NDA 20–135	Motrin (ibuprofen) Chewable Tablets	McNeil Consumer & Specialty Pharmaceuticals, 7050 Camp Hill Rd., Fort Washington, PA 19034–2299

Application No.	Drug	Applicant
NDA 20–233	Rhinocort (budesomide) Nasal Inhaler	AstraZeneca LP
NDA 20–240	Renormax (spirapril HCl) Tablets, 3 mg, 6 mg, 12 mg, and 24 mg	Schering Corp.
NDA 20–418	Motrin (ibuprofen) Caplets	McNeil Consumer & Specialty Pharmaceuticals
NDA 20–469	Vancenase AQ (beclomethasone dipropionate monohydrate) Nasal Spray	Schering Corp.
NDA 20–476	Motrin (ibuprofen) Oral Drops	McNeil Consumer &Specialty Pharmaceuticals
NDA 20–874	Lunelle (estradiol cypionate and medroxyprogesterone acetate) Injection	Pharmacia Corp., c/o Pfizer Pharmaceuticals Group, 235 E. 42d St., New York, NY 10017–5755
NDA 20–951	Tagamet HB (cimetidine) Suspension	GlaxoSmithKline Consumer Healthcare LP, 1500 Littleton Rd., Parsippany, NJ 07054–3884
NDA 50–012	Garamycin (gentamicin sulfate injection USP) Injectable	Schering Corp.
NDA 50–051	Grisactin (griseofulvin, microcrystalline) Capsules	Wyeth Pharmaceuticals
NDA 50–092	Pathocil (dicloxacillin sodium) for Suspension	Do.
NDA 50–094	Erythrocin (erythromycin) Suppositories	Abbott Laboratories
NDA 50–111	Unipen (nafcillin sodium) Capsules	Wyeth Pharmaceuticals
NDA 50–262	Declomycin (demeclocycline HCl) Capsules	Lederle Laboratories, c/o Wyeth Pharmaceuticals, P.O. Box 8299, Philadelphia, PA 19101–8299
NDA 50–273	Achromycin (tetracycline HCl) Intravenous Injection	Do.
NDA 50–276	Achromycin (tetracyclilne HCl and procaine HCl) Sterile Intramuscular Injection	Do.
NDA 50–296	Erythrocin Suspension	Abbott Laboratories
NDA 50–324	Neodecadron (neomycin sulfate and dexamethasone sodium phosphate) Ophthalmic Ointment	Merck Research Laboratories, Sumneytown Pike, P.O. Box 4, BLA-20, West Point, PA 19486–0004
NDA 50–341	Fungizone (amphotericin B) Oral Suspension	Bristol-Myers Squibb Co.
NDA 50–425	Garamycin (gentamicin sulfate) Ophthalmic Ointment	Schering Corp.
NDA 50–439	Erythrocin (erythromycin stearate)	Abbott Laboratories
NDA 50–482	Keflin (cephalothin sodium) for Injection	Lilly Research Laboratories, Lilly Corporate Center, Indianapolis, IN 46285
NDA 50–744	Periostat (doxycycline hyclate USP) Capsules, 20 mg	CollaGenex Pharmaceuticals, Inc., 301 South State St., Newtown, PA 18940
ANDA 60–006	Pen-Vee K (penicillin V potassium) Tablets, 125 mg, 250 mg, and 500 mg (base)	Wyeth Pharmaceuticals
ANDA 60–611	Neomycin Sulfate and Methylprednisolone Acetate Topical Cream	Pharmacia & Upjohn Co., 7000 Portage Rd., Kalamazoo, MI 49001
ANDA 60–624	Omnipen (ampicillin) Capsules, 250 mg and 500 mg	Wyeth Pharmaceuticals
ANDA 62–178	Grisactin Ultra (griseofulvin, ultramicro crystalline) Tablets, 125 mg and 250 mg	Do.

Application No.	Drug	Applicant
ANDA 62–438	Grisactin Ultra (griseofulvin, ultramicro crystalline) Tablets, 165 mg and 330 mg	Do.
ANDA 62–549	Keflin (cephalothin sodium for injection USP), 1 g and 2 g	Lilly Research Laboratories
ANDA 62–690	Ticar (ticarcillin disodium) Injection, 3 g	GlaxoSmithKline
ANDA 62–905	Clindamycin Phosphate Injection USP, 150 mg/mL	Loch Pharmaceuticals, c/o Bedford Laboratories, 300 Northfield Rd., Bedford, OH 44146
ANDA 63–087	Lincomycin HCl USP	Abbott Laboratories
ANDA 63–321	Vancoled (vancomycin HCl for oral solution USP)	Lederle Laboratories, c/o Wyeth Pharmaceuticals
ANDA 70–188	Naloxone HCl Injection USP, 0.02 mg/mL	Wyeth Pharmaceuticals
ANDA 70–189	Naloxone HCl Injection USP, 0.02 mg/mL	Do.
ANDA 70–190	Naloxone HCl Injection USP, 0.4 mg/mL	Do.
ANDA 70–191	Naloxone HCl Injection USP, 0.4 mg/mL	Do.
ANDA 70–480	Leucovorin Calcium for Injection, 50 mg	Elkins Sinn, c/o Wyeth Pharmaceuticals, P.O. Box 8299, Philadelphia, PA 19101–8299
ANDA 70–917	Nalbuphine HCl Injection, 20 mg/mL	Abbott Laboratories
ANDA 72–639	Metoclopramide HCl Tablets USP, 10 mg	Clonmel Healthcare Ltd., c/o STADA Pharmaceuticals Inc., U.S. Agent, 5 Cedar Brook Dr., Cranbury, NJ 08512
ANDA 74–051	Diltiazem HCl Tablets USP, 30 mg, 60 mg, 90 mg, and 120 mg	Apothecon, c/o Bristol-Myers Squibb Co., P.O. Box 4500, Princeton, NJ 08543–4500
ANDA 74–211	Naproxen Tablets USP, 250 mg, 375 mg, and 500 mg	Roxane Laboratories, Inc., P.O. Box 16532, Columbus, OH 43216
ANDA 74–257	Naproxen Sodium Tablets USP	Do.
ANDA 80–454	Meperidine HCl Tablets USP, 50 mg	Do.
ANDA 80–553	Thiamine HCl Injection USP, 100 mg/mL	Do.
ANDA 80–554	Cyanocobalamin Injection USP	Do.
ANDA 80–577	Diphenhydramine HCl Injection USP, 50 mg/mL	Do.
ANDA 81–224	Leucovorin Calcium for Injection, 100 mg	Elkins Sinn, c/o Wyeth Pharmaceuticals
ANDA 81–239	Cycrin (medroxyprogesterone acetate) Tablets USP, 2.5 mg	Do.
ANDA 81–240	Cycrin (medroxyprogesterone) Tablets USP, 5 mg	Do.
ANDA 83–159	Calcium Gluceptate Injection	Abbott Laboratories
ANDA 83–262	Secobarbital Sodium Injection USP, 50 mg/mL	Wyeth Pharmaceuticals
ANDA 83–640	Quinidine Sulfate Tablets USP, 200 mg	Roxane Laboratories, Inc.
ANDA 84–316	Dimenhydrinate Injection USP, 50 mg	Wyeth Pharmaceuticals
ANDA 84–386	Digoxin Injection USP, 500 micrograms/2 mL	Do.
ANDA 84–445	Phenaphen with Codeine (acetaminophen and codeine phosphate capsules USP) No. 3 Capsules	A. H. Robins Co.

Application No.	Drug	Applicant
ANDA 84–446	Phenaphen with Codeine (acetaminophen and codeine phosphate capsules USP) No. 4 Capsules	Do.
ANDA 85–328	Theo-Dur (theophylline) Extended-Release Tablets, 100 mg and 300 mg	Schering Corp.
ANDA 85–632	Quinidine Sulfate Tablets USP, 300 mg	Roxane Laboratories, Inc.
ANDA 86–134	Nitro-Bid Ointment (nitroglycerin ointment USP, 2%)	Altana Inc., 60 Baylis Rd., Melville, NY 11747
ANDA 86–348	Prochlorperazine Edisylate Injection USP, 5 mg (base)/mL	Wyeth Pharmaceuticals
ANDA 86–998	Theo-Dur (theophylline) Extended-Release Tablets, 200 mg	Schering Corp.
ANDA 88–584	DHCplus (dihydrocodeine bitartrate, acetaminophen, and caffeine) Capsules, 356.4 mg	Purdue Frederick Co., One Stamford Forum, Stamford, CT 06901–3431
ANDA 89–116	Brompheril (dexbrompheniramine maleate/pseudoephedrine sulfate) Extended-Release Tablets, 6 mg/120 mg	Copley Pharmaceuticals, Inc., c/o Teva Pharmaceuticals, 1090 Horsham Rd., North Wales, PA 19454
ANDA 89–131	Theo-Dur (theophylline) Extended-Release Tablets, 450 mg	Schering Corp.
ANDA 89–386	Cycrin (medroxyprogesterone acetate) Tablets, 10 mg	Wyeth Pharmaceuticals
ANDA 89–573	Methylprednisolone Sodium Succinate for Injection USP, 40 mg	Abbott Laboratories
ANDA 89–574	Methylprednisolone Sodium Succinate for Injection USP, 125 mg	Do.
ANDA 89–575	Methylprednisolone Sodium Succinate for Injection USP, 500 mg	Do.
ANDA 89–576	Methylprednisolone Sodium Succinate for Injection USP, 1000 mg	Do.
ANDA 89–822	Uni-Dur (theophylline) Extended-Release Tablets, 400 mg	Schering Corp.
ANDA 89–823	Uni-Dur (theophylline) Extended-Release Tablets, 600 mg	Do.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research by the Commissioner, approval of the applications listed in the table in this document, and all amendments and supplements thereto, is hereby withdrawn, effective June 4, 2004.

Dated: March 22, 2004.

Steven K. Galson,

Acting Deputy Director, Center for Drug Evaluation and Research.

[FR Doc. 04–10194 Filed 5–4–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. 2004D–0187, 2004D–0188, and 2004D–0189]

Draft Guidances for Industry on Premarketing Risk Assessment; Development and Use of Risk Minimization Action Plans; and Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of three draft guidances for industry entitled "Premarketing Risk Assessment," "Development and Use of Risk Minimization Action Plans," and "Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment." All are dated May 2004. These draft guidances provide guidance to industry on risk management activities for drug products, including biological drug products, in the Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER). The draft guidances address, respectively, premarket risk assessment; the development, implementation, and evaluation of risk minimization action plans for drug products; and good pharmacovigilance practices and pharmacoepidemiologic assessment of observational data.

DATES: Submit written or electronic comments on the draft guidances by July 6, 2004. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidances to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidances to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify each set of comments with the corresponding docket number of the draft guidance as follows: Docket No. [2004D–0187] "Premarketing Risk Assessment," Docket No. [2004D–0188] "Development and Use of Risk Minimization Action Plans," and Docket No. [2004D–0189] "Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment." See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance documents.

FOR FURTHER INFORMATION CONTACT: For "Premarketing Risk Assessment": Barbara Gould, Center for Drug Evaluation and Research (HFD–550), Food and Drug Administration, 9201 Corporate Blvd., Rockville, MD 20850, 301–827–2504, or

Patricia Rohan, Center for Biologics Evaluation and Research (HFM–485), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–3070.

For "Development and Use of Risk Minimization Action Plans": Christine Bechtel, Center for Drug Evaluation and Research (HFD–006), Food and Drug Administration, 1451 Rockville Pike, Rockville, MD 20852, 301–443–5572, or

Mark Weinstein, Center for Biologics Evaluation and Research (HFM–300), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–3518.

For "Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment": Patrick Guinn, Center for Drug Evaluation and Research (HFD–6), Food and Drug Administration, 5515 Security Lane, Rockville, MD 20852, 301–443–5590, or

Miles Braun, Center for Biologics Evaluation and Research (HFM–220), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–6090.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of three draft guidances for industry entitled "Premarketing Risk Assessment," "Development and Use of Risk Minimization Action Plans," and "Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment." These three guidances were produced in part to fulfill FDA's commitment to certain risk management performance goals agreed to in relation to the Prescription Drug User Fee Act upon its reauthorization in June 2002. As an initial step, FDA announced on March 7, 2003 (68 FR 11120), the availability of three concept papers. Each concept paper focused on one aspect of risk management. FDA held a public workshop on April 9–11, 2003, to obtain comment on the concept papers. The comments submitted on the concept papers and at the public meeting were considered in developing these draft guidances.

These three draft guidances address risk management issues pertinent to the successive stages of a product's lifecycle, specifically: (1) During medical product development, (2) during product application review and approval, and (3) during the postmarketing period. The approaches recommended in the draft guidances should not be viewed as a new collection of generalized and discrete tools for risk minimization but rather as part of much broader, ongoing, and comprehensive efforts to provide additional guidance to industry on measures that can be employed to minimize the risks while preserving benefits of medical products.

The draft guidances recommend that sponsors consider specific risk minimization efforts beyond routine risk minimization measures for the few products presenting unusual types or levels of risk. In these circumstances, using strategies that go beyond routine risk assessment and minimization may further improve the product's benefit-risk balance. FDA is specifically soliciting public comment on how to best characterize the types and levels of risk that might suggest the need for a risk management plan.

FDA understands that risk management programs generate costs and place new burdens on product developers, health care practitioners, and patients. FDA recommends that, whenever possible, sponsors give every consideration to using the least burdensome method to achieve the desired public health outcome. For example, making increasing use of automatic reporting and future notification systems for adverse events will help the agency learn quickly of potential problems. Use of networks for electronic prescribing can enable the real-time, efficient collection of data on adverse events and even alert physicians to adverse events at the time of prescribing.

As new products are developed, FDA recommends that sponsors seek to identify risk signals as early as possible in a product's development cycle, to evaluate the risks, to communicate predictable risk and benefit information effectively and thoroughly, and to employ efforts to manage these risks as efficiently as possible.

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidances, when finalized, will represent the agency's current thinking on these topics. They do not create or confer any rights for or on any person and do not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the draft guidances. Two copies of mailed comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket numbers found in brackets in the heading of this document. Identify each set of comments with the corresponding docket number of the draft guidance as follows: Docket No. [2004D–0187] "Premarketing Risk Assessment," Docket No. [2004D–0188] "Development and Use of Risk Minimization Action Plans," and Docket No. [2004D–0189] "Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment." The draft guidances and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m. Monday through Friday.

III. Paperwork Reduction Act of 1995

These guidances contain information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection(s) of information in the guidances were approved under OMB control numbers 0910–0001 (until

March 31, 2005) and 0910–0338 (until August 31, 2005).

IV. Electronic Access

Persons with access to the Internet may obtain the documents at *http://www.fda.gov/cder/guidance/index.htm*, *http://www.fda.gov/cber/guidelines.htm*, or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: April 26, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–10028 Filed 5–4–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Graduate Student Training Programs Application

SUMMARY: 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 Graduate Partnerships Program/OIR/OD, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Graduate Student Training Programs Application. *Type of Information Collection Request:* Extension. *Form Number:* 0925–0501. *Expiration Date:* June 30, 2005. *Need and Use of Information Collection:* The information gathered in the Graduate Student Training Programs application will enable the identification and evaluation of graduate students interested in performing their dissertation research in the NIH Intramural Research Program laboratories (NIH–IRP). Modeling university applications for admission into graduate programs, the Graduate Student Training Program application contains several sections that will aid the NIH admission committee's identification and evaluation of each graduate student. Specific areas required to evaluate a candidate include the following: contact information, citizenship status, identification of programs to which the student wishes to apply, students' graduate university information and undergraduate university information, standardized examination scores, references and letters of recommendation, proposed NIH advisor information, University advisor information, research interests, career goals, and proposed research in NIH IRP. Ethnicity and gender are additional optional information used to evaluate the GPP recruiting abilities and compliance with federal regulations. *Frequency of Response:* Once. *Affected Public:* Individuals. *Type of Respondents:* Students pursuing an advanced degree, Ph.D., and would like to perform their dissertation research in the NIH Intramural Research Program laboratories.

The annual reporting burden is displayed in the following table:

ESTIMATES OF HOUR BURDEN

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Student Application to Current Graduate Student Programs	200	1	0.50	100
Student Application to Future Graduate Student Programs	400	1	0.50	200
Recommendations (600 × 3)	1800	1	0.25	450
Totals	2400			750

Estimate of Capital Costs, Operating Costs, and/or Maintenance Costs are displayed in the following table:

ESTIMATE OF ANNUAL COST TO THE FEDERAL GOVERNMENT

Annualized capital, start-up cost	Amount (dollars)	Operational/maintenance & purchase components	Amount (dollars)
Information Collection	0.00	Trouble-shooting and monitoring fees	2,000.00
Aplication Design, Development, Testing	12,000.00	Maintenance	1,000.00
Total	12,000.00	Total	$3,000.00

Estimate of Other Total Annual Cost Burden: $15,000.00.

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Patty McCarthy, Program Coordinator, Graduate Partnerships Program, National Institutes of Health, 10 Center Drive, Building 10/Room 1C129, Bethesda, Maryland 20892–1153, or call 301–594–9603 or e-mail your request, including your address to: *mccarthy@od.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Dated: April 24, 2004.

Michael M. Gottesman,

Deputy Director for Intramural Research, National Institutes of Health.

[FR Doc. 04–10147 Filed 5–4–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of 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 a meeting of the National Advisory Mental Health Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the 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 Advisory Mental Health Council.

Date: May 13–14, 2004.

Closed: May 13, 2004, 10 a.m. to recess.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Open: May 14, 2004, 8:30 a.m. to adjournment.

Agenda: Presentation of NIMH Director's report and discussion on NIMH program and policy issues.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, C Wing, Bethesda, MD 20892.

Contact Person: Jane A. Steinberg, PhD, Director, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6154, MSC 9609, Bethesda, MD 20892–9609, 301–443–5047.

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.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by nongovernment employees. Persons without a government I.D. will need to show a photo I.D. and sign-in at the security desk upon entering the building.

Information is also available on the Institute's/Center's home page: *http://www.nimh.nih.gov/council/advis.cfm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: April 28, 2004.

Anna P. Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–10148 Filed 5–4–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards to Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories currently certified to meet the standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) published in the **Federal Register** on April 11, 1988 (53 FR 11970), and revised in the **Federal Register** on June 9, 1994 (59 FR 29908) and on September 30, 1997 (62 FR 51118). A notice listing all currently certified laboratories is published in the **Federal Register** during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory has withdrawn from HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh or Dr. Walter Vogl, Division of Workplace Programs, 5600 Fishers Lane, Rockwall 2, Room 815, Rockville, Maryland 20857; 301–443–6014 (voice), 301–443–3031 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were developed in accordance with Executive Order 12564 and section 503 of Pub. L. 100–71. Subpart C of the Guidelines, "Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies," sets strict standards that laboratories must meet in order to conduct urine drug testing for Federal agencies. To become certified, an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection.

To maintain that certification, a laboratory must participate in a quarterly performance testing program plus periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements expressed in the HHS Mandatory Guidelines. A laboratory must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Mandatory Guidelines, the following laboratories meet the minimum standards set forth in the Mandatory Guidelines:

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227 414–328–7840 / 800–877–7016 (Formerly: Bayshore Clinical Laboratory)

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770 / 888–290–1150

Aegis Analytical Laboratories, Inc., 345 Hill Ave., Nashville, TN 37210, 615–255–2400

Baptist Medical Center-Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299, 501–202–2783, (Formerly: Forensic Toxicology Laboratory Baptist Medical Center)

Clinical Reference Lab, 8433 Quivira Rd., Lenexa, KS 66215–2802, 800–445–6917

Diagnostic Services Inc., dba DSI, 12700 Westlinks Dr., Fort Myers, FL 33913, 239–561–8200 / 800–735–5416

DrugProof, Division of Dynacare/Laboratory of Pathology, LLC, 1229 Madison St., Suite 500, Nordstrom Medical Tower, Seattle, WA 98104, 206–386–2661 / 800–898–0180, (Formerly: Laboratory of Pathology of Seattle, Inc., DrugProof, Division of Laboratory of Pathology of Seattle, Inc.)

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Rd., Warminster, PA 18974, 215–674–9310

Dynacare Kasper Medical Laboratories*, 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2, 780–451–3702 / 800–661–9876

ElSohly Laboratories, Inc., 5 Industrial Park Dr., Oxford, MS 38655, 662–236–2609

Express Analytical Labs, 3405 7th Ave., Suite 106, Marion, IA 52302, 319–377–0500

Gamma-Dynacare Medical Laboratories*, A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall St., London, ONT, Canada N6A 1P4, 519–679–1630

General Medical Laboratories, 36 South Brooks St., Madison, WI 53715, 608–267–6225

Kroll Laboratory Specialists, Inc., 1111 Newton St., Gretna, LA 70053, 504–361–8989 / 800–433–3823, (Formerly: Laboratory Specialists, Inc.)

LabOne, Inc., 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927 / 800–873–8845, (Formerly: Center for Laboratory Services, a Division of LabOne, Inc.)

Laboratory Corporation of America Holdings, 7207 N. Gessner Rd., Houston, TX 77040, 713–856–8288 / 800–800–2387

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400 / 800–437–4986, (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 Alexander Dr., Research Triangle Park, NC 27709, 919–572–6900 / 800–833–3984, (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings, 10788 Roselle St., San Diego, CA 92121, 800–882–7272, (Formerly: Poisonlab, Inc.)

Laboratory Corporation of America Holdings, 1120 Stateline Rd. West, Southaven, MS 38671, 866–827–8042 / 800–233–6339, (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

Marshfield Laboratories, Forensic Toxicology Laboratory, 1000 North Oak Ave., Marshfield, WI 54449, 715–389–3734 / 800–331–3734

MAXXAM Analytics Inc.*, 5540 McAdam Rd., Mississauga, ON, Canada L4Z 1P1, 905–890–2555, (Formerly: NOVAMANN (Ontario) Inc.)

MedTox Laboratories, Inc., 402 W. County Rd. D, St. Paul, MN 55112, 651–636–7466 / 800–832–3244

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295 / 800–950–5295

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Dr., Minneapolis, MN 55417, 612–725–2088

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250 / 800–350–3515

Northwest Drug Testing, a division of NWT Inc., 1141 E. 3900 S., Salt Lake City, UT 84124, 801–293–2300 / 800–322–3361, (Formerly: NWT Drug Testing, NorthWest Toxicology, Inc.)

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774, (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory)

Oregon Medical Laboratories, P.O. Box 972, 722 East 11th Ave., Eugene, OR 97440–0972, 541–687–2134

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942, (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991 / 800–541–7891x8991

PharmChem Laboratories, Inc., 4600 N. Beach, Haltom City, TX 76137, 817–605–5300, (Formerly: PharmChem Laboratories, Inc., Texas Division; Harris Medical Laboratory)

Physicians Reference Laboratory, 7800 West 110th St., Overland Park, KS 66210, 913–339–0372 / 800–821–3627

Quest Diagnostics Incorporated, 3175 Presidential Dr., Atlanta, GA 30340, 770–452–1590 / 800–729–6432, (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 4770 Regent Blvd., Irving, TX 75063, 800–824–6152, (Moved from the Dallas location on 03/31/01; Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 4230 South Burnham Ave., Suite 250, Las Vegas, NV 89119–5412, 702–733–7866 / 800–433–2750, (Formerly: Associated Pathologists Laboratories, Inc.)

Quest Diagnostics Incorporated, 400 Egypt Rd., Norristown, PA 19403, 610–631–4600 / 877–642–2216, (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 506 E. State Pkwy., Schaumburg, IL 60173, 800–669–6995 / 847–885–2010, (Formerly: SmithKline Beecham Clinical Laboratories; International Toxicology Laboratories)

Quest Diagnostics Incorporated, 7600 Tyrone Ave., Van Nuys, CA 91405, 818–989–2520 / 800–877–2520, (Formerly: SmithKline Beecham Clinical Laboratories)

Scientific Testing Laboratories, Inc., 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130

Sciteck Clinical Laboratories, Inc., 317 Rutledge Rd., Fletcher, NC 28732, 828–650–0409

S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109, 505–727–6300 / 800–999–5227

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 574–234–4176 x276

Southwest Laboratories, 2727 W. Baseline Rd., Tempe, AZ 85283, 602–438–8507 / 800–279–0027

Sparrow Health System, Toxicology Testing Center, St. Lawrence Campus, 1210 W. Saginaw, Lansing, MI 48915, 517–377–0520, (Formerly: St. Lawrence Hospital & Healthcare System)

St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101, 405–272–7052

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273

Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on June 9, 1994 (59 FR 29908) and on September 30, 1997 (62 FR 51118). After receiving DOT certification, the laboratory will be included in the monthly list of HHS certified laboratories and participate in the NLCP certification maintenance program.

U.S. Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. 04–10175 Filed 5–4–04; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Application for Exportation of Articles Under Special Bond

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Exportation of Articles under Special Bond. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue, NW., Washington, DC 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application for Exportation of Articles under Special Bond.

OMB Number: 1651–0004.

Form Number: Form CBP–3495.

Abstract: This collection is used by importers for articles entered temporarily into the United States. These articles are free of duty under bond, and are exported within one year from the date of importation.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, individuals, institutions.

Estimated Number of Respondents: 1500.

Estimated Time Per Respondent: 8 minutes.

Estimated Total Annual Burden Hours: 2,000.

Estimated Total Annualized Cost on the Public: $32,040.00.

Dated: April 29, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 04–10186 Filed 5–4–04; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection (CBP)

Proposed Collection; Comment Request; Articles Assembled Abroad with Textile Components Cut to Shape in the U.S.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning Articles Assembled Abroad with Textile Components Cut to Shape in the U.S. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2C, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2C, 1300 Pennsylvania Avenue NW., Washington, DC 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Articles Assembled Abroad with Textile Components Cut to Shape in the U.S.

OMB Number: 1651–0070.

Form Number: N/A.

Abstract: This collection of information enables CBP to ascertain whether the conditions and requirements relating to 9802.00.80, Harmonized Tariff Schedule (HTSUS), have been met.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, individuals, institutions.

Estimated Number of Respondents: 500.

Estimated Time Per Respondent: 80 minutes.

Estimated Total Annual Burden Hours: 667.

Estimated Total Annualized Cost on the Public: $11,785.

Dated: April 29, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 04–10187 Filed 5–4–04; 8:45 am]

BILLING CODE 4820–02–U

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Importation of Ethyl Alcohol For Non-Beverage Purpose

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Importation of Ethyl Alcohol for Non-Beverage Purpose. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Attn: Tracey Denning, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW., Washington, DC 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Importation of Ethyl Alcohol for Non-Beverage Purpose.

OMB Number: 1651–0056.

Form Number: N/A.

Abstract: This collection is a declaration claiming duty-free entry. It is filed by the broker or their agent, and then is transferred with other documentation to the Bureau of Alcohol, Tobacco, and Firearms.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, individuals, institutions.

Estimated Number of Respondents: 300.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 25.

Estimated Total Annualized Cost on the Public: $544.50.

Dated: April 29, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 04–10188 Filed 5–4–04; 8:45 am]

BILLING CODE 4820–02–U

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Declaration by the Person Who Performed the Processing of Goods Abroad

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning Declaration by the Person Who Performed the Processing of Goods Abroad. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2C, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2C, 1300 Pennsylvania Avenue NW., Washington, DC 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and

included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Declaration by the Person Who Performed the Processing of Goods Abroad.

OMB Number: 1651–0039.

Form Number: N/A.

Abstract: This declaration, which is prepared by the foreign processor and submitted by the filer with each entry, provides details on the processing performed abroad and is necessary to assist CBP in determining whether the declared value of the processing is accurate.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, Individuals, Institutions.

Estimated Number of Respondents: 7,500.

Estimated Time Per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 1,880.

Estimated Total Annualized Cost on the Public: $41,284.

Dated: April 29, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 04–10189 Filed 5–4–04; 8:45 am]

BILLING CODE 4820–02–U

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; U.S./Israel Free Trade Agreement

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the U.S./Israel Free Trade Agreement. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2C, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2C, 1300 Pennsylvania Avenue NW., Washington, DC 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's' estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: U.S./Israel Free Trade Agreement.

OMB Number: 1651–0065.

Form Number: N/A.

Abstract: This collection is used to ensure conformance with the provisions of the U.S./Israel Free Trade Agreement for duty free entry status.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, Individuals, Institutions.

Estimated Number of Respondents: 34,500.

Estimated Time Per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 7,505.

Estimated Total Annualized Cost on the Public: $157,605.

Dated: April 29, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 04–10190 Filed 5–4–04; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Transportation Entry and Manifest of Goods

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW., Washington, DC 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to

enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit.

OMB Number: 1651–0003.

Form Number: Form CBP–7512A and B.

Abstract: This collection involves the movement of imported merchandise from the port of importation to another Customs port prior to release of the merchandise.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, Individuals, Institutions.

Estimated Number of Respondents: 10,000.

Estimated Time Per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 56,000.

Estimated Total Annualized Cost on the Public: $918,400.

Dated: April 30, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 04–10191 Filed 5–4–04; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Proposed Collection; Comment Request; Importation Bond Structure

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning Importation Bond Structure. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESS: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2C, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2C, 1300 Pennsylvania Avenue NW., Washington, DC 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Importation Bond Structure.

OMB Number: 1651–0050.

Form Number: CBP–301 and CBP–5297.

Abstract: Bonds are used to assure that duties, taxes, charges, penalties, and reimbursable expenses owed to the Government are paid. They are also used to provide legal recourse for the Government for noncompliance with CBP laws and regulations.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses, Individuals, Institutions.

Estimated Number of Respondents: 590,250.

Estimated Time Per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 147,563.

Estimated Total Annualized Cost on the Public: $4,283,777.

Dated: April 29, 2004.

Tracey Denning,

Agency Clearance Officer, Information Services Group.

[FR Doc. 04–10192 Filed 5–4–04; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Post Security Grant Program: Application Notice Describing the Program and Establishing the Closing Date for Receipt of Applications Under the Port Security Grant Program

AGENCY: Transportation Security Administration, Department of Homeland Security.

ACTION: Notice inviting applications under the Port Security Grant Program.

SUMMARY: The purpose of the Port Security Grant Program is to support efforts for port security at critical national seaports in the area of enhanced facility and operational security.

The Port Security Grant Program will fund projects in the Enhanced Facility and Operational Security Category. The Transportation Security Administration (TSA) is coordinating with the Maritime Administration, the U.S. Coast Guard, and the Department of Homeland Security's Office of State and Local Coordination in this effort. Applications may be submitted by federally regulated critical national seaports, terminals, U.S. inspected passenger vessels, or ferries as specified in the Funding Opportunity Announcement. Authority for this program was first contained in the Fiscal Year 2002 DOD Supplemental Appropriations Act under Pub. L. 107–117. Funds appropriated from the 2004 appropriations for the Department of Homeland Security, Pub. L. 108–90 are being awarded under the Port Security Grant Program—Round 4.

DATES: The program announcement and application forms for the Port Security Grant Program—Round 4 are expected to be available on or about Wednesday, May 5, 2004. Applications must be received on or before 3 p.m. eastern daylight savings time on Wednesday, June 9, 2004.

ADDRESSES: Information about this funding opportunity is available through TSA Internet site at *http://www.tsa.gov* under Industry Partners and Business Opportunities, at *http://www.fedgrants.gov*, and applicable trade magazines. The Request for Applications, forms and instructions for preparing and submitting an application for the Port Security Grant Program will be available through *https://www.portsecuritygrants.dottsa.net/*.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Bagorazzi, Transportation Security Administration, Office of Maritime and Land Security, (571) 227–2818, e-mail: *portsecuritygrants@dhs.gov*.

SUPPLEMENTARY INFORMATION: Total anticipated funding available for the Port Security Grant Program—Round 4 is $49,500,000. Awards under this program are subject to the availability of funds.

Port Security Grant Program—Round 4 Category: Enhanced Facility and Operational Security which includes but is not limited to: access control, physical security, surveillance, communication, cargo security, and passenger security.

This program has the following prerequisites: In compliance with the Maritime Transportation Security Act (MTSA), applicants are required to be owners/operators of federally regulated public or private ports, terminals, U.S. inspected passenger vessels, or ferries as defined in 33 CFR Part 101, 140, 105, 106. Grant-funded activity must take place within the footprint of the regulated port, terminal U.S. inspected passenger vessel, or ferry.

In addition, applicants must have completed a security assessment and tie the security enhancements to their assessment in order to submit an eligible grant application. Security assessments must be available for review upon the request of the evaluators.

In addition, TSA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for projects being considered for Federal funding. The purpose of the NEPA review is to weigh the impacts of major Federal actions (such as security enhancements) on elements such as adjacent communities, water supplies, historical buildings or culturally sensitive areas prior to construction. Consequently, applicants may be required to provide additional detailed information on the activities to be conducted, locations sites, possible construction activities, and any environmental concerns that may exist. Results of the NEPA Compliance Review could result in a project not being approved for funding.

Dated: April 30, 2004.

Chester Lunner,

Assistant Administrator, Office of Maritime and Land Security, Transportation Security Administration.

[FR Doc. 04–10218 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–62–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–170–0777–XG]

Notice of Public Meeting: Central California Resource Advisory Council

SUMMARY: In accordance with the Federal Land and Policy Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Central California Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held Friday, June 4 and Saturday, June 5, 2004, in Bridgeport, California. On Friday, June 4, the meeting begins at 8 a.m. at the Hunewill Ranch, 1110 Hunewill Ranch Road. From U.S. Highway 395 in Bridgeport, proceed four miles southwest on Twin Lakes Road to Hunewill Ranch Road. Proceed one mile on Hunewill Ranch Road to Hunewill Ranch. At 1:30 p.m. on Friday, June 4, a public comment period will be held at the Memorial Hall, 73 North School Street, Bridgeport. A field tour of the public lands in the Bodie Hills will commence at 3 p.m., following the public comment period. On Saturday, June 5, the meeting begins at 8 a.m. at the Hunewill Ranch.

FOR FURTHER INFORMATION CONTACT: Mark Gish, BLM Bishop Field Office, 351 Pacu Lane, Suite 100, Bishop, CA 93514, (760) 872–5000.

SUPPLEMENTARY INFORMATION: The 12-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in central California. At this meeting, agenda topics will include discussions of the abandoned mine lands program on BLM managed lands in central California, regional planning efforts, land conservation programs, sage grouse conservation as well as recreation, grazing, cultural resources, fire management, land access, and wilderness issues. The RAC members will also hear status reports from the Bakersfield, Bishop, Folsom, and Hollister field office managers. All meetings are open to the public. Members of the public may present written comments to the council. Each formal council meeting allocates time for oral public comments. Depending on the number of persons wishing to speak and the time available, time for individual comments may be limited. Members of the public are welcome on field tours but they must provide for their own transportation and sustenance. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations should contact the BLM as provided above.

Dated: April 23, 2004.

Bill Dunkelberger,

Field Office Manager, Bishop Field Office.

[FR Doc. 04–10143 Filed 5–4–04; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–030–1020–XX–028H; HAG 04–0170]

Resource Advisory Council Meeting

AGENCY: Bureau of Land Management (BLM), Vale District, Interior.

ACTION: Meeting notice for the John Day/Snake Resource Advisory Council.

SUMMARY: The John Day/Snake Resource Advisory Council will meet on Tuesday, June 22, 2004, at the Sunridge Inn, One Sunridge Way, Baker City, OR, 8 a.m. to 4 p.m. (Pacific Time).

The meeting may include such topics as, Northwest Power Planning Council Sub-basin Planning; Blue Mountain Forest Plan Revision; Grazing; and Healthy Forest Restoration Act. There will also be subcommittee updates on OHV, Noxious Weeds, Planning, Sage Grouse, and other matters as may reasonably come before the board.

There will be a field trip from approximately 8 a.m. to 2 p.m. on Wednesday, June 23, 2004 to view the Frazier Stewardship Forest Health Project. Any public that would like to join in the field trip will need to provide their own transportation.

The entire meeting is open to the public. For a copy of the information to

be distributed to the Council members, please submit a written request to the Vale District Office 10 days prior to the meeting. Public comment is scheduled for 11 a.m. to 11:15 a.m., Pacific Time (PT).

FOR FURTHER INFORMATION CONTACT: Additional information concerning the John Day/Snake Resource Advisory Council may be obtained from Peggy Diegan, Management Assistant/ Webmaster, Vale District Office, 100 Oregon Street, Vale, OR 97918 (541) 473–3144, or e-mail *Peggy_Diegan@or.blm.gov.*

Dated: April 29, 2004.

David R. Henderson,

District Manager.

[FR Doc. 04–10176 Filed 5–4–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–130–1020–PH; GP4–0172]

Notice of Public Meeting, Eastern Washington Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

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 Washington Resource Advisory Council (RAC), will meet as indicated below.

DATES: The Eastern Washington Resource Advisory Council (EWRAC) will meet for a field trip on May 27, 2004, starting from the Spokane District Office, Bureau of Land Management, 1103 North Fancher Road, Spokane, Washington, 99212–1275.

SUPPLEMENTARY INFORMATION: The RAC meeting will convene at the Spokane District Office, with a 30-minute public input time scheduled to commence at 9 a.m., contingent on public in attendance at that time. The remainder of the meeting will be a field tour to public lands BLM administers in western Lincoln County, departing from the Spokane BLM office about 9:30 a.m. and returning about 4 p.m.

Information to be distributed to Council members for their review is requested in written format 10 days prior to the Council meeting date.

FOR FURTHER INFORMATION CONTACT: Sandra Gourdin or Kathy Helm, Bureau of Land Management, Spokane District Office, 1103 N. Fancher Road, Spokane, Washington, 99212, or call (509) 536–1200.

Dated: April 29, 2004.

Joseph K. Buesing,

District Manager.

[FR Doc. 04–10178 Filed 5–4–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–930–1430–ET; AZA 6630, AZA 9224, AZA 9683, and AZA 12162]

Expiration of Withdrawals and Opening of Lands; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Four public land orders, which withdrew 2,051 total acres of public lands from surface entry and mining, have expired. This order opens the lands to surface entry and mining.

FOR FURTHER INFORMATION CONTACT: Cliff Yardley, BLM Arizona State Office, 222 North Central Avenue, Phoenix, Arizona 85004–2203, 602–417–9437.

SUPPLEMENTARY INFORMATION:

1. The following public land orders (PLOs), which withdrew public lands for the areas listed below, have expired:

PLO	FR citation	Area name	Expired	Acres
5756	45 FR 63850 (1980)	Wellton-Mohawk Irrigation District	9/25/2000	1,468
5788	45 FR 82934 (1980)	Burro Creek Campground	12/16/2000	310
5954	46 FR 31892 (1981)	Border Patrol, Yuma Area Station	6/17/2001	20
6475	48 FR 45394 (1983)	Yuma Proving Grounds—Dept of Army	10/4/2003	253

2. Copies of the public land orders for the expired withdrawals, showing the lands involved, are available at the BLM Arizona State Office (address above).

3. In accordance with 43 CFR 2091.6, at 10 a.m. on June 4, 2004, the lands withdrawn by the public land orders listed in Paragraph 1 above will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on June 4, 2004, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. In accordance with 43 CFR 2091.6, at 10 a.m. on June 4, 2004, the lands withdrawn by the public land orders listed in Paragraph 1 above will be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of any of the lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (2000), shall vest no rights against the United States. State law governs acts required to establish a location and to initiate a right of possession where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: April 21, 2004.

Steven J. Gobat,

Acting Deputy State Director, Resources Division.

[FR Doc. 04–10130 Filed 5–4–04; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–926–04–1420–BJ]

Montana: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Montana State Office, Interior.

ACTION: Notice of filing of plat of survey.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of the lands described below in the BLM Montana State Office, Billings, Montana,

(30) days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Robert L. Brockie, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, P.O. Box 36800, Billings, Montana 59107–6800, telephone (406) 896–5125 or (406) 896–5009.

SUPPLEMENTARY INFORMATION: The survey was executed at the request of the Bureau of Indian Affairs (BIA), and was necessary to determine boundaries and areas of accretion. The lands we surveyed are:

Principal Meridian, Montana

Township 27 North, Range 50 East.

The plat, in three sheets, representing the dependent resurvey of a portion of the subdivisional lines, the adjusted original meanders of the former left bank of the Missouri River, downstream, through sections 15 and 16, and the subdivision of sections 15 and 16, and the subdivision of sections 15 and 16, the survey of the present left bank of the Missouri River, downstream, through sections 15 and 16, and the survey of certain division of accretion lines in sections 15 and 16, in Township 27 North, Range 50 East, Principal Meridian, Montana, was accepted April 23, 2004.

We will place a copy of the plat, in three sheets, we described in the open files. It will be available to the public as a matter of information.

If BLM receives a protest against this survey, as shown on this plat, in three sheets, prior to the date of the official filing, we will stay the filing pending our consideration of the protest.

We will not officially file this plat, in three sheets, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

Dated: April 27, 2004

Thomas M. Deiling,

Chief Cadastral Surveyor, Division of Resources.

[FR Doc. 04–10141 Filed 5–4–04; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

Availability of Environmental Assessment for the Proposed Expansion of the Westfield River's National Wild and Scenic River Designation, Massachusetts

AGENCY: National Park Service, Interior.

ACTION: Publication of environmental assessment for public comment.

SUMMARY: The National Park Service is publishing for public review and comment an environmental assessment on designating additional miles to the Westfield River, Massachusetts, National Wild and Scenic River. The National Park Service has found that the Westfield River, Massachusetts (Upper East Branch and Tributaries: Drowned Land Brook; Center Brook; Windsor Jambs Brook—*Towns of Savoy and Windsor;* Headwater Tributaries of the West Branch: Shaker Mill Brook; Depot Brook; Savery Brook; Watson Brook; Center Pond Brook—*Towns of Becket and Washington;* Lower Middle Branch, East Branch and Main Stem—*Town of Huntington*) is eligible for the national system and concludes that designation of the additional sections of the river is the preferred alternative.

DATES: Comments must be postmarked June 4, 2004.

ADDRESSES: Copies of the environmental assessment are available for public inspection at: National Park Service, Boston Support Office, 15 State Street, Boston, MA 02109; National Park Service, 1201 Eye Street, NW., Washington, DC 20240–0001. Hours of availability are between 8:30 a.m. and 4:30 p.m., Monday through Friday, except holidays. Copies of the draft report maybe obtained from Jamie Fosburgh, National Park Service, Boston Support Office, 15 State Street, Boston, MA 617–223–5191.

Comments should be directed to the National Park Service, Boston Support Office, attention Jamie Fosburgh at the address above or e-mailed to *Jamie Fosburgh@nps.gov.*

FOR FURTHER INFORMATION CONTACT: Jamie Fosburgh, National Park Service, Boston Support Office, 15 State Street, Boston, MA 617–223–5191.

SUPPLEMENTARY INFORMATION: On April 26, 2002, Acting Governor Jane Swift of the Commonwealth of Massachusetts petitioned the Secretary of the Interior to extend the Westfield River's Wild and Scenic designation to include additional segments of the river and its headwaters (34.8 miles) under the National Wild and Scenic Rivers Act. The sections of river under consideration includes the Upper East Branch and Tributaries: Drowned Land Brook; Center Brook; Windsor Jambs Brook in the Towns of Savoy and Windsor; the Headwater Tributaries of the West Branch: Shaker Mill Brook; Depot Brook; Savery Brook; Watson Brook; Center Pond Brook in the Towns of Becket and Washington; and the Lower Middle Branch, East Branch and Main Stem in the Town of Huntington. Under section 2(a)(ii) of the National Wild and Scenic Rivers Act (16 U.S.C. 1273(a)(ii)), the Secretary has the authority to add a river to the National System at the request of a State, provided the State has met certain prior conditions and the river meets eligibility criteria, based upon an evaluation of natural and cultural resources.

Upon the request of a State governor to the Secretary of the Interior, the National Park Service, acting for the Secretary, undertakes an evaluation of the State's request. As a result of the evaluation and the subsequent environmental assessment, the National Park Service has concluded that all requirements were fully met for the designation extension for the Westfield River. Review of public comments on the environmental assessment is required before the Service can forward a recommendation of designation to the Secretary of Interior.

Dated: April 2, 2004.

D. Thomas Ross,

Assistant Director, Recreation and Conservation, National Park Service.

[FR Doc. 04–10144 Filed 5–4–04; 8:45 am]

BILLING CODE 4310–51–M

DEPARTMENT OF JUSTICE

Justice Management Division

Agency Information Collection Activities: Proposed Collection; Comment Requested

ACTION: 30-Day notice of information collection under review: certification of identity.

The Department of Justice (DOJ), Justice Management Division, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (Volume 68, Number 198, on page 59195 on October 14, 2003, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until June 4, 2004. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public

burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *The type of information collection:* Extension, without change, of a previously approved collection for which approval has expired.

(2) *The title of the form/collection:* Certification of Identity.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form: DOJ–361. Facilities and Administrative Services Staff, Justice Management Division, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: American Citizens. Other: Federal Government. The information collection will be used by the Department to identify individuals requesting certain records under the Privacy Act. Without this form an individual cannot obtain the information requested.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 55,478 respondents at 30 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 27,739 annual burden hours.

If additional information is required contact Ms. Brenda E. Dyer, Department Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: April 29, 2004.

Brenda E. Dyer,

Department Deputy Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 04–10181 Filed 5–4–04; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF JUSTICE

Justice Management Division

Agency Information Collection Activities: Existing Collection: Comment Request

ACTION: 30 day notice of information collection under review: Department of Justice procurement blanket clearance.

The Department of Justice, Justice Management Division, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register**, volume 69, number 6, on page 1603, on January 9, 2004, allowing for a 60 day public comment period.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 4, 2004. This process is conducted in accordance with 5 CFR 3120.10.

Written comments and/or suggestions regarding the items contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs: Attention: Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile on (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Department of Justice Procurement Blanket Clearance.

(3) *The Agency Form Number, if any, and the Applicable Component of the Department of Justice Sponsoring the Collection:* Form Number: None. Sponsor: Justice Management Division.

(4) *Affected Public Who Will be Asked or Required to Respond, as Well as a Brief Abstract:* Primary: Commercial organizations and individuals who voluntarily submit offers and bids to compete for contract awards to provide supplies and services required by the Government. All work statements and pricing data are required to evaluate the contractors bid or proposal.

(5) *An Estimate of the Total Number of Respondents and the Amount of Time for an Average Respondent to Respond:* 5,996 respondents, 20 hours average response time.

(6) *An Estimate of the Total Public Burden (in Hours) Associated with this Collection:* 119,920 hours annually.

FOR FURTHER INFORMATION CONTACT: Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: April 29, 2004.

Brenda E. Dyer,

Department Deputy Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 04–10182 Filed 5–4–04; 8:45 am]

BILLING CODE 4410–CJ–P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Collection; Comment Request—Workforce Investment Act (WIA) of 1998: OMB Approval for Five-Year State Plan Modifications Submitted Under the Planning Guidance and Instructions for Title I and the Wagner-Peyser Act

February 25, 1999.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (P.A.–95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension of the "Planning Guidance and Instructions for Submission of the Strategic Five-Year State Plan and Plan Modifications for Title I of the Workforce Investment Act of 1998 (Workforce Investment Act) and the Wagner-Peyser Act." A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Submit comments below on or before July 6, 2004.

ADDRESSES: Send comments to Christine Kulick, Acting Division Chief, Office of One-Stop Operations, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210. Telephone: (202) 693–3045 (this is not a toll-free number); fax: (202) 693–3015; or via e-mail: *Kulick.christine@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Christine Kulick, Acting Division Chief, Office of One-Stop Operations, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210. Telephone: (202) 693–3045 (this is not a toll-free number); fax: (202) 693–3015; e-mail: *Kulick.christine@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 112(a) of the Workforce Investment Act (Pub. L. 105–220, August 7, 1998) requires the Governor of the state to submit a Strategic Five-Year State Plan to the Secretary of Labor in order to be eligible to receive an allocation under Sections 127 or 132 or to receive financial assistance under the Wagner-Peyser Act. Situations in which a new Five-Year Plan or Plan modification may be required by the Governor include when: (1) The approved Five-year Plan is expiring; (2) changes in Federal or state law or policy substantially change the assumptions upon which the plan is based; (3) there are changes in the statewide vision, strategies, policies, performance indicators, the methodology used to determine local allocation of funds, reorganizations which change the working relationship with system employees, changes in organizational responsibilities, changes to the membership structure of the State Board or alternative entity, and similar substantial changes to the states' workforce investment system; and (4) the state has failed to meet performances goals and must adjust service strategies.

II. Desired Focus of Comments

Currently, the Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed ICR can be obtained by contacting the office listed above in the addressee section of this notice.

III. Current Actions

The Workforce Investment Act of 1998 (Pub. L. 105–220, August 7, 1998), Section 112(a), requires the Governor of the state to submit a State Plan to the Secretary of Labor to be eligible to receive an allocation under Sections 127 or 132 or to receive financial assistance under the Wagner-Peyser Act. The Plan outlines a five-year strategy for the statewide workforce investment system of the state that meets the requirements of Sections 111 and 112 of the Act. This extension is needed in order for state governments to submit new Five-Year State Plans or modifications to existing Five-Year Plans as needed.

Type of Review: Extension.

Agency: Employment and Training Administration.

Title: Planning Guidance and Instructions for Submission of the Strategic Five-Year State Plan and Plan modifications for Title I of the Workforce Investment Act of 1998 and the Wagner-Peyser Act.

OMB Number: 1205–0398.

Total Respondents: 59.

Frequency: As needed.

Total Responses: one.

Average Time Per Response: 25 hours.

Estimated Total Burden Hours: 1,475.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for the Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: This 30th Day of April 2004.

Emily Stover DeRocco,

Assistant Secretary for Employment and Training.

[FR Doc. 04–10196 Filed 5–4–04; 8:45 am]

BILLING CODE 4510–30–U

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. NRTL2–98]

NSF International, Application for Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: This notice announces the application of NSF International (NSF) for expansion of its recognition to use an additional test standard, and to add two supplemental programs to its current scope of recognition. The notice also presents the Agency's preliminary findings on this application. This preliminary finding does not constitute an interim or temporary approval of this application.

DATES: You may submit comments in response to this notice, or any request for extension of the time to comment, by (1) regular mail, (2) express or overnight delivery service, (3) hand delivery, (4) messenger service, or (5) FAX transmission (facsimile). Because of security-related problems there may be a significant delay in the receipt of comments by regular mail. Comments (or any request for extension of the time to comment) must be submitted by the following dates:

Regular mail and express delivery service: Your comments must be postmarked by May 20, 2004.

Hand delivery and messenger service: Your comments must be received in the OSHA Docket Office by May 20, 2004. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m.

Facsimile and electronic transmission: Your comments must be sent by May 20, 2004.

ADDRESSES: Regular mail, express delivery, hand-delivery, and messenger service: You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket NRTL2–93, Room N–2625, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, NW., Washington, DC 20210. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery and messenger service.

Facsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number of this notice, Docket NRTL2–93, in your comments.

Internet access to comments and submissions: OSHA will place comments and submissions in response to this notice on the OSHA Web page *http://www.osha.gov*. Accordingly, OSHA cautions you about submitting information of a personal nature (*e.g.*, social security number, date of birth). There may be a lag time between when comments and submissions are received and when they are placed on the Web page. Please contact the OSHA Docket Office at (202) 693–2350 for information about materials not available through the OSHA Web page and for assistance in using the Web page to locate docket submissions. Comments and submissions will also be available for inspection and copying at the OSHA Docket Office at the address above.

Extension of Comment Period: Submit requests for extensions concerning this notice to: Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3653, 200 Constitution Avenue, NW., Washington, DC 20210. Or fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Bernard Pasquet or Roy Resnick, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N3653, Washington, DC 20210, or phone (202) 693–2110.

SUPPLEMENTARY INFORMATION:

Notice of Application

The Occupational Safety and Health Administration (OSHA) hereby gives notice that NSF International (NSF) has applied for expansion of its current recognition as a Nationally Recognized Testing Laboratory (NRTL). NSF's expansion request covers the use of additional programs and an additional test standard. OSHA's current scope of recognition for NSF may be found on the following informational Web page: *http://www.osha-slc.gov/dts/otpca/nrtl/nsf.html*.

OSHA recognition of an NRTL signifies that the organization has met the legal requirements in Section 1910.7 of Title 29, Code of Federal Regulations (29 CFR 1910.7). Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products "properly certified" by the NRTL to meet OSHA standards that require testing and certification.

The Agency processes applications by an NRTL for initial recognition or for expansion or renewal of this recognition following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the Agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. We maintain an informational web page for each NRTL, which details its scope of recognition. These pages can be accessed from our web site at *http://www.osha-slc.gov/dts/otpca/nrtl/index.html*.

The most recent notice published by OSHA for NSF's recognition covered an expansion of recognition, which became effective on April 3, 2003 (68 FR 16311).

The current address of the NSF facility already recognized by OSHA is: NSF International, 789 Dixboro, Ann Arbor, Michigan 48105.

General Background on the Application

NSF has submitted an application, dated October 8, 2003 (*see* Exhibit 14) to expand its recognition to include one additional test standard. The NRTL Program staff has determined this standard is an "appropriate test standard" within the meaning of 29 CFR 1910.7(c). Therefore, OSHA may approve this test standard for the expansion.

Prior to submitting this application, NSF submitted a request, dated July 31, 2003, (*see* Exhibit 15) to include several additional programs within its current scope of recognition. NSF has since amended its request to request only the addition of Programs 2 and 5. While we do not ordinarily prepare a **Federal Register** notice for requests to add programs to a NRTL's scope of recognition, we often incorporate such requests into notices that announce an application for recognition or expansion or renewal of recognition. The present notice follows this approach for NSF's application.

NSF seeks recognition for testing and certification of products for demonstration of conformance to the following test standard: UL 61010A–1, Electrical Equipment For Laboratory Use; Part 1: General Requirements.

Additional Programs

NSF has applied to use supplemental programs 2 and 5, based upon the criteria detailed in OSHA's March 9, 1995 **Federal Register** notice on the NRTL programs (60 FR 12980, 3/9/95). This notice lists nine (9) programs, eight of which (called the supplemental programs) an NRTL may use to control and audit, but not actually to generate, the data relied upon for product certification. An NRTL's initial recognition will always include the first or basic program, which requires that all product testing and evaluation be performed in-house by the NRTL that will certify the product. NSF's current scope also includes the use of Programs 4, 8, and 9. OSHA's on-site review report on NSF's application for expansion indicates that NSF appears to meet the criteria for use of the following additional supplemental programs:
Program 2: Acceptance of testing data from independent organizations, other than NRTLs.

Program 5: Acceptance of testing data from non-independent organizations.

Preliminary Finding on the Application

NSF has submitted an acceptable request for expansion of its recognition as an NRTL. In connection with this request, OSHA performed an on-site review of NSF's NRTL facilities and, in the on-site review report, the assessor recommended the expansion for the additional test standard (*see* Exhibit 16 in Docket No. NRTL2–98).

Our review of the application file, the assessor's report, and other pertinent documents, indicates that NSF should be capable of using the additional test standard listed above. Accordingly, OSHA has made a preliminary finding that NSF International can meet the requirements, as prescribed by 29 CFR 1910.7, for the expansion of its recognition to include that test standard. This preliminary finding does not constitute an interim or temporary approval of the application.

OSHA welcomes public comments, in sufficient detail, as to whether NSF has met the requirements of 29 CFR 1910.7 for expansion of its recognition as a Nationally Recognized Testing Laboratory. Your comments should consist of pertinent written documents and exhibits. To consider a comment, OSHA must receive it at the address provided above (*see* **ADDRESSES**), no later than the last date for comments (*see* **DATES** above). Should you need more time to comment, OSHA must receive your written request for extension at the address provided above no later than the last date for comments. You must include your reason(s) for any request for extension. OSHA will limit any extension to 30 days, unless the requester justifies a longer period. We may deny a request for extension if it is frivolous or otherwise unwarranted. You may obtain or review copies of NSF's request, the recommendation on the expansion, and all submitted comments, as received, by contacting the Docket Office, Room N2625, Occupational Safety and Health Administration, U.S. Department of Labor, at the above address. You should refer to Docket No. NRTL2–98, the permanent record of public information on NSF's recognition.

The NRTL Program staff will review all timely comments and, after resolution of issues raised by these comments, will recommend whether to grant NSF's expansion request. The Agency will make the final decision on granting the expansion and, in making this decision, may undertake other proceedings that are prescribed in Appendix A to 29 CFR 1910.7. OSHA will publish a public notice of this final decision in the **Federal Register**.

Signed at Washington, DC this 22 day of April, 2004.

John L. Henshaw,

Assistant Secretary.

[FR Doc. 04–10165 Filed 5–4–04; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Combined Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that three meetings of the Combined Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506 as follows:

Design: June 2–3, 2004, Room 716 (Access to Artistic Excellence category). A portion of this meeting, from 1 p.m. to 2 p.m. on June 3rd, will be open to the public for policy discussion. The remaining portions of this meeting, from 9 a.m. to 5 p.m. on June 2nd, and from 9 a.m. to 1 p.m. and from 2 p.m. to 3 p.m. on June 3rd, will be closed.

Local Arts Agencies: June 2–3, 2004, Room 714 (Access to Artistic Excellence category). A portion of this meeting, from 10:30 a.m. to 12 p.m. on June 3rd, will be open to the public for policy discussion. The remaining portions of this meeting, from 9 a.m. to 5 p.m. on June 2nd and from 9 a.m. to 10:30 a.m. on June 3rd, will be closed.

Media Arts: June 7–9, 2004, Room 716 (Access to Artistic Excellence category). A portion of this meeting, from 11:15 a.m. to 12:15 p.m. on June 9th, will be open to the public for policy discussion. The remaining portions of this meeting, from 9 a.m. to 5:30 p.m. on June 7th and 8th, and from 9 a.m. to 11:15 a.m. and 12:15 p.m. to 3 p.m. on June 9th, will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of April 14, 2004, these sessions will be closed to the public pursuant to subsection (c)(6) of 5 U.S.C. 552b.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and, if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5691.

Dated: April 28, 2004.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 04–10185 Filed 5–4–04; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection; Comment Request; Correction

AGENCY: National Science Foundation.

ACTION: Notice; correction.

SUMMARY: The National Science Foundation (NSF) published a document in the **Federal Register** of April 12, 2004, concerning request for

comments on a proposed information collection. The document contained an incorrect title for the information collection.

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send e-mail to *splimpto@nsf.gov.*, Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., eastern time, Monday through Friday.

Correction

In the **Federal Register** of April 12, 2004, in FR Doc. 04–8174, on page 12941, first column, correct the title of the information collection to read: Monitoring for the National Science Foundation's Math and Science Partnership (MSP) Program.

Dated: April 29, 2004.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 04–10142 Filed 5–4–04; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–293]

Entergy Nuclear Generation Company, Entergy Nuclear Operations, Inc.; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission or NRC) has granted the request of Entergy Nuclear Operations, Inc. (ENO or the licensee) to withdraw its January 16, 2004, application for a proposed amendment to Facility Operating License No. DPR–35 for the Pilgrim Nuclear Power Station, located in Plymouth County, Massachusetts. ENO supplemented its application by letter dated February 25, 2004.

The proposed amendment requested approval of an engineering evaluation performed in accordance with facility Technical Specification (TS) 3.6.D.3 to justify continued power operation with safety relief valve (SRV)—3A and SRV—3D discharge pipe temperatures exceeding 212 degrees Fahrenheit for greater than 24 hours as required by TS 3.6.D.4.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on February 17, 2004 (69 FR 7522). However, by letter dated March 26, 2004, the licensee withdrew the request.

For further details with respect to this action, *see* the application for amendment dated January 16, 2004, as supplemented by letter dated February 25, 2004, and the licensee's letter dated March 26, 2004, which withdrew the application for license amendment. 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. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (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's PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 26th day of April, 2004.

For the Nuclear Regulatory Commission.

Travis L. Tate,

Project Manager, Section 2, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–10161 Filed 5–4–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Radiac Research Corporation, Brooklyn, New York; Receipt of Request for Action Under 10 CFR 2.206

Notice is hereby given that by petition dated November 3, 2003, Mr. Michael B. Gerrard, representing Neighbors Against Garbage, *et al.* (petitioners), have requested that the Nuclear Regulatory Commission (NRC) take action with regard to Radiac Research Corporation Brooklyn, New York, a licensee with the New York State Department of Labor. By letter dated December 17, 2003, NRC staff informed Mr. Gerrard that his letter dated November 4, 2003, submitted on behalf of Neighbors Against Garbage, was being considered under 10 CFR Part 2.206 and that his request for emergency action had been denied.

The petitioners requested that the NRC use its authority to protect the common defense and security under the Atomic Energy Act of 1954 to close the Radiac facility. As the basis for the request, the petitioner stated that the radioactive waste storage operation adjoining a hazardous waste transfer and storage operation at the Radiac Research Corporation in Brooklyn, New York represented a significant risk.

The request meets the criteria for evaluation pursuant to 10 CFR 2.206 of the Commission's regulations and will be reviewed accordingly. The request has been referred to the Director of the Office of Nuclear Material Safety and Safeguards. As provided by Section 2.206, appropriate action will be taken on this petition within a reasonable time. A copy of the petition is available for inspection in the Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 27th day of April, 2004.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Director, Office of Nuclear Safety and Safeguards.

[FR Doc. 04–10160 Filed 5–4–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will convene a teleconference meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on May 13, 2004. The topic of discussion will be "ACMUI Vote on the Dose Reconstruction Subcommittee's Recommendation Relating to the NRC's Method of Dose Reconstruction."

TIME: The Thursday, May 13, 2004, teleconference meeting will be held from 1 p.m. to 2 p.m. Eastern Daylight Time.

Public Participation: Any member of the public who wishes to participate in the teleconference discussion may contact Angela R. Williamson using the contact information below.

FOR FURTHER INFORMATION CONTACT: Angela R. Williamson, telephone (301) 415–5030; e-mail *arw@nrc.gov* of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Conduct of the Meeting: Leon S. Malmud, M.D., will chair the meeting. Dr. Malmud will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit a reproducible copy to Angela Williamson, U.S. Nuclear Regulatory Commission, Two White Flint North, Mail Stop T8F5, Washington, DC 20555–0001. Hard copy submittals must be postmarked by May 10, 2004. Electronic submittals must be submitted by May 12, 2004. Any submittal must pertain to the topic on the agenda for the meeting.

2. Questions from members of the public will be permitted during the meeting, at the discretion of the Chairman.

3. The transcript and written comments will be available for inspection on NRC's Web site (*http://www.nrc.gov*) and at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852–2738, telephone (800) 397–4209, on or about June 1, 2004. Minutes of the meeting will be available on or about June 14, 2004.

This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10, *U.S. Code of Federal Regulations*, Part 7.

Dated: April 29, 2004.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 04–10159 Filed 5–4–04; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Executive Office of the President; Draft Report of the Small Business Paperwork Relief Act Task Force

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice and request for comments.

Authority: The Small Business Paperwork Relief Act (44 U.S.C. 3520).

SUMMARY: The Small Business Paperwork Relief Task Force requests comments on the attached Draft Report. In this Draft Report, the Small Business Paperwork Relief Task Force discusses and makes recommendations concerning the improvement of electronic dissemination of information collected under Federal requirements and a plan to develop an interactive Government-wide Internet program to identify applicable collections and facilitate compliance.

DATES: Submit comments on or before June 4, 2004.

ADDRESSES: Comments on this Draft Report should be addressed to Jonathan Koller, Office of E-Government and Information Technology. You are encouraged to submit these comments by facsimile to (202) 395–0342, or by electronic mail to *smallbiz@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Koller, Office of Electronic Government and Information Technology, OMB Washington, DC 20503 (202) 395–4955. Inquiries may be submitted by facsimile to (202) 395–0342.

SUPPLEMENTARY INFORMATION: Under the SBPRA (44 U.S.C. 3520) Congress directed the Director of OMB to convene a Task Force to study the feasibility of streamlining requirements with respect to small business concerns regarding collection of information and strengthening dissemination of information (44 U.S.C. 3520, Pub. L. 107–198). More specifically, this Task Force is charged with examining five tasks designed to reduce the information collection burden placed by government on small businesses. These tasks are as follows:

1. Examine the feasibility and desirability of requiring the consolidation of information collection requirements within and across Federal agencies and programs, and identify ways of doing so.

2. Examine the feasibility and benefits to small businesses of having OMB publish a list of data collections organized in a manner by which they can more easily identify requirements with which they are expected to comply.

3. Examine the savings and develop recommendations for implementing electronic submissions of information to the Federal government with immediate feedback to the submitter.

4. Make recommendations to improve the electronic dissemination of information collected under Federal requirements.

5. Recommend a plan to develop an interactive Government-wide Internet program to identify applicable collections and facilitate compliance.

While carrying out its work, the Task Force is to consider opportunities for the coordination of Federal and State reporting requirements, and coordination among individuals who have been designated as the small business "point of contact" for their agencies.

On June 28, 2003, the Task Force submitted a report of its findings on the first three issues. This report, which addresses the final two issues, is required no later than two years after enactment, or June 28, 2004. Both reports must be submitted to the Director of OMB, the Small Business and Agriculture Regulatory Enforcement Ombudsman, and the Senate Committees on Governmental Affairs and Small Business and Entrepreneurship, and the House Committees on Government Reform and Small Business.

The Director of OMB appointed Dr. John D. Graham, Administrator of the Office of Information and Regulatory Affairs, and Ms. Karen S. Evans, Administrator for E-Government and Information Technology, to co-chair the Task Force.

The Act specifies the following agencies to be represented on the SBPRA Task Force: Department of Labor (including the Bureau of Labor Statistics, and the Occupational Safety and Health Administration); Environmental Protection Agency; Department of Transportation; Office of Advocacy of the Small Business Administration; Internal Revenue Service; Department of Health and Human Services (including the Centers for Medicare and Medicaid Services); Department of Agriculture; Department of the Interior; the General Services Administration; and two other participants to be selected by the Director of OMB (who are the Department of Commerce and additional representatives from the Small Business Administration).

The Task Force is now seeking input from all interested parties concerning the findings and recommendations contained in this draft report. All comments will be considered and may result in modifications to the final report. A summary of the public comments with responses of the Task

Force will be attached to the final report.

John D. Graham,

Administrator, Office of Information and Regulatory Affairs.

Karen S. Evans,

Administrator for E-Government and Information Technology.

Executive Summary

The Small Business Paperwork Relief Act of 2002 (the Act) was enacted June 28, 2002. The goal of the Act is to reduce the burden of Federal paperwork on small businesses. The Act requires the Federal government to (1) publish an annual list of the compliance assistance resources available to small businesses, (2) establish a single point of contact within agencies to interact with small businesses, and (3) establish an interagency Task Force to study and recommend additional means of reducing the burden on small businesses.

On June 28, 2003, the SBPRA Task Force submitted their first report to Congress outlining a series of recommendations that would streamline the information submission process and reduce the paperwork burden for small businesses. It identified a number of steps to be taken to consolidate information collections, organize a list of such collections, and provide for electronic submission of forms.

This second SBPRA Task Force report builds upon the recommendations provided in the first report and reflects the impact that the first report has had upon the small business community. It identifies a series of recommendations on disseminating information and specifically identifies a solution, developed over the previous year among agencies, to identify applicable collections and facilitate compliance with Federal paperwork requirements.

First, the Task Force identifies opportunities for improved consolidation or coordination of information dissemination efforts. There are significant barriers to the establishment of a unilateral requirement or mandate for Federal agencies to coordinate information dissemination activities. However, a number of steps are recommended to encourage similar access to the broader base of Federal information. These steps include augmenting agency SBPRA plans, improving the organization and classification of information and establishing a partnership between agencies and the small business community.

Second, the Task Force describes an interactive Internet-based system to help small business better understand existing paperwork requirements and make it easier for businesses to comply with such requirements. The Business Gateway initiative will provide a single web point of access for relevant regulatory information on all Federal forms, and harmonize industry-specific information collection requirements.

The Task Force and their members have identified a significant number of opportunities for the Federal government to support and provide better assistance to the small business community. The recommendations in both reports, if implemented, will fulfill the objectives outlined in the Act.

1. The Small Business Paperwork Relief Act Task Force

A. What Specific Functions Are Assigned to the Task Force?

The Small Business Paperwork Relief Act requires the Director of Office of Management and Budget (OMB) to convene and chair a Task Force "to study the feasibility of streamlining requirements with respect to small business concerns regarding collection of information and strengthening dissemination of information."

More specifically, the Task Force is charged with five tasks designed to reduce the information collection burden placed by the Federal government on small businesses. These tasks are as follows:

1. Examine the feasibility and desirability of requiring the consolidation of information collection requirements within and across Federal agencies and programs, and identify ways of doing so.

2. Examine the feasibility and benefits to small businesses of having OMB publish a list of data collections organized in a manner by which they can more easily identify requirements with which they are expected to comply.

3. Examine the savings and develop recommendations for implementing electronic submissions of information to the Federal government with immediate feedback to the submitter.

4. Make recommendations to improve the electronic dissemination of information collected under Federal requirements.

5. Recommend a plan to develop an interactive Government-wide Internet program to identify applicable collections and facilitate compliance.

While carrying out its work, the Task Force is asked to consider opportunities for the coordination of Federal and State reporting requirements, and coordination among individuals who have been designated as the small business "point of contact" for their agencies.

The Task Force is required to submit a report of its findings on the first three tasks no later than one year after enactment, or June 28, 2003. A second report on the final two tasks is required no later than two years after enactment, or June 28, 2004. Both reports must be submitted to the Director of OMB, the Small Business and Agriculture Regulatory Enforcement Ombudsman, the Senate Committees on Governmental Affairs and Small Business and Entrepreneurship and the House Committees on Government Reform and Small Business.

This draft represents the second report required under the Act. The first report was submitted to Congress on June 28, 2003 and is available at *http://www.whitehouse.gov/omb/inforeg/sbpr2003.pdf.*

B. Which Agencies Are Represented, and Who Are the Small Business Paperwork Relief Task Force Members?

The Director of OMB appointed Dr. John D. Graham, Administrator of the Office of Information and Regulatory Affairs, and Karen S. Evans, Administrator of the Office of E-Government and Information Technology, to co-chair the Task Force. Dr. Graham is responsible for administering the Paperwork Reduction Act and for overseeing the Federal regulatory process. Ms. Evans is responsible for overseeing the President's Expanding E-Gov Initiative, including a Government-to-Business Portfolio of projects.

The Act specifies the following agencies to be represented on the Task Force: The Department of Labor (including the Bureau of Labor Statistics, and the Occupational Safety and Health Administration), Environmental Protection Agency, Department of Transportation, Office of Advocacy of the Small Business Administration, Internal Revenue Service, Department of Health and Human Services (including the Centers for Medicare and Medicaid Services), Department of Agriculture, Department of Interior, General Services Administration and two other participants to be selected by the Director of OMB (the Department of Commerce and additional representation from the Small Business Administration were chosen).

C. What Are the Goals, Objectives, and Operating Principles of the Task Force?

Goal: Identify effective, realistic ways to reduce the burden on small

businesses by making it easier to find, understand, and comply with government information collections.

Objective 1: Recommend actions that can make it easier for small businesses to find out what information collections apply to them from individual Federal agencies, across all Federal agencies, and from State and local governments, where practicable.

Objective 2: Recommend actions that can reduce the difficulty, frequency, redundancy, and expense of compliance for small businesses.

Objective 3: Recommend actions that will help small businesses understand why information is being collected and how it benefits them.

Operating Principles:

1. Recommendations should be consistent with principles of the President's Management Agenda:

a. Citizen-centered, not bureaucracy-centered.

b. Small business concerns and burden reduction are a priority for the Federal government.

c. Results-oriented. Success should be measured by benefits that are demonstrable.

d. Market-based, actively promoting innovation.

2. Recommendations must be technically feasible.

3. Recommendations should be supportable within existing government agencies and management structures.

4. Recommendations must be achievable given existing Agency resources, or sufficient case must be made to support additional costs.

5. Recommendations should address both short term and long term remedies.

6. Recommendations should leverage and build on efforts underway that address the Task Force's goals.

7. Recommendations should be consistent with lessons learned and based on best practices from past efforts.

D. What Methods Did the Task Force Use to Derive Its Recommendations?

The Task Force began its work with a meeting of the full membership to develop a common understanding of the law, project goals, scope, roles and responsibilities, resource requirements, strategy, timeline and deliverables.

After the initial meeting, the Task Force formed two subcommittees to address each of the two statutorily required tasks questions in greater detail. Additional staff experts from Federal agencies joined the effort. The subcommittees used methods such as assigning specific questions to experts for research, in-person and virtual brainstorming, inventorying and investigating activities and projects already underway, studying best practices and lessons learned from prior/current activities, and studying the results of public outreach conducted by the Small Business Administration's (SBA) Office of Advocacy and other reference material intended to provide input from the business community and other stakeholders.

The subcommittee members and staff experts worked together to develop findings and recommendations.

The SBA's Office of Advocacy held a public meeting on February 9, 2004, to solicit the views of interested persons regarding the Task Force's duties. The Chief Counsel for Advocacy convened and chaired the meeting.

2. Findings and Recommendations

A. Task #4: Improve Electronic Dissemination of Information Collected Under Federal Requirements

Problem Statement

As noted earlier in this report, accessing the wide variety of public information collected by the Federal government can place a difficult, time-consuming, and expensive burden on citizens and businesses, particularly small businesses. Understanding the information that is available is made more difficult by the size and complexity of the government and enormous volume of information collections that the Federal government conducts. All sectors of the public, including small businesses and private citizens, should be able to easily access, retrieve, and use available government information, ideally free of charge. A May 2000 report stated the government then had an estimated 20,000 separate homepages and 40 million web pages.[1] Substantial growth has occurred since then and current seekers of government information often find poorly organized government databases and websites lacking user-friendly search capabilities.

One obvious challenge is simply the enormity of the volume of information collected. Improving electronic dissemination of Federally-collected information requires enhancing government information technology, both in terms of simple agency management and distribution, and in terms of capabilities for sharing with the public and other government entities. Other issues are the adequacy of searching mechanisms and use of government terminology versus common terms.

During the Small Business Administration's Office of Advocacy Public Outreach Meeting held on February 9, 2004, the following issues and problems were identified by small business community representatives in the area of information dissemination:

1. Federal agency web sites need to be customer-centric with information organized by topic area, not by the organization that collected or reported the information.

2. There is a need for "one-stop shopping" or one source for information.

3. Search engines widely used on the Internet cannot locate Federal government information.

4. There is a need for a contact person or Hotline that can be called and that can assist in locating information.

5. Wherever possible, Federal agency web sites need to clearly date materials they post on the internet. The public wants to know when material was created or collected. Dating materials provides the public with guidance as to how relevant or timely the resources are and in some circumstances, whether the materials were prepared prior to or after, pertinent regulatory change.

In addition the Task Force has identified eight specific areas that contribute the need for improving the dissemination of federally-collected information:

1. Information is frequently difficult to locate.

2. Some information is not in a useful form. For example, data sets should be provided in formats that allow adjustment for specialized use.

3. Not all information that is collected may be disseminated; for example, information that may not be useful in aggregated form and information collected for enforcement and other protected purposes.

4. Many small businesses and other citizen groups do not know how or where to locate the information, or even that specific information is available. Today's public may not realize what information is available, may not know how to access it, and may not recognize the value of secondary uses.

5. The needs of small businesses and citizens are many and varied, and are sometimes not well defined; and agencies frequently do not make adequate efforts to address these needs.

6. Collected information needs to be more broadly shared among Federal agencies, and State and local governments.

7. Information integrity must be maintained. Assuming that Federally-

[1] *Workshop Report on a Future Information Infrastructure for the Physical Sciences: The Facts of the Matter: Finding, Understanding and Using Information About Our Physical World,* Washington, DC, May 30–31, Department of Energy, Office of Scientific and Technical Information.

collected information is quality-verified and reliable, maintaining the integrity of the information is a necessary consideration. Some information is time-sensitive or short-lived, and may lose its relevance or importance if not used quickly.

The Task Force has considered ways to improve access to information collected by identifying actions that Federal agencies can take to improve and coordinate their electronic dissemination of information.

Assumptions

In developing these recommendations, the Task Force made the assumption that electronic information dissemination issues are not restricted to small businesses, but apply to all businesses, state and local governments, and citizens. Therefore the recommendations have a general focus, with an emphasis on small business needs.

These recommendations will not focus on certain categories of Federally-collected information (explained below) either because such information lacks utility to the public or because of direct prohibitions to its release.

1. As recognized by the Freedom of Information Act's nine exemption categories some information in the possession of the Federal Government is not appropriate for public disclosure. Such sensitive information can include taxpayer data, personal or medical data, certain proprietary data, and information that would reveal sensitive deliberative processes.

2. Some information that is collected is not useful in an aggregated form or when it is retained in "raw" form. These recommendations should be focused on the particular stage or stages of the information life cycle that is useful to the particular constituencies of the information. However, it should be noted that multiple specialized constituencies often exist for the information that often make proactive dissemination appropriate at many or all stages.

Issues

The Task Force was asked to specifically consider the methods of improving the electronic dissemination of information collected under Federal requirements. The Task Force conducted a review, which identified a number of Federal government initiatives to improve electronic information dissemination. Several of these initiatives are described in Appendix I.

The Task Force believes that there is opportunity for improved consolidation or coordination of information dissemination efforts. This report outlines recommendations for accomplishing this task. However, the Task Force recognizes that, given the diversity of Federal government activities, no one method or template for disseminating information would fit all requirements. Below are four obstacles that make it difficult to improve dissemination of information through a top-down approach.

Vast Amount of Federal Information

Federal agencies collect a vast amount of information and make a great deal of it available to the public (as allowed by law and pursuant to statistical standards). However, this information or data is not readily available to the lay public and is spread across many different Federal agencies. The sheer volume of Federal information makes improvement in dissemination a very complex, time-consuming task.

Capabilities of the Small-Business Point of Contact

The Act requires each Agency to designate a single point of contact. Small business participants in the SBA public meeting were very supportive of this measure. The point of contact should be able to assist in locating electronic information disseminated by the Agency; however, the variety and volume of information collected and disseminated by any agency makes that a difficult task for a single point of contact. Defining how each agency should accomplish this educational service and assistance is difficult. An agency with a single point of dissemination, particularly where it is applicable to a discrete group of businesses, may find it relatively easy to provide a telephone service to address all of the relevant issues. More difficult would be the provision of knowledgeable assistance and services to a large number of businesses across many populations with different information requirements. In addition, if agencies have well-designed websites that provide information on whom to call or contact for specific types of information, fewer inquiries will go to their small business point of contact.

Challenges of Cross-Agency Initiatives

Although the E-Government initiatives have begun to demonstrate how cross-agency initiatives can be governed and financed, it has not been without a great deal of struggle. A significant challenge remains for agencies to coordinate and integrate their information.

Determining Customer Needs

One important role that the Federal government needs to fill is that of a service organization that provides its citizens/customers with the information and assistance they need to comply with Federal regulations and other requirements. In order to adequately serve its customers, the Federal government needs to be well informed about its customers' needs, expectations and abilities. Thus, agencies need to devote more time to better determine customer needs and abilities and to better inform, educate, and assist them. They need to be proactive, using an assessment of their needs and abilities to plan, design, and promptly deliver the right information, assistance, and service to our customers.

To determine customer needs, the government must identify its customers. Depending on the situation, our customers include the citizenry at large, small businesses, the third parties that represent them, and many other groups. We need to identify our customers, and determine how best to organize the information and services to meet the unique needs of specific customer market segments. Often these customers and their needs are very different for different agency missions. For example, in complying with Federal tax law, most guidance is general in nature, applies to a vast number of citizens, and is segmented by the type of organizational entity or form. Other regulators, such as Department of Transportation, have a narrower customer base that can more readily be segmented. Third parties are sometimes used to address regulatory compliance. For instance, 80% percent of small businesses use the services of a tax professional to assist them with tax law compliance, so the needs of third-party customers must be addressed as well.

Recommendations

The Task Force has developed several recommendations to achieve the Act's goals. The recommendations discussed below are consistent with the operating principles of the Task Force. They have been limited to options considered technically feasible, supportable within existing government management structures, and achievable given existing agency resources. The Task Force also considered the previous legislative efforts to address paperwork burden, discussed above, when developing the recommendations. The recommendations listed below are intended to supplement these prior efforts, and they do not alleviate the need to continue those efforts. The Task

Force determined that more can and should be done within the existing framework created by these Acts to improve access to Federally-collected information.

A number of government projects, including multi-agency projects, have proven the feasibility and desirability of the consolidation of information dissemination activities, as well as improving the labeling, organization, and visibility of Federally collected data. While there are significant barriers to the establishment of a unilateral requirement or mandate to do so, a number of steps can be recommended to encourage similar approaches to a broader base of Federal information. Based on the analysis of the problem, assumptions, and issues discussed above, the Task Force recommends the following actions to improve electronic dissemination of information collected under Federal requirements. These recommendations should not be viewed as discrete actions; the recommendations form an integrated and inter-dependent set of actions.

1. *Require Agencies to Augment their SBPRA Plan.* The First Task Force Report, of June 2003, recommended that agencies be required to develop an SBPRA Plan. It is the recommendation of this Task Force that any such plan be augmented with the following information:

a. The plan should outline specific steps the agency would take to improve electronic dissemination of information collected under Federal requirements.

b. The plan should set goals for improving electronic dissemination of information, and establish timelines for achieving those goals.

c. The plan should identify activities that can be undertaken with other agencies having similar or related information collections. (See Recommendation 5 below.)

d. Additionally, each Agency should identify opportunities to improve public access to information; provide assistance to the public in locating, and using, Federally-collected information; and market, or publicize the availability of the information.

2. *Improve the Organization and Classification of Information.* Unfortunately, much government information is still categorized and displayed based on the organizational structure of the agency. This approach is not intuitively obvious to the customer, and desired information is difficult to find unless the customer is familiar with a particular program and where that program falls within an agency.

For example, within the Department of Agriculture, in order to find out about the requirements for conducting aquaculture business or how to certify fish health prior to export, a customer must first go to the Animal and Plant Health Inspection Service (APHIS) website, look under Veterinary Service to find the aquaculture program information. Only after examining the "Link to Other Sites" is the customer directed to aquaculture resources. Clearly, from a user's perspective, a search based on the topic "aquaculture," which produces the "Resource" webpage, is a more direct path to the information.

In order to make government information more readily available to businesses or citizens, Federal agencies should move from an organizational context to a subject matter and/or audience context to organize and classify information. One approach for improving the organization and classification of government information is to create a standard Federal methodology for classifying information on web pages to improve Federal website content management. A methodology for organizing government information could include the following:

a. A common Federal subject tree for Federal Web sites could significantly assist small businesses and the general public to find the information they seek. The Interagency Committee on Government Information is looking at this issue and is considering the public-centric taxonomies on FirstGov.gov and the departmental portals, as well as the business-line taxonomies used in the Federal Enterprise Architectures Business Reference Model. The ICGI should also consider and compare the **Federal Register** Thesaurus among the other taxonomies it is reviewing. The **Federal Register** Thesaurus provides standard broad topics used to classify all Federal regulations and is particularly useful to small businesses.

b. Assisted and unassisted search and navigation could be improved by establishing some basic, common metadata for all top level websites. Areas to be addressed include:

(a) The terminology and taxonomy must include the common terms used by customers, especially small business owners, to locate information.

(b) The Government needs to explore metadata and taxonomies used on business-friendly web sites and by web search engines, especially with regard to how they classify and organize government data, and to identify commonly requested government information.

(c) Trade and library associations can also assist with classification of Federal information, which would make it more accessible to the public, including small businesses.

(d) There is a need to understand and stay current with the state-of-the-art search techniques and taxonomy structures.

(e) The Interagency Committee on Government Information (see Appendix I), established by the E-Gov Act of 2002, has commissioned working groups to address these areas, and their work needs to be supported by the agencies.

Adopting a common Federal subject tree as a Federal taxonomy would, at a minimum, simplify a customer's navigation and search for information by making the classification of subject and content more consistent across the Federal government. Moving toward standard metadata tagging of websites and information across the Federal government would provide the opportunity to construct search engines and wizards that search for information based not only on the subject, but on the business context (*i.e.*, taxes, agricultural loans), linking the search for information more directly to the customer's business needs.

3. *Improve Outreach To Small Businesses.* Agencies should also take steps to improve outreach to small businesses, including public meetings and announcements regarding information that is available from the agency, especially the collections of information that are of particular interest to small businesses. Additional outreach efforts would significantly improve an agency's efforts to identify opportunities for improving the dissemination of information. As part of this effort, OMB published a summary of the Compliance Assistance Resources offered by the various agencies in the **Federal Register** (68 FR 38525–38556 (June 27, 2003)). However, more extensive outreach and education efforts are required by the regulatory agencies to make customers aware of the information, assistance, and services that are available to help them comply with regulations and how to access them.

4. *Broaden and Improve Partnerships among Agencies with Similar or Overlapping Information Collections.* Agencies, with varying degrees of success, have tried independently or in small consortiums, to provide their customers with the information, assistance, and services that meet their needs and expectations. Agencies should be encouraged to expand their effort in working across agency boundaries to improve information

dissemination. Agencies should take additional steps to identify other agencies, including state and local government agencies, with similar types of information and partner with them to develop consolidated access to those information collections. This would allow Agencies to eliminate duplication of dissemination and better ensure the accuracy and currency of information. Additionally, it would assist Agencies in identifying sources of information that would be useful in their work. For example, links between web sites with similar or related data can provide additional ease of use and capabilities to the customer.

5. *Use the E-Government Cross-Agency Initiatives to Improve Dissemination of Information.* The Task Force strongly supports the Administration's E-Government initiatives as ways to further improve the dissemination of electronic information. The E-Gov initiatives should be a tool to achieve further improvements through process re-engineering when feasible. In this way the E-Gov working groups would complement, rather than duplicate, other information dissemination efforts within the agencies. Highlights of activities of some of the E-Government initiatives are included in Appendix I. Further work will need to be done to consolidate or integrate the products of the E-Gov initiatives as these initiatives mature.

6. *Determine Customer Needs.* Agencies need to conduct a needs and abilities assessment of their customer base in order to provide the right information and services, in an understandable and accessible format that facilitates compliance with Federal regulations and minimizes customer burden. The agencies should make every effort to use existing opportunities and avenues for administering the data collection instrument, including focus groups and surveys, to help determine how the collected data could best be disseminated back to the public. Focus groups and Government-wide portals, such as Business.Gov and FirstGov.gov, should also be employed to collect data regarding customer needs.

7. *Market Information.* It is the responsibility of the Federal agencies to reach out and inform the public about these resources. Marketing or outreach can be done by individual agencies or by interagency "workgroups." The SBA should develop a cross-agency marketing or outreach campaign along the lines described above, requesting any additional resources needed through normal budget channels. In addition, third-party organizations, such as universities, trade associations, trade journals and professional societies, should be employed to spread the word to their members (such organizations usually have multiple avenues for communicating "websites, newsletters, magazines, conferences, *etc.*).

8. *Explore Public/Private Partnerships with Web Services Companies.* Federal agencies need to explore working with companies whose search engines look for, classify and link to Agency information. This will assist in identifying other ways of looking at the collection of Federal information.

9. *Don't Forget the Human Interface.* There is much to be said for electronic dissemination of information, but, as was clearly articulated in the Public Outreach Meeting, there will always be a need for a person to be available to directly answer questions and provide assistance. This service can be provided through Call Centers and other techniques. Federal Help Line employees and small business points of contact should be educated on where to refer data requests across the government, as should specific program employees who may receive questions on data produced by agencies outside their own. Such services can be augmented, but not replaced, by providing "Frequently Asked Questions" on web sites, to respond 24 hours a day to commonly asked questions.

B. Task #5: Recommend a Plan to Develop an Interactive Government-wide Internet Program to Identify Applicable Collections and Facilitate Compliance

A key recommendation from last year's Task Force Report was the use of information technology to reduce the paperwork burden on small businesses. The Task Force recommended application of several ongoing Presidential E-Government initiatives and management reform programs to overcome the technology and policy barriers hindering the harmonization, streamlining, and reengineering necessary to achieve the Act's objectives. Prominent among these recommendations was the realignment of the Business Compliance One-Stop (BCOS) initiative to focus more specifically on reducing the paperwork burden for small businesses. As a direct result of the first Task Force report, the BCOS initiative was renamed Business Gateway, and its governance team began work identifying a solution to the concerns raised by the Congress and citizens, namely to develop an interactive system to identify applicable collections and facilitate compliance.

In developing the recommendation in this second report, the Task Force built upon the following recommendations from the first report.

1. Adoption of a Set of Technology Standards—To provide opportunities for consolidated reporting and information sharing, the gateway should adopt standards that are consistent with industry standards when appropriate. The adopted set of standards should address format, design, security measures, and architecture.

2. Protect and Ensure Privacy—In developing the technology standards, the Federal government should include small businesses and their representatives in development and validation of a strong privacy policy.

3. Strategic Plan—Establish a strategic plan or business case that takes a synergistic approach to an integrated e-forms solution across all Federal agencies. The Federal government should work together to create a road map to implement the plan, within each agency's strategic planning and budget processes. The strategic plan should include burden reduction goals for small businesses.

4. Outreach Efforts to Small Business—Once reporting products become available that meet the government-wide standard, work with agencies to develop a multi-agency plan for marketing the products and services, and training and assisting small businesses to use them.

5. Work with Businesses and Associations—Fruitful areas for streamlining and harmonizing data requirements should be determined, including a new look for ways that businesses and associations can become viable, trusted, collection and dissemination points.

6. Approach Change Incrementally—Select each year a limited group of stakeholders to provide input on reducing information collection burdens.

7. Identify duplication through electronic forms management—The Paperwork Reduction Act requires agencies to self-certify that existing and proposed information gathering systems do not duplicate or overlap those of other systems in the same agency/department.

8. Encourage Agencies to Utilize "Smart" Electronic Forms—Consistent with the Government Paperwork Elimination Act (GPEA), federal agencies should develop "smart" electronic forms that provide immediate feedback to ensure that submitted data meet format requirements and are within the range of acceptable options for each data field. Government forms

should be a model of "user friendliness" and efficiency. Agencies should accept electronic submission of forms to avoid errors when paper forms are manually transcribed.

Recommendations

The Task Force proposes adoption of the implementation plan for the Business Gateway to help businesses find, understand, and comply with Federal laws, regulations, and information collection requirements.

As a result of the first task force report, the project team increased emphasis on consolidating and harmonizing Federal paperwork requirements, which would help meet the goals of the Act, the Paperwork Reduction Act (PRA), the Government Paperwork Elimination Act (GPEA), and the E-Government Act of 2002. In addition to addressing Federal paperwork requirements, Business Gateway will provide a Web-based portal for small businesses looking to find useful regulatory information in one place.

Business Gateway Vision, Mission, and Strategic Goals

The vision of the Business Gateway E-Government initiative is:

To reduce the burden on the Nation's small businesses by simplifying and improving electronic access to Federal Government information, programs and services and provide businesses and citizens with a one-stop means to find, fill, sign and submit forms and transactions electronically.

This vision is focused on alleviating the estimated $320 billion annual regulatory burden imposed on citizens and business by the Federal Government. Since forms account for about half of that burden, the initiative's emphasis on customer-friendly forms offers significant savings to small businesses that can be reinvested in productivity enhancement and job creation.

In order to achieve the vision, the Business Gateway seeks to build a Federal cross-agency infrastructure to provide useful regulatory information in one place, eliminate redundant data collection and provide electronically fill-able, file-able, and sign-able forms.

The initiative will result in an interactive Government-wide Internet solution that provides a "one-stop" access point for Federal regulatory and information collection requirements affecting small businesses; enables them to find, fill out, and sign the required forms; and ensures that information common to multiple Federal information collection requirements is gathered only once and used multiple times to ensure data integrity and consistency throughout the compliance process.

The goals of the Business Gateway are:

1. To provide the Nation's small business owner with a single access point to government services and information designed to assist them to start, run, and grow their business

2. To simplify, unify, and better manage citizen-facing E-forms infrastructure and processes on a government-wide basis

3. Begin the process of harmonizing and streamlining data.

Each of these goals is aligned with a specific technology solution, and the integration of these solutions will meet the requirements of the Act for "an interactive Government-wide system, available through the Internet" that eases the regulatory burden on small businesses. This integrated Internet system will also provide a single Federal cross-agency architectural framework that could eventually simplify the integration of Federal and state reporting requirements for small businesses. This will facilitate further dialogue between the Federal Government and the states on the coordination of reporting requirements as called for in both SBPRA and the E-Government Act. The following information describes each of the three specific goals.

Goal 1: To provide the Nation's small business owner with a single access point to government services and information designed to assist them to start, run, and grow their business.

To achieve this goal, the Business Gateway Program Office will develop a business portal on the Web, providing a "one-stop" service portal that greatly simplifies and streamlines the relationship between government, citizens and businesses by being the single access point for:

1. Government services and information needed to start, run, and grow a business.

2. Tools to find information and to comply with government laws and regulations.

The Business Gateway business portal will include a searchable library of information that deals with government services for businesses, and will provide links to several existing Federal Web sites with content and services relevant to small businesses. Examples of such sites include cross-agency Web sites such as Business.gov, Export.gov, Regulations.gov, and Grants.gov, and department/agency specific sites such as SBA.gov. The business portal will save small businesses approximately $56 million annually by consolidating relevant content and services in one place and by providing a user-friendly navigation scheme to make it easier to locate the desired information.

The Business Gateway business portal will adopt the uniform resource locator (URL), or Web address, currently used by the U.S. Business Advisor (Business.gov). The content of the U.S. Business Advisor will be updated, streamlined, and harmonized with similar content on BusinessLaw.gov and portions of SBA.gov to eliminate duplication, identify gaps in content or services, and greatly simplify navigation for an improved user experience.

The implementation of the Business Gateway business portal will occur in three phases.

In Phase I, the business portal will, in fact, be a "metasite" rather than a true portal, simply offering an aggregation of links to Federal Web sites selected for content and services relevant to small businesses. The metasite model will have a home page with a specific user interface, or "look and feel", but selecting a link will deliver the user to another Web site altogether. Also during this phase, the Business Gateway program office will develop an information architecture to provide a roadmap for business content to be included under the business portal.

In Phase II, the Web site will shift from a metasite to a true portal, utilizing a common look and feel for all offered content and services, even though it will access information from different agencies and technology platforms. The software tools used to develop and maintain the portal will give small businesses the option of a standard or custom interface depending on their needs.

In Phase III, the Business Gateway Program Office will fully integrate small business content and services into a common technology platform, with common tools to create, manage, publish, and integrate content. Federal agencies will still own the content and services, and the processes associated with them, but this fact will be transparent to small business users, who will have access to a common portal. User customization features will be fully available so that small businesses can tailor the portal to meet their unique needs.

Phase I is expected to be completed by September 2004. The timeline for subsequent phases are to be determined.

Goal 2: To simplify, unify, and better manage citizen-facing E-Forms infrastructure and processes on a government-wide basis.

This goal will be met through the development and deployment of a single point of entry to "Government to Business" (G2B) and "Government to Citizen" (G2C) Federal forms and forms systems from 43 Federal departments and agencies. This capability will be accessible through the business portal (Business.gov) and will eventually allow small businesses to electronically find, fill out, and file the necessary Federal forms for compliance with Federal laws and regulations, all from a single Web location.

The forms component of the Business Gateway will include a forms portal containing a catalog of G2C and G2B forms, regardless of format (electronic, paper, Web questionnaire, *etc.*). This catalog will perform two functions. First, the catalog will enable small businesses to locate a form in the Federal Government that they may need and point them to the appropriate Federal site to acquire the form or fill it out directly online and submit it for further processing. Second, the catalog will provide Federal agencies with a common architecture to manage common forms processes, including inventory, version control, access management, utilization metrics, metadata (data about the data elements on the form), search, and user customization.

The forms architecture will also provide a shared services utility for forms deployments in the Federal Government. This means that agencies seeking full compliance with GPEA by converting their paper forms to an electronic format will have a Federal cross-agency platform ready to support their requirements. This will eliminate the need for future agency-specific investments in new forms systems.

Eventually, the forms architecture will mature to include a forms engine that will support electronically "fill-able, file-able, and sign-able" forms. The forms engine will be integrated with an Extensible Markup Language (XML) Gateway, allowing the data collected by these forms to be routed to the appropriate agencies in XML format and fed directly into legacy systems for processing. The use of XML provides a common data standard for information sharing across the Federal Government and with other public and private sector enterprises.

The implementation of the Business Gateway forms component occurs in three phases. In Phase I, 43 Federal agencies will create and populate an electronic forms catalog by checking in their G2C and G2B forms. This will give small businesses a "one-stop" service portal for finding Federal customer-facing forms. Since all of the G2B and G2C transactions will have their metadata in one place, small businesses will be able to find the forms they need, no matter where they reside and regardless of the format, since the catalog links to existing agency-specific forms systems. In addition, the Business Gateway will sponsor a select number of hosted and brokered forms systems. Federal agencies that have yet to invest in forms systems will be supported by an e-forms shared services organization which will offer them assistance and e-forms options and help bring them into full GPEA compliance. Finally, select industry segments that are highly regulated will be used as a proof of concept to reduce overall forms burden through data harmonization and streamlining. This process will be explained under Goal 3.

In Phase II, hosted and brokered forms systems will continue to operate as an interim step between multiple agency-specific forms systems, which will also continue to exist, and a common forms engine to support all Federal forms requirements. These forms systems will facilitate the migration of those agencies that use them to the common forms engine and the XML Gateway when they are deployed.

In Phase III, the hosted and brokered forms systems under the shared services model will be migrated into the Federal forms engine that allows small businesses and citizens to find, fill, file, and sign forms, and the XML Gateway to facilitate data exchange with Federal agency legacy systems.

Goal 3: Begin the process of harmonizing and streamlining data collection in order to reduce burden and make it easier for businesses to interact with the Federal government.

To achieve this goal, the Business Gateway team will work with specific industries and Federal agencies to harmonize data elements, forms, and processes and reduce the regulatory paperwork burden by reducing the duplication and overlap in data and forms. The model resulting from these industry-specific pilot programs will be used to harmonize data in other industry sectors and business life cycle categories. The success of this effort will reduce the number of forms used across agencies, and allow small businesses to submit information common to multiple forms one time and have it reused many times. Both of these outcomes will reduce the amount of time small businesses spend complying with Federal laws and regulations.

The pilot projects identified for the Business Gateway address two heavily regulated industry sectors, trucking and surface coal mining that could benefit greatly from burden reduction. The development tasks to be accomplished during these pilot programs include the:

1. Identification of common data across diverse forms;

2. Definition of business rules for the industry vertical sector(s), and;

3. Creation of "one form" to collect common data, and another for the remaining unique data.

The value of this effort to the small business is apparent when multiple customer-facing forms are reduced to a single form for common data, and a single form for unique data. The data collected from these forms can be used to populate all the forms required for the small business to be compliant with Federal laws and regulations.

These pilot programs are scheduled to be completed in October 2004.

Conclusion: Based on the analysis of the problem, assumptions, and issues discussed above, the Task Force recommends the development of the Business Gateway as an interactive Government-wide Internet program to identify applicable collections and facilitate compliance. This initiative is designed specifically to meet the Act's objective of reducing the paperwork burden on America's small businesses. The initiative accomplishes this by:

1. providing a single Web point of access for relevant regulatory information and all Federal G2C and G2B forms, and

2. harmonizing industry-specific information collection requirements to collect information once and use it many times and reduce the overall number of forms to be completed.

The Business Gateway, using the Internet as a service delivery channel, will promote the rate and accuracy with which citizens and small businesses comply with the myriad of government regulations, and save them millions of dollars which can be reinvested in the growth of our economy.

Appendix I—Highlights of E-Government Activities That Are Improving Electronic Information Dissemination

U.S. Government Gateway (GSA): http://www.firstgov.gov. FirstGov.gov, the official U.S. gateway to all government information. On FirstGov.gov, you can search millions of web pages from Federal and state governments, the District of Columbia and U.S. territories. Most of these pages are not available on commercial websites. FirstGov has the most comprehensive government search engine anywhere on the Internet. Government information on FirstGov is also presented to visitors through various channels such as by audience, by topics, and by organization. For visitors that are unable

to find the information on their own, FirstGov accepts and responds to e-mail and provides a telephone number to the National Contact Center which is equipped to answer questions and provide referrals to appropriate agencies. See USAServices below.

Federal Statistical Information: http://www.fedstats.gov. FedStats provides the full range of official statistical information available to the public from the Federal Government. It uses the Internet's powerful linking and searching capabilities to track economic and population trends, education, health care costs, aviation safety, foreign trade, energy use, farm production, and more. It accesses official statistics collected and published by more than 100 Federal agencies without having to know in advance which agency produces them. All of the statistical information available through FedStats is maintained and updated solely by Federal agencies on their own web servers.

E-Rulemaking (EPA): http://www.regulations.gov. Allows citizens to easily access and participate in the rulemaking process. It improves the access to, and the quality of, the rulemaking process for individuals, businesses, and other government entities while streamlining and increasing the efficiency of internal agency processes.

International Trade Process Streamlining (DoC): http://www.export.gov. Makes it easy for Small and Medium Enterprises (SMEs) to obtain the information and documents needed to conduct business abroad.

Business Gateway (SBA): http://www.business.gov. Reduces the burden on businesses by making it easy to find, understand, and comply (including submitting forms) with relevant laws and regulations at all levels of government.

Geospatial One-Stop (DoI): http://www.geodata.gov. Provides Federal and state agencies with a single-point of access to map-related data, enabling consolidation of redundant data.

Disaster Management (DHS): http://www.disasterhelp.gov. Provides Federal, state, and local emergency managers on-line access to disaster-management-related information, planning, and response tools.

Grants.gov (HHS): http://www.grants.gov. Creates a single portal for all Federal grant customers to find, apply, and ultimately manage grants on-line.

Recruitment One-Stop (OPM): http://www.usajobs.gov. Outsources delivery of USAJOBS Federal Employment Information System to deliver state-of-the-art on-line recruitment services to job seekers including intuitive job searching, on-line resume submission, applicant data mining, and on-line feedback on status and eligibility.

Recreation One-Stop (DoI): http://www.recreation.gov. Provides a single-point of access, user-friendly, web-based resource to citizens, offering information and access to government recreational sites.

GovBenefits.gov (DoL): http://www.govbenefits.gov. Provides a single point of access for citizens to locate and determine potential eligibility for government benefits and services.

E-Loans (ED)

Creates a single point of access for citizens to locate information on Federal loan programs, and improves back-office loan functions.

USA Services (GSA) *http://www.firstgov.gov* 1–800–FedInfo and Pueblo CO 81009. Develop and deploy government-wide citizen customer service using industry best practices that will provide citizens with timely, consistent responses about government information and services.

Additional Cross Agency Portals

A more complete list of other Cross Agency Portals and initiatives can be found on FirstGov.gov at *http://www.firstgov.gov/Topics/Cross_Agency_Portals.shtml.*

Interagency Committee on Government Information (ICGI) Work Groups: http://www.cio.gov/documents/ICGI.html. In response to the E-Gov Act of 2002, the ICGI has formed cross-agency working groups which are addressing categorization of information; electronic records policy; and web content management.

Appendix II—Business Gateway Governance

The Business Gateway is a coordinated effort of 14 Federal agencies, with the U.S. Small Business Administration (SBA) as the managing partner. The Business Gateway Governance Board is chartered by the participating agencies, and comprised of senior representatives from each agency. The participating agencies include the Small Business Administration (Managing Partner), Department of Labor, General Services Administration, Department of Transportation, Department of Homeland Security, Environmental Protection Agency, Department of Commerce, Department of Health and Human Services, Department of Energy, Social Security Administration, Department of Interior, Department of Treasury, Department of Justice and Department of Agriculture.

Appendix III—Summary of Public Comments on Implementing the Small Business Paperwork Relief Act of 2002, Excerpted From the Transcript of a Public Outreach Meeting Held by the Office of Advocacy on February 9, 2004

Electronic Dissemination of Information Collected Under Federal Requirements

"I think that there's a lot of discussion about industry-specific information. But I think you should also think in terms of doing general industry information * * * they have some idea they've got to put all their ducks in a row outside of their industry-specific information. Other information would be useful * * * by size standard * * * Another thing is triggers by organizational structure * * *" *Anita Drummond, Associated Builders and Contractors,* pp. 20–21.

"The biggest complaint that our members (NFIB) mentioned * * * was trying to understand whether or not they were required to comply with a given regulation. In some cases * * * it costs a business owner more money to find out if they had to comply than they actually spent complying * * * (there should be) something that would direct a business owner directly to certain requirements of their business, to try to tell them within a few short clicks." *Bruce Phillips, National Federation of Independent Business (NFIB),* pp. 25–26.

"One of the major complaints we get from our small business members, frankly, is that the language in the websites is just not real business friendly. It is too stilted. It's too complex. It's too 'government-ese.'" *Bruce Philips, NFIB,* p. 27.

Regulatory Compliance Information on the Web

"We have a weekly newsletter that's more government oriented than anything else, but it also has compliance and regulatory on there. And we're finding it very helpful to hyperlink directly from the newsletter. So instead of just having a website that's back there, we actually are proactively printing out requirements that we'll get calls on * * *" *Michael Wilson, Textile Rental Services Association,* p. 32.

"I find it a little disconcerting that an agency would not want to put all of its regulatory information up on the Web. You know, if the businesses have to comply with it, they have to be able to find it, and for a lot of them, the only place they're going to be able to go to find that information is the Web. We've found out from our own polling, you know, businesses find out about regulations by talking to other businesses, or they find out by going to the Web or doing some basic research." *Andrew Langer, NFIB,* p. 35.

"A big pet peeve of mine * * * not being able to find the document because you don't have the exact name that it's searchable under." *Andrew Langer, NFIB,* p. 45.

"Our members tell us that when they finally find the information, they think they find the information they're looking for, what they really want is a phone number, toll free or not, or a fax number that they can get their answers to immediately." *Bruce Phillips, NFIB,* p. 46.

Compliance Assistance Hotlines

"We use the EPA refrigerant hotline a lot, and that used to have funding so they would be able to have a contractor do it. Now it's the actual division head at EPA who answers all the calls, which put a tremendous burden on him as well as not meeting the needs of people that are calling in, since you only have one person that's answering the phone now." *John Herzog, Air Conditioning Contractors of America (ACCA),* p. 49.

"I would just like to comment on the importance of there being hotlines that are somewhat available because in all of our e-strategies and e-government, I think sometimes we do lose sight of the fact that there are some small businesses and small business owners who either aren't on the Web or at least aren't comfortable on the Web." *Todd McCracken, National Small Business Association,* pp. 49–50.

Single Point of Contact Within an Agency

"Colorado in the '80s started an ombudsman for business, and they set a single spot—it was Wellington Webb, who later became the mayor of Denver. And that

was so a business could go to this one single center and get all the information in terms of licenses needed and what paperwork they had to do in order to be in business in the state." *John Herzog, ACCA*, p.24.

"You need to have someplace the small business person can go outside of the Web to get a real-time answer to a question, because usually there may be some sort of urgency, or they may just get carried away in the course of their business that they may not have time other than that moment when they have however long it takes them to call." *Andrew Langer, NFIB*, p. 53.

Update on Business Gateway Project

"I'd like to say that the good part is, what you're telling us is what we've heard, and that's the direction we're moving in. * * * We wanted to focus more specifically on making an easy way to find the information and compliance, all the things in terms of making the one-stop access to who wants information specifically from a website that's posted almost without the agency to it; more of a portal of information." *Shivani Desai, Office of Management and Budget*, pp. 59–60.

"(On forms) So of the thousands of transactional forms, one place across 43 agencies at this point in one website. Those forms, plus the access to many different portals that have different content needs. There's business, there's grants, there's benefits. There are other portals already there from the federal perspective that have content informational things that will guide a person to understanding what they need to do to comply." *Sandy Gibbs, U.S. Small Business Administration*, p.64.

Opportunities To Reduce Regulatory Burdens

"But one of the problems that we see is a state/federal interface. On the Boiler MACT standards that are coming up, the paperwork for the federal requirements may not be so onerous that it be devastating. It's going to be onerous, but we've accepted it. But there's going to be an even greater paperwork burden at the State Title V levels with regard to that rule, and that's not really been addressed." *Bob Bessette, Council of Industrial Boiler Owners*, pp. 66–67.

"New York City actually had a terrific website, and I'd use that as a model of where actually the Federal Government should be. You go onto the website, and it asks you a series of questions * * * it will go through a flow chart; and as it goes through that flow chart, at the end it produces all the regulations and all the different submissions that you have to have at the end or submit and provide the state and licenses" *Giovanni Coratolo, U.S. Chamber of Commerce*, pp. 22–23.

"Business owners complain actually that half their burden approximately is state-local and the other half is federal. So any formal or final version that uses the Web as a compliance tool should have some sort of links clearly to the state in which your business is located * * *" *Bruce Phillips, NFIB*, p.26.

"For sending hazardous waste off-site to be treated and disposed, or even recycled in some cases, you have to submit a hazardous waste manifest. There's been an initiative at EPA for a couple of years now to try to create electronic manifests where you could go onto a EPA site and fill that out and then submit it. There are about 25 states that have agreed to that arrangement * * * that would be very helpful." *Jeff Gunnulfsen, SOCMA*, p. 71.

Reducing IRS Paperwork Requirements

"I think if you can combine forms as often as you can so that you don't have the duplications, and then when you fill the form out it goes to the various agencies that need to know that would be one step * * *" *John Herzog, ACCA*, p.75.

"I've worked very closely with the Office of Burden Reduction, and my biggest complaint is it's just not big enough. I think they have like three people over there, and 80 percent of the paperwork is in the IRS. I mean if you really want to make a meaningful foray into reducing paperwork, I think the IRS has to really increase that office." *Giovanni Coratolo, U.S. Chamber*, p. 76.

Miscellaneous Comments

"I think there should be an effort made by every agency to make sure that their websites are Google searchable." *Andrew Langer, NFIB*, p. 35.

"There doesn't seem to be a consolidated place for them—for us to go find the partner we want for small business firms in a lot of business. You can't find them at any websites for any of the organizations. You know, certifications, for the most part you have to certify for the small business owners. It's cumbersome and it takes an enormous amount of time for the paperwork to be filled out." *Johnnie Simpson, National Veterans Association Business Forum*, p.57.

Appendix IV—Small Business Paperwork Relief Task Force Members

Agency	Member	Title
Office of Management and Budget	Dr. John Graham	Administrator, Office of Information and Regulatory Affairs.
Office of Management and Budget	Karen S. Evans	Administrator, Office of E-Government and Information Technology.
Department of Agriculture	Marty Mitchell	Chief of Information Collection Division.
Department of Commerce	Karen Hogan	Deputy Chief Information Officer.
Department of Energy	William Lewis	Office of Economic Impact and Diversity.
Department of Interior	Edwin McCeney	Office of the Chief Information Officer.
Department of Interior	Peter Ertman	E-Gov Program Manager, Bureau of Land Management.
Department of Labor	Robert Gaddie	Associate Commissioner for Sale Operations.
Department of Labor	Barbara Bingham	Director, Office of Compliance Assistance Policy.
Department of Labor	Audie Woolsey	Directorate of Cooperative State Programs, OSHA.
Department of Labor	Paula White	Director, Directorate of Cooperative State Programs, OSHA.
Department of Labor	Jeff Koch	Special Assistant to the Chief Information Officer.
Department of Labor	David Gray	Acting Assistant Secretary for Policy.
Department of Labor	Tyna Coles	Director, Office of Small Business Assistance.
Department of Justice	Robert B. Briggs	Program Manager, Information Collection Svcs, Justice Management Division.
Department of Transportation	Steve Lott	Manager, Strategic Integration, IT Program Management, Office of the CIO.
Environmental Protection Agency	Jay Benforado	Director, National Center for Environmental Innovation, Office of Policy Economics, and Innovation.
Environmental Protection Agency	Jim Edward	Director, Compliance Assistance and Sector Programs Division.
Environmental Protection Agency	Kim Nelson	Assistant Administrator, Chief Information Officer.
Environmental Protection Agency	Karen Brown	Director, Small Business Division, Small Business Ombudsman, SBPRA POC.
Environmental Protection Agency	Tracy Back	Team Leader, Compliance Assistance and Sector Programs Division.
Environmental Protection Agency	Catherine Tunis	Senior Analyst, Small Business Division.
General Services Administration	Felipe Mendoza	Associate Administrator, Small Business Utilization.
Health and Human Services	Arthuretta Martin	Deputy Director, Office of Small and Disadvantaged Business Utilization.

Agency	Member	Title
Health and Human Services	Michael Miller	Director, Audit, Analysis, and Information Group Office of Strategic Operations and Regulatory Affairs Centers for Medicare and Medicaid Services.
Internal Revenue Service	Ron Kovatch	Senior Advisor, Office of Taxpayer Burden Reduction.
Small Business Administration	Ron Miller	Program Executive Officer for E-Government.
Small Business Administration	Jody Wharton	Director of Information, Office of Advocacy.

Appendix V—Contributing Staff

Agency	Member	Title
Office of Management and Budget	Donald Arbuckle	Deputy Administrator, Office of Information and Regulatory Affairs (OIRA).
Office of Management and Budget	David Rostker	Policy Analyst, OIRA.
Office of Management and Budget	Keith Belton	Policy Analyst, OIRA.
Office of Management and Budget	Jonathan Womer	Policy Analyst, OIRA.
Office of Management and Budget	Shivani Desai	Policy Analyst, OIRA.
Office of Management and Budget	Jack Koller	G2C Portfolio Manager.
Small Business Administration	Keith Holman	Assistant Chief Counsel, Office of Advocacy.

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BILLING CODE 3110–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:
Form N–5—SEC File No. 270–172—OMB Control No. 3235–0169.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Form N–5—Registration Statement of Small Business Investment Companies Under the Securities Act of 1933 and the Investment Company Act of 1940. Form N–5 is the integrated registration statement form adopted by the Commission for use by a small business investment company which has been licensed as such under the Small Business Investment Act of 1958 and has been notified by the Small Business Administration that the company may submit a license application, to register its securities under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] ("Securities Act"), and to register as an investment company under section 8 of the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] ("Investment Company Act"). The purpose of registration under the Securities Act is to ensure that investors are provided with material information concerning securities offered for public sale that will permit investors to make informed decisions regarding such securities. The Commission staff reviews the registration statements for the adequacy and accuracy of the disclosure contained therein. Without Form N–5, the Commission would be unable to carry out the requirements to the Securities Act and the Investment Company Act for registration of small business investment companies. The respondents to the collection of information are small business investment companies seeking to register under the Investment Company Act and to register their securities for sale to the public under the Securities Act. The estimated number of respondents is two and the proposed frequency of response is annually. The estimate of the total annual reporting burden of the collection of information is approximately 352 hours per respondent, for a total of 704 hours.

Written 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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: April 28, 2004.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:
Form N–8A, File No. 270–135, OMB Control No. 3235–0175

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq.*], the Securities and Exchange Commission ("Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Form N–8A—Notification of Registration of Investment Companies. Form N–8A [17 CFR 274.10] is the form that investment companies file to notify the Commission of the existence of active investment companies. After an investment company has filed its notification of registration under section 8(a) of the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*] ("1940 Act"), the company is then subject to the provisions of the 1940 Act which govern certain aspects of its organization and activities, such as the composition of its board of directors and the issuance of senior securities. Form N–8A requires an investment company to provide its name, state of organization, form of organization, classification, if it is a management company, the name and address of each investment adviser of the investment company, the current value of its total assets and certain other information readily available to the investment company. If the investment company is filing simultaneously its notification of registration and registration statement, Form N–8A requires only that the registrant file the cover page (giving its name, address and agent for service of process) and sign the form in order to effect registration.

The Commission uses the information provided in the notification on Form N–8A to determine the existence of active investment companies and to enable the Commission to administer the provisions of the 1940 Act with respect to those companies. Each year approximately 263 investment companies file a notification on Form N–8A. The Commission estimates that preparing Form N–8A requires an investment company to spend approximately 1 hour so that the total burden of preparing Form N–8A for all affected investment companies is 263 hours. Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written 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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: April 28, 2004.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49626; File No. SR–BSE–2004–11]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Boston Stock Exchange, Inc. Relating to an Interpretation of ITS Trade-Throughs and Locked Markets

April 28, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 23, 2004, the Boston Stock Exchange, Inc. ("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. The Exchange filed the proposal pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon filing with the Commission. On April 5, 2004, the Exchange submitted Amendment No. 1 to the proposed rule change.[5] On April 22, 2004, the Exchange submitted Amendment No. 2 to the proposed rule change.[6] 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 is proposing to codify an interpretation concerning ITS Trade-Throughs and Locked Markets. The text of the proposed rule change is below. Additions are in *italics.*

* * * * *

Chapter XXXI

Intermarket Trading System

Secs. 1–3 no change

Sec. 4(a)–(f) no change

* * * Supplementary Material

(1)–(10) no change

(11)(a) The terms "trade through" and "third participating market center trade-through" do not include the situation where a member who initiated the purchase (sale) of an ITS security at a price which is higher (lower) than the price at which the security is being offered (bid) in another ITS participating market, contemporaneously sends through ITS to such ITS participating market a commitment to trade at such offer (bid) price or better and for at least the number of shares displayed with that market center's better-priced offer (bid); and

(b) a trade-through complaint sent in these circumstances is not valid, even if the commitment sent in satisfaction cancels or expires, and even if there is more stock behind the quote in the other market.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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[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 19b–4(f)(1).

[5] *See* letter from John A. Boese, Vice President, Legal and Compliance, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 2, 2004 ("Amendment No. 1"). Amendment No. 1 adds an exhibit to the proposed rule change to include the proposed interpretation as rule text, and replaces the original filing in its entirety.

[6] *See* letter from John A. Boese, Vice President, Legal and Compliance, BSE, to Nancy Sanow, Assistant Director, Division, Commission, dated April 21, 2004 ("Amendment No. 2"). Amendment No. 2 clarifies the proposed interpretation by adding the term "contemporaneously" to the proposed rule text.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the filing is to codify a long-standing interpretation of Chapter XXXI (Intermarket Trading System), Section 4 (Trade-Throughs and Locked Markets) of the Rules of the Board of Governors of the Boston Stock Exchange ("BSE Rules"). This section of the BSE Rules uses certain defined terms as follows:

(a)(1) A "trade-through", as that term is used in this Rule, occurs whenever a member on the Exchange purchases a security traded through ITS (referred to in this Rule as "an ITS Security") on the Exchange at a price which is higher than the price at which the security is being offered (or sells such a security on the Exchange at price which is lower than the price at which the security is being bid for) at the time of the purchase (or sale) in another ITS participating market center as reflected by the offer (bid) then being displayed on the Floor from such other market center. The member described in the foregoing sentence is referred to in this Rule as the member who initiated a trade-through.

(2) A "third participating market center trade-through", as that term is used in this Rule, occurs whenever a member on the Exchange initiates the purchase of an ITS Security by sending a commitment to trade through the System and such commitment results in an execution at a price which is higher than the price at which the security is being offered (or initiates the sale of such a security by sending a commitment to trade through the System and such commitment results in an execution at a price which is lower than the price at which the security is being bid for) at the time of the purchase (or sale) in another ITS participating market center as reflected by the offer (bid) then being displayed on the Exchange from such other market center. The member described in the foregoing sentence is referred to in this Rule as the "member who initiated a third participating market center trade-through."

According to the BSE, the basic concept of the Trade-Through Rule ("Rule") is that superior priced quotations in a security displayed from other ITS Participant markets should be protected/satisfied if, in another ITS Participant market, an execution in the security occurs at an inferior price ("trade-through"). One of the remedies the Rule provides is that, upon a valid complaint of a trade-through, a commitment to trade, at the price and for the number of shares in the disseminated quotation, must be sent to the other ITS Participant market to fully satisfy such quotation. The proposed interpretation being filed by the BSE has long recognized that superior quotations are fully protected/satisfied if an ITS commitment is sent to trade with a bid/offer that would otherwise appear to have been traded-through. That is, a trade will not be considered a trade-through if an ITS commitment is sent contemporaneously from the ITS Participant executing the trade for the purpose of being executed against the better-priced displayed bid or offer. A trade-through complaint is not valid even if a commitment cancels or expires or there is more stock behind the away quote. Furthermore, the BSE believes that the proposed interpretation recognizes the impracticality of having to wait for the other market to revise its quotation as a result of trading with a satisfying commitment before trade activity may occur in other markets.

Specifically, the proposed interpretation is that:

i. The terms "trade-through" and "third participating market center trade-through" do not include the situation where a member who initiated the purchase (sale) of an ITS security at a price which is higher (lower) than the price at which the security is being offered (bid) in another ITS participating market, sends through ITS to such ITS participating market a commitment to trade at such offer (bid) price or better and for at least the number of shares displayed with that market center's better-priced offer (bid); and,

ii. A trade-through complaint sent in these circumstances is not valid, even if the commitment sent in satisfaction cancels or expires, and even if there is more stock behind the quote in the other market.

2. Statutory Basis

The Exchange believes that the statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[7] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities transactions, 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.

[7] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act[8] and subparagraph (f)(1) of Rule 19b–4 thereunder,[9] because it is concerned solely with the interpretation of the meaning, administration or enforcement of an existing BSE Rule. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an E-mail to *rule-comments@sec.gov*. Please include File Number SR–BSE–2004–11 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

[8] 15 U.S.C 78s(b)(3)(A)(i).

[9] 17 CFR 240.19b–4(f)(1).

[10] For purposes of determining the effective date of the filing and calculating the 60-day abrogation date, the Commission considers the period to commence on April 22, 2004, the date the BSE filed Amendment No. 2.

All submissions should refer to File Number SR–BSE–2004–11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml)*. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2004–11 and should be submitted on or before May 26, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10200 Filed 5–4–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49627; File No. SR–ISE–2004–05]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the International Securities Exchange, Inc., Relating to Customized Market Data Reports ("ISEMine")

April 28, 2004.

On March 4, 2004, the International Securities Exchange, Inc. ("ISE" 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 establish fees in connection with the preparation of customized market data reports for both members and non-members. The Exchange maintains databases that contain information relating to option contracts traded on the Exchange. The Exchange is proposing to provide members and non-members with the ability to "mine" this data through the use of customized market data reports. The Exchange refers to this service as "ISEmine."

The proposed rule change was published for comment in the **Federal Register** on March 24, 2004.[3] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[4] and, in particular, the requirements of section 6 of the Act[5] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with section 6(b)(4) of the Act,[6] in that it provides for the equitable allocation of reasonable dues, fees, and other charges among ISE members and issuers and other persons using its facilities. Additionally, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[7] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities transactions, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[8] that the proposed rule change (SR–ISE–2004–05) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10201 Filed 5–4–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49625; File No. SR–NYSE–2004–11]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments No. 1 and No. 2 Thereto by the New York Stock Exchange, Inc. To Amend Its Rule 122 Concerning Orders With More Than One Broker

April 28, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 20, 2004, the New York Stock Exchange, Inc. ("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 April 5, 2004, the NYSE filed an amendment to the proposed rule change.[3] On April 20, 2004, the NYSE filed another amendment to the proposed rule change.[4] The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend NYSE Rule 122 to provide that a Floor broker may send a portion of an order to a specialist either manually or via a hand-held terminal while retaining a portion of the same order. The text of the proposed rule change appears below. New text is in brackets.

* * * * *

Orders With More Than One Broker

Rule 122 *Except as provided herein,* [N]*n*o member, member organization or any allied member therein, or subsidiary of such organization within the meaning of Rule 321, shall maintain with more than one broker, for execution on the Exchange, market orders or orders at the same price for the purchase or sale of

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 49442 (March 17, 2004), 69 FR 13925.

[4] 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).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 2, 2004 ("Amendment No. 1"). Amendment No. 1 replaced and superseded the Exchange's original filing in its entirety.

[4] *See* letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy J. Sanow, Division, Commission, dated April 19, 2004 ("Amendment No. 2"). In Amendment No. 2, NYSE clarified and expanded its rule text.

the same security with knowledge that such orders are for the account of the same principal, unless specific permission has been obtained from a Floor Official. *However, a Floor broker may transmit an order manually or from a hand-held terminal to the specialist's display book, for representation by the specialist, a portion of an order, while retaining the balance of the order. In any instance where a Floor broker has given the specialist a portion of an order for execution and retained the balance of such order, the Floor broker may not make a bid (offer) on behalf of the retained order, or execute any part of the retained order, at a price at which the portion of the order with the specialist may also be represented in a bid (offer) or executed until the portion of the order sent to the specialist has been executed or cancelled.*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Rule 122 (Orders with More than One Broker) prohibits a member from having orders on the Exchange with more than one broker executable at the same price in the same stock on the same side of the market for the account of the same principal. According to the Exchange, NYSE Rule 122 is intended to negate the possibility that the same customer could have an unequal representation in the auction in parity situations. The Exchange also believes that NYSE Rule 122 provides a deterrent to any attempt to create the appearance that there is greater trading interest in a stock than may be actually present by limiting the representation of agency orders in the market for the same customer to a single agent.

Currently, Floor brokers are able to manually give a portion of an order to the specialist for execution, while retaining the remainder of such order. Pending technological advances will enable Floor brokers to have the ability to send orders from their hand-held devices directly to the specialist's limit order book. According to the Exchange, this ability will improve a broker's efficiency by allowing greater order management capabilities. As is the case today, brokers may desire to send part of a large order for representation by the specialist while retaining the balance of the order for execution by the broker. For example, a broker with a 100,000 share market "not held" order may determine to electronically "book" (*e.g.*, send to the specialist) 20,000 shares of that order at a limit price of $20.20, while retaining the 80,000 share balance of the order.

The Exchange proposes to amend NYSE Rule 122 to provide that a Floor broker may send a portion of an order to a specialist either manually or via a hand-held terminal while retaining a portion of the same order as long as the broker does not bid (offer) or execute the retained portion of the order at a price at which the booked order may also be represented in a bid (offer) or executed. The Exchange represents that this proposal does not impose any new requirements or obligations and is consistent with current practice.

Thus, in the above example, the broker could bid on behalf of the retained portion of the order, or take offers, at prices of $20.21 or above, but could not, on behalf of the retained portion of the order, purchase stock at $20.20 or lower, unless the "booked" portion of the order had been executed or canceled.

2. Statutory Basis

The Exchange believes that the proposal to amend NYSE Rule 122 to provide that a Floor broker may send a portion of an order to a specialist manually or via a hand-held terminal while retaining the remainder of the order is consistent with Section 6(b) of the Act,[5] in general, and Section 6(b)(5) of the Act,[6] 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments regarding the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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, as amended, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment for (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2004–11 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NYSE–2004–11. 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

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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–NSYE–2004–11 and should be submitted on or before May 26, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10152 Filed 5–4–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49631; File No. SR–PCX–2004–35]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. To Amend the Market Maker Fees Portion of Its Schedule of Fees and Charges in Order To Extend a Temporary Waiver of the Market Maker Fees for Those Market Makers That Utilize More Than One Seat

April 29, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 19, 2004, the Pacific Exchange, Inc. ("PCX" 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. The PCX has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the PCX under section 19(b)(3)(A) of the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend the Market Maker Fees portion of its Schedule of Fees and Charges ("Schedule") in order to extend a temporary waiver of the Market Maker fees for those Market Makers that utilize more than one seat. The text of the proposed rule change is available at the PCX and at the Commission.

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 PCX 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 PCX 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to extend for one month the temporary waiver of the Market Maker fees for those Market Makers that utilize more than one seat. The Exchange is proposing to amend the Market Maker Fees portion of its Schedule in order to extend the previously effective temporary waiver of the Market Maker fees for those Market Makers that utilize more than one seat.[4]

Under the current Schedule, all Market Makers are assessed a fee of $1,750 per month for each seat for which such Market Maker holds a primary appointment. In connection, PCX Rule 6.35(g)(2) permits Market Makers to increase the number of issues within their primary appointments depending on the number of seats that a Market Maker holds.[5] Hence, the PCX believes a Market Maker would benefit from additional issues as a result of holding multiple seats.

The Exchange proposes to extend the temporary waiver of the $1,750 Market Maker fee for all Market Makers for each additional seat (for which the Market Maker holds a primary appointment) beyond the first seat held by such Market Maker. In other words, a Market Maker will only be assessed one Market Maker fee of $1,750 per month whether the Market Maker utilizes one seat or multiple seats. The PCX believes that a temporary waiver of the Market Maker fee in this limited circumstance is appropriate to encourage participation by a larger number of Market Makers on PCX Plus.[6] As PCX Plus continues to expand, PCX believes this temporary waiver will provide Market Makers with an incentive to take on a larger number of issues without incurring additional Market Maker fees. Therefore, the PCX believes the added participation will result in increased liquidity, which, in turn, will further competition. This waiver will remain in effect until May 28, 2004 or such earlier date as determined by the Exchange.

2. Statutory Basis

The Exchange believes the proposal is consistent with Section 6(b) of the Act,[7] in general, and Section 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 49207 (February 6, 2004), 69 FR 07277 (February 13, 2004) (File No. SR–PCX–2004–04).

[5] *See* PCX Rule 6.35(g)(2).

[6] The temporary waiver of the Market Maker fee only applies to Market Makers on PCX Plus, because only Remote Market Makers on PCX Plus utilize multiple seats. *See* PCX Rule 6.35(g)(2). PCX represents that this waiver has no impact upon floor-based operations. Telephone conversation between Steven B. Matlin, Senior Counsel, Regulatory Policy, PCX, and A. Michael Pierson, Attorney, Division of Market Regulation, Commission on April 26, 2004.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

19(b)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4[10] thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2004–35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–PCX–2004–35. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2004–35 and should be submitted on or before May 26, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10199 Filed 5–4–04; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 4712]

30-Day Notice of Proposed Information Collection: Form DS–117, Application To Determine Returning Resident Status; OMB Control Number 1405–0091

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995. Comments should be submitted to OMB within 30 days of the publication of this notice.

The following summarizes the information collection proposal submitted to OMB:

Type of Request: Extension of currently approved collection.

Originating Office: Bureau of Consular Affairs, Department of State (CA/VO).

Title of Information Collection: Application to Determine Returning Resident Status.

Frequency: On occasion. Once per respondent.

Form Number: DS–117.

Respondents: Aliens applying for special immigrant classification as a returning resident.

Estimated Number of Respondents: 875 per year.

Average Hours Per Response: 30 minutes.

Total Estimated Burden: 438 hours per year.

Public comments are being solicited to permit the agency to:

- Evaluate whether the proposed information collection 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 proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including through the use of automated collection techniques or other forms of technology.

FOR FURTHER INFORMATION CONTACT: Copies of the proposed information collection and supporting documents may be obtained from Brendan Mullarkey of the Office of Visa Services, U.S. Department of State, 2401 E St. NW., RM L–703, Washington, DC 20520, who may be reached on 202–663–1166. Public comments and questions should be directed to the State Department Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20530, who may be reached on 202–395–7860.

Dated: April 16, 2004.

Janice L. Jacobs,

Deputy Assistant Secretary of State for Visa Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 04–10217 Filed 5–4–04; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 4711]

Bureau of Educational and Cultural Affairs Request for Grant Proposals: To Organize a Competition To Select the U.S. Commissioner and U.S. Representative to the 2005 Venice Biennale of Visual Arts

SUMMARY: The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs announces an open competition for U.S. public and private non-profit organizations meeting the provisions described in Internal Revenue Code Section 26 U.S.C. 501 (C) 3 to conduct an open competition to identify and recommend an American Curator(s) and Artist(s) to organize an exhibition, publications and accompanying artist and curatorial exchange program to represent the United States at the 2005 Venice Biennale of visual arts.

Important Note: This Request for Proposals contains language in the "Shipment and Deadline for Proposals" section that is significantly different from that used in the

past. Please pay special attention to procedural changes as outlined.

Program Information

Overview: The Cultural Programs Division within the Bureau of Educational and Cultural Affairs welcomes proposals that directly respond to the following requirements:

1. Applicants will describe a methodology for conducting an Open Competition, notification of which reaches the broadest potential pool of prospective applicants—curators of Contemporary American art—in the United States.

2. Applicants will present a detailed timeline for the execution of the competition, including deadlines for publicizing the competition and other outreach to the field in the U.S.; deadlines for receipt of proposals; assembling a fair and objective panel of experts in the field of Contemporary American art; and managing the panel process. All work for this phase is to be completed by August 20, 2004.

3. Applicants will describe a plan for publicizing the resulting selection of a Commissioner and U.S. Representative, working cooperatively with the Cultural Programs Division of ECA to do so.

Guidelines: The grantee will work cooperatively with the designated Cultural Programs Division Program Officer to design and produce solicitation materials that articulate both the practical requirements of organizing and presenting the exhibition and the Bureau of Educational and Cultural Affairs mission of conducting educational and cultural exchange programs that promote respect and mutual understanding.

Upon receipt and review of proposals from Curators by the Cultural Programs Division Program Officer, the grantee will be responsible for distributing all Curator's proposals to panel members for their review and convening a panel meeting.

Upon approval of the panel's recommendation, the grantee will issue a Sub-grant (or multiple grants if multiple projects are selected) to the recipient curator or recipient's sponsoring organization. The Sub-grant(s) will describe the terms and conditions for organization of the official U.S. presentation at the 2005 Venice Biennale.

Upon acceptance of the terms by the Sub-grant recipient(s), the grantee will then work with the Bureau of Educational and Cultural Affairs and the Sub-grantee to oversee program planning for the exhibition. The grantee will consult with the Bureau and the artist(s) and curator(s) in the development of public education programs in which the artist, curator and other appropriate scholars from around the world can participate. The goal of these programs is to place the exhibition in context for foreign audiences and to encourage the unique opportunities for the exchange of people and ideas that Venice affords. The cost of public education programs, including administrative expenses, is not to be included in this proposal.

Applicants should anticipate a start date for this Cooperative Agreement of approximately July 15, 2004.

Ineligible Proposals

Proposals from organizations that do not meet the minimum experience and expertise criteria will be declared technically ineligible. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs. Proposals based on achieving other artistic objectives will not be accepted. Museums or arts centers that might ordinarily be applicants to the Venice Biennale competition that apply do so with the understanding that by entering into a Cooperative Agreement with the Department of State to conduct this competition they, their employees, or any others with a prior relationship in the organization will be ineligible to apply to represent the United States at the 2005 Venice Biennale.

Guidelines

Programs must comply with J–1 visa regulations. Please refer to Solicitation Package for further information. Applicant will not be required to obtain visas for participants in the Competition or the 2005 Venice Biennale.

Budget Guidelines

The Bureau anticipates awarding one grant, in an amount up to $170,000 to provide partial support for program and administrative costs required to implement the competition and follow on activities. Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. Of the $170,000 made available by the Office of Citizen Exchanges for this Cooperative Agreement, up to $50,000 may be allocated to the administration and publicizing of the competition and publicizing the selection. The total project budget (*i.e.* ECA's contribution, plus the applicant's matching support) should be at least $340,000, with a resulting award to the selected Commissioner/Artist of at least $290,000. The applicant's matching support may include, but is not limited to, funds raised from private and corporate philanthropy, individual donors or in-kind support. A complete list of contributors, and a sample agreement with potential donors must accompany the proposal. Support received under assistance awards from the U.S. Government may not be used for expenses related to fundraising.

Applicants must submit a comprehensive budget for the entire program. There must be a summary budget as well as breakdowns reflecting both administrative and program expenses. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification. Since Bureau assistance through this Cooperative Agreement constitutes only a portion of total project funding, proposals should list and provide evidence of other sources of financial and in-kind support.

Allowable costs for the program include the following:

(1) *Travel Costs:* Domestic airfares; transit costs; ground transportation costs. Please note, all air travel must be in compliance with the Fly America Act.

(2) *Per Diem:* Organizations have the option of using a flat $160/day for program participants or the published U.S. Federal per diem rates for the U.S. city in which activities take place.

(3) *Consultants:* Consultants may be used to provide specialized expertise. For example to design solicitation and publicity materials, or to conduct a publicity campaign.

(4) *Administrative Costs:* Costs necessary for the effective administration of the program may include salaries for employees of the grantee organization, benefits and other direct or indirect costs per detailed instructions in the Solicitation Package.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

Announcement Title and Number: All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/PE/C/CU–04–17.

FOR FURTHER INFORMATION CONTACT: The Cultural Programs Division, ECA/PE/C/CU, Room 664, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, D.C. 20547, 202 203–7497, to request a Solicitation Package. The Solicitation Package contains detailed

award criteria, required application forms, specific budget instructions, and standard guidelines for proposal preparation. Please specify Bureau Program Leanne Mella on all other inquiries and correspondence.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's website at *http://exchanges.state.gov/education/RFGPs.* Please read all information before downloading.

New OMB Requirement

An OMB policy directive published in the **Federal Register** on Friday, June 27, 2003, requires that all organizations applying for Federal grants or cooperative agreements must provide a Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number when applying for all Federal grants or cooperative agreements on or after October 1, 2003. The complete OMB policy directive can be referenced at *http://www.whitehouse.gov/omb/fedreg/062703_grant_identifier.pdf.* Please also visit the ECA Web site at *http://exchanges.state.gov/education/rfgps/menu.htm* for additional information on how to comply with this new directive.

Shipment and Deadline for Proposals

Important Note: The deadline for this competition is Wednesday, June 2, 2004. In light of recent events and heightened security measures, proposal submissions must be sent via a nationally recognized overnight delivery service (*i.e.*, DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, *etc.*) and be shipped no later than the above deadline. The delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Applicants must follow all instructions in the Solicitation Package. The original and 12 copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C/CU–04–17, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the "Support for Diversity" section for specific suggestions on incorporating diversity into the total proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

Adherence to All Regulations Governing the J Visa

The Bureau of Educational and Cultural Affairs is placing renewed emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements. ECA or the Grantee (program office: please specify which) will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD–SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 401–9810, FAX: (202) 401–9809.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, when appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for cooperative agreements resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Program planning:* Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above.

2. *Ability to achieve program objectives:* Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

3. *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue and program evaluation) and

program content (orientation and wrap-up sessions, program meetings, resource materials and follow-up activities).

4. *Institutional Capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals.

5. *Institution's Record/Ability:* Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grant Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

6. *Project Evaluation:* Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original project objectives is recommended. Successful applicants will be expected to submit intermediate reports after each project component is concluded or quarterly, whichever is less frequent.

7. *Cost-effectiveness:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate.

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world."

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

. Dated: April 28, 2004.

Patricia S. Harrison,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 04–10216 Filed 5–4–04; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Voluntary Intermodal Sealift Agreement (VISA)

AGENCY: Maritime Administration, DOT.

ACTION: Notice of open season for enrollment in the VISA Program.

Introduction

The VISA program was established pursuant to section 708 of the Defense Production Act of 1950, as amended (DPA), which provides for voluntary agreements for emergency preparedness programs. VISA was approved for a two year term on January 30, 1997, and published in the **Federal Register** on February 13, 1997, (62 FR 6837). Approval was extended through February 13, 2005, and published in the **Federal Register** on February 25, 2003 (68 FR 8800).

As implemented, the VISA program is open to U.S.-flag vessel operators of militarily useful vessels, including bareboat charter operators if satisfactory signed agreements are in place committing the assets of the owner to the bareboat charterer for purposes of VISA. While tug/barge operators must own or bareboat charter barges committed to the VISA program, it is not required that these operators commit tug service through bareboat charter or ownership arrangements. Time charters of U.S.-flag tugs will satisfy tug commitments to the VISA program. However, participation in the VISA program is not satisfied by tug commitment only. Tug/barge VISA participants must commit capacity of at least one barge to the VISA program. Voyage and space charterers are not considered U.S.-flag vessel operators for purposes of VISA eligibility.

VISA Concept

The mission of VISA is to provide commercial sealift and intermodal shipping services and systems, including vessels, vessel space, intermodal systems and equipment, terminal facilities, and related management services, to the Department of Defense (DOD), as necessary, to meet national defense contingency requirements or national emergencies.

VISA provides for the staged, time-phased availability of participants' shipping services/systems to meet contingency requirements through prenegotiated contracts between the Government and participants. Such arrangements are jointly planned with the Maritime Administration (MARAD), U.S. Transportation Command (USTRANSCOM), and participants in peacetime to allow effective and best valued use of commercial sealift capacity, to provide DOD assured contingency access, and to minimize commercial disruption, whenever possible.

There are three time-phased stages in the event of VISA activation. VISA Stages I and II provide for prenegotiated contracts between the DOD and participants to provide sealift capacity to meet all projected DOD contingency requirements. These contracts are executed in accordance with approved DOD contracting methodologies. VISA Stage III will provide for additional capacity to the DOD when Stage I and II commitments or volunteered capacity are insufficient to meet contingency requirements, and adequate shipping services from non-participants are not available through established DOD contracting practices or U.S. Government treaty agreements.

VISA Enrollment Open Season

The purpose of this notice is to invite interested, qualified U.S.-flag vessel operators that are not currently enrolled in the VISA program to participate in the program. Approved participants' VISA contingency contracts will coincide with the DOD contracting cycle of September 1, 2004 through August 31, 2005. Current participants in the VISA program are not required to apply for this enrollment, as VISA participation will be automatically extended for this period, provided that current participants have approved contingency contracts on file with the appropriate DOD contracting agency. This is the seventh annual enrollment period since the commencement of the VISA program. The annual enrollment

was initiated because VISA has been fully integrated into DOD's priority for award of cargo to VISA participants. It is necessary to link the VISA enrollment cycle with DOD's peacetime cargo contracting cycle.

New VISA applicants are required to submit their applications for the VISA program as described in this Notice no later than June 1, 2004. This alignment of VISA enrollment and eligibility for VISA priority will solidify the linkage between commitment of contingency assets by VISA participants and receiving VISA priority consideration for the award of DOD peacetime cargo.

This is the only planned enrollment period for carriers to join the VISA program and derive benefits for DOD peacetime contracts during the time frame of September 1, 2004 through August 31, 2005. The only exception to this open season period for VISA enrollment will be for a non-VISA carrier that reflags a vessel into U.S. registry. That carrier may submit an application to participate in the VISA program at any time upon completion of reflagging.

Advantages of Peacetime Participation

Because enrollment of carriers in the VISA program provides the DOD with assured access to sealift services during contingencies based on a level of commitment, as well as a mechanism for joint planning, the DOD awards peacetime cargo contracts to VISA participants on a priority basis. This applies to liner trades and charter contracts alike. Award of DOD cargoes to meet DOD peacetime and contingency requirements is made on the basis of the following priorities:

- U.S.-flag vessel capacity operated by VISA participants, and U.S.-flag Vessel Sharing Agreement (VSA) capacity held by VISA participants.
- U.S.-flag vessel capacity operated by non-participants.
- Combination U.S.-flag/foreign-flag vessel capacity operated by VISA participants, and combination U.S.-flag/foreign-flag VSA capacity held by VISA participants.
- Combination U.S.-flag/foreign-flag vessel capacity operated by non-participants.
- U.S.-owned or operated foreign-flag vessel capacity and VSA capacity held by VISA participants.
- U.S.-owned or operated foreign-flag vessel capacity and VSA capacity held by non-participants.
- Foreign-owned or operated foreign-flag vessel capacity of non-participants.

Participants

Any U.S.-flag vessel operator organized under the laws of a state of the United States, or the District of Columbia, who is able and willing to commit militarily useful sealift assets and assume the related consequential risks of commercial disruption, may be eligible to participate in the VISA program. While vessel brokers and agents play an important role as a conduit to locate and secure appropriate vessels for the carriage of DOD cargo, they may not become participants in the VISA program due to lack of requisite vessel ownership or operation. However, brokers and agents should encourage the carriers they represent to join the program.

Commitment

Any U.S.-flag vessel operator desiring to receive priority consideration in the award of DOD peacetime contracts must commit no less than 50 percent of its total U.S.-flag militarily useful capacity in Stage III of the VISA program. Participants operating vessels in international trade and desiring to bid on DOD peacetime contracts will be required to provide commitment levels to meet DOD-established Stages I and/or II minimum percentages of the participant's militarily useful, oceangoing U.S-flag international trading fleet capacity on an annual basis. The USTRANSCOM and MARAD will coordinate to ensure that the amount of sealift assets committed to Stages I and II will not have an adverse national economic impact. To minimize domestic commercial disruption, participants operating vessels exclusively in the domestic Jones Act trades are not required to commit the capacity of those U.S. domestic trading vessels to VISA Stages I and II. Overall VISA commitment requirements are based on annual enrollment.

In order to protect a U.S.-flag vessel operator's market share during contingency activation, VISA allows participants to join with other vessel operators in Carrier Coordination Agreements (CCAs) to satisfy commercial or DOD requirements. VISA provides a defense against antitrust laws in accordance with the DPA. CCAs must be submitted to MARAD for coordination with the Department of Justice for approval, before they can be utilized.

Compensation

In addition to receiving priority in the award of DOD peacetime cargo, a participant will receive compensation during contingency activation. During enrollment, each participant may choose a compensation methodology which is commensurate with risk and service provided. The compensation methodology selection will be completed with the appropriate DOD agency.

Enrollment

New applicants may enroll by obtaining a VISA application package (Form MA–1020 (OMB Approval No. 2133–0532)) from the Director, Office of Sealift Support, at the address indicated below. Form MA–1020 includes instructions for completing and submitting the application, blank VISA Application forms and a request for information regarding the operations and U.S. citizenship of the applicant company. A copy of the February 25, 2003 VISA will also be provided with the package. This information is needed in order to assist MARAD in making a determination of the applicant's eligibility. An applicant company must provide an affidavit that demonstrates that the company is qualified to document a vessel under 46 U.S.C., section 12102, and that it owns, or bareboat charters and controls, oceangoing, militarily useful vessel(s) for purposes of committing assets to the VISA program. As previously mentioned, VISA applicants must return the completed VISA application documents to MARAD not later than June 1, 2004. Once MARAD has reviewed the application and determined VISA eligibility, MARAD will sign the VISA application document which completes the eligibility phase of the VISA enrollment process.

In addition, the applicant will be required to enter into a contingency contract with the DOD. For the VISA open season applicants, and prior to being enrolled in VISA, eligible VISA applicants will be required to execute a joint VISA Enrollment Contract (VEC) with the DOD [Surface Deployment Distribution Center (SDDC) and the Military Sealift Command (MSC)] which will specify the participant's Stage III commitment for the period September 1, 2004 through August 31, 2005. Once the VEC is completed, the applicant completes the DOD contracting process by executing a Drytime Contingency Contract (DCC) with MSC (for Charter Operators) and if applicable, a VISA Contingency Contract (VCC) with SDDC (for Liner Operators).

For Additional Information and Applications Contact: Frances M. Olsen, Deputy Director, Office of Sealift Support, U.S. Maritime Administration, Room 7307, 400 Seventh Street, SW.,

Washington, DC 20590. Telephone (202) 366–2323. Fax (202) 493–2180. Other information about the VISA can be found on MARAD's Internet Web Page at *http://www.marad.dot.gov.*

Authority: 49 CFR 1.66.

By Order of the Maritime Administrator. Dated: April 30, 2004.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 04–10202 Filed 5–4–04; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Departmental Offices; Treasury's Decision To Extend the Terrorism Risk Insurance Act's "Make Available" Requirement

AGENCY: Department of the Treasury, Departmental Offices.

ACTION: Notice; Request for Comments.

SUMMARY: Title I of the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297) requires that, from the date of enactment (November 26, 2002) through the last day of Program Year 2 (December 31, 2004), each insurer must make available, in all of its property and casualty insurance policies, coverage for insured losses under the Act. In this regard, the Act requires that such insurance coverage must not differ materially from the terms, amounts and other coverage limitations applicable to losses arising from events other than acts of terrorism. In addition, the Act requires the Secretary of the Treasury (Treasury) to determine, no later than September 1, 2004, whether to extend these statutory make available requirements through Program Year 3 (December 31, 2005). To obtain additional information to assist Treasury in its determination, the Treasury solicits public comment on the questions listed below.

DATES: Comments must be in writing and received by June 4, 2004.

ADDRESSES: Send comments by e-mail to *triacomments@do.treas.gov.* Please include your name, affiliation, address, e-mail address, and telephone number. All submissions should be captioned "Comments on Make Available Determination."

FOR FURTHER INFORMATION CONTACT: Mario Ugoletti, Acting Director, Office of Financial Institutions Policy, 202–622–0715; Roy Woodall, Senior Insurance Analyst, Office of Financial Institutions Policy, 202–622–5171; U.S. Treasury Department (not toll-free numbers).

SUPPLEMENTARY INFORMATION: On November 26, 2002, President Bush signed into law the Terrorism Risk Insurance Act of 2002 (the Act). The Act was effective immediately. Title I of the Act established a temporary federal program of shared public and private compensation for insured commercial property and casualty insured losses resulting from an act of terrorism as defined by the Act. The Act authorized Treasury to administer and implement the three year Terrorism Risk Insurance Program which ends on December 31, 2005.

Section 103(c)(1) of the Act requires each entity that meets the definition of an insurer under the Act to (A) make available, in all of its property and casualty insurance polices coverage for insured losses; and (B) make available property and casualty insurance coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism. These requirements apply from the date of enactment (November 26, 2002) through the last day of Program Year 2 (December 31, 2004).[1]

In addition, section 103(c)(2) of the Act requires Treasury to determine, no later than September 1, 2004, whether to extend the "make available" requirements of section 103(c)(1) through Program Year 3 (December 31, 2005). (Regardless of whether the make available requirements are extended by Treasury through Program Year 3, we note that the overall Program and the Act's federal backstop for insured losses for acts of terrorism continue though December 31, 2005.) The Treasury determination on whether to extend the make available requirements through Program Year 3 is to be based on the factors referred to in section 108(d)(1) of the Act. The factors referred to in section 108(d)(1) are:

- The "effectiveness of the Program;"
- The "likely capacity of the property and casualty insurance industry to offer insurance for terrorism risk after termination of the Program" and
- The "availability and affordability of such insurance for various policyholders, including railroads, trucking, and public transit."

[1] Following enactment of the Act, Treasury promptly issued interim guidance on the make available requirement and other provisions of the Act. See for example, 67 FR 76206 (December 11, 2002). This interim guidance was superceded by Treasury's interim final rules and notice and comment rulemaking. Treasury's final regulations implementing the make available requirements of section 103(c)(1) are located at 31 CFR 50.20–24. See also 68 FR 59720 (October 17, 2003).

Pursuant to the Act, Treasury is now considering whether to extend the make available requirements in section 103(c)(1)(A) and (B) to Program Year 3. As noted above, section 103(c)(2) provides that Treasury base this determination "on the factors referred to in section 108(d)(1)". Section 108(d) of the Act requires Treasury to conduct a study and prepare a report to Congress by June 30, 2005 relating to the termination of the Program; the factors described in section 108(d)(1) (and cross-referenced by section 103 of the Act) are keyed directly to the overall effectiveness of the Program and how the insurance industry might respond after the termination of the Program. To better enable Treasury to evaluate the overall effectiveness of the Act as required by section 108(d), Treasury is in the process of conducting a series of nationally representative surveys of insurers and policyholders.

The section 103(c) determination of whether to extend the make available requirements, and its timing, differ from the purpose and timing of the study and report required by section 108(d), but the Act requires Treasury to base the make available determination on the factors referenced in section 108(d)(1).

Treasury's data collection from the surveys we are conducting as part of our overall evaluation of the Program for purposes of the study under section 108(d) will only be partially complete by the time a decision on extending the make available requirement must be made. In addition, the make available requirement of section 103(c) comprises only one component of the overall Program. Thus, as Treasury considers whether to extend the make available requirement into Program Year 3, we are particularly interested in any specific way, or ways, in which the make available requirement has worked or affected the overall operation of the Program and whether this ties into the factors described in section 108(d)(1).

To facilitate a determination by Treasury within the required time frame on whether to extend the make available requirement into Program Year 3, Treasury solicits general comments from the public as well as specific responses to the following questions, including submission of any relevant empirical data in support of such comments where appropriate and available.

I. Effectiveness of the Make Available Requirement in the Context of the Overall Program

1.1 Has the make available requirement contributed to the overall effectiveness of the Program over the first two years of the Program? In

particular, has the make available requirement been effective in making terrorism insurance coverage available and more affordable to the insurance marketplace in general, to large corporate policyholders, and to small business policyholders? (We specifically seek information on terrorism coverage for railroads, trucking and public transit in response to this question.)

1.2 How would the effectiveness of the Program be affected during Program Year 3 (where the federal backstop for terrorism insurance is still maintained under the Act) if the make available requirement is not extended? Would policyholders still be able to obtain terrorism risk insurance (under what terms and conditions) and would the affordability be impacted if the requirement is not extended? Compare your response to the preceding questions to what you believe would be the effectiveness of the Program if the make available requirement is extended into 2005.

1.3 Has Treasury's implementation of the make available requirement contributed to the effectiveness of the Program? In particular, has the make available requirement resulted in businesses being provided with useful information and the enhanced ability to compare prices for terrorism risk insurance across a number of providers? Given the experience with the make available requirement since enactment and policyholders' decisions on whether to purchase coverage provided by the Act, are there other approaches to implementing the make available requirement that are worth considering?

1.4 How would a decision on extending or not extending the make available requirement affect policyholders' understanding of their options regarding the availability of terrorism risk insurance coverage in Program Year 3 (*e.g.*, that the federal backstop for terrorism risk insurance is still in force)? Would one course of action be better understood by policyholders than other options?

II. The Relationship Between the Make Available Requirement and the Likely Capacity of Property and Casualty Insurers To Offer Coverage for Terrorism Risk After Termination of the Program

2.1 What is the relationship between the make available requirement and an insurer's capacity to offer terrorism risk insurance coverage? How has the make available requirement affected or interacted with the available capacity of property and casualty insurers to provide terrorism risk insurance coverage during the course of the Program to date? Has the make available requirement led to any build-up in capacity?

2.2. How would a Treasury decision to extend or not to extend the make available requirement affect or interact with the capacity of property and casualty insurers (including the availability of reinsurance) in terms of offering terrorism risk insurance coverage in Program Year 3? In addition, would there be any effect on insurers' decision to offer terrorism risk insurance coverage beyond 2005 that could be associated with a decision to extend or not to extend the make available requirement during Program Year 3?

III. Operational Issues

3.1 What would be the regulatory impact at the state level (*e.g.* on filings with the state regulator of policy forms or exclusions) if the make available requirement were extended through Program Year 3 (2005)? Similarly, what would be the regulatory impact at the state level if the make available requirement were not extended through Program Year 3?

3.2 Are there other operational issues that Treasury should consider as part of determining whether or not to extend the make available requirement through Program Year 3?

Dated: April 28, 2004.

Wayne A. Abernathy,

Assistant Secretary for Financial Institutions.

[FR Doc. 04–10151 Filed 5–4–04; 8:45 am]

BILLING CODE 4811–15–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1116

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1116, Foreign Tax Credit.

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Foreign Tax Credit.

OMB Number: 1545–0121.

Form Number: 1116.

Abstract: Form 1116 is used by individuals (including nonresident aliens), estates, or trusts who paid foreign income taxes on U.S. taxable income, to compute the foreign tax credit. This information is used by the IRS to determine if the foreign tax credit is properly computed.

Current Actions: There are no changes being made to Form 1116 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 442,425.

Estimated Time Per Respondent: 6 hours, 33 minutes.

Estimated Total Annual Burden Hours: 2,897,886.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of

information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 29, 2004.

Carol Savage,

Management and Program Analyst.

[FR Doc. 04–10224 Filed 5–4–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–107151–00]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–107151–00 (TD 9035), Constructive Transfers and Transfers of Property to a Third-Party on Behalf of a Spouse (§ 1.1041–2).

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Constructive Transfers and Transfers of Property to a Third Party on Behalf of a Spouse.

OMB Number: 1545–1751.

Regulation Project Number: REG–107151–00.

Abstract: The regulation sets forth the required information that will permit spouses or former spouses to treat a redemption by a corporation of stock of one spouse or former spouse as a transfer of that stock to the other spouse or former spouse in exchange for the redemption proceeds and a redemption of the stock from the latter spouse or former spouse in exchange for the redemption proceeds.

Current Actions: There are no changes being made to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or household, and business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 500.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 29, 2004.

Carol Savage,

Management and Program Analyst.

[FR Doc. 04–10225 Filed 5–4–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8655

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8655, Reporting Agent Authorization for Magnetic Tape/Electronic Filers.

DATES: Written comments should be received on or before July 6, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Reporting Agent Authorization for Magnetic Tape/Electronic Filers.

OMB Number: 1545–1058.

Form Number: Form 8655.

Abstract: Form 8655 allows a taxpayer to designate a reporting agent to file certain employment tax returns electronically or on magnetic tape, to receive copies of notices and other tax information, and to submit Federal tax deposits. This form allows IRS to disclose tax account information and to provide duplicate copies of taxpayer correspondence to authorized agents.

Current Actions: There are no changes being made to this form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 110,000.

Estimated Time Per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 11,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 29, 2004.

Carol Savage,

Management and Program Analyst.

[FR Doc. 04–10227 Filed 5–4–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, New Mexico, Nevada, Oregon, Washington and Wyoming)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 6 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. The TAP will use citizen input to make recommendations to the Internal Revenue Service.

DATES: The meeting will be held Monday, May 17, 2004.

FOR FURTHER INFORMATION CONTACT: Anne Gruber at 1–888–912–1227, or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 6 Taxpayer Advocacy Panel will be held Monday, May 17, 2004, from 2 p.m. Pacific time to 3 p.m. Pacific time via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Anne Gruber, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Anne Gruber. Ms. Gruber can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: various IRS issues.

Dated: April 29, 2004.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 04–10228 Filed 5–4–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0600]

Agency Information Collection 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. 3501–21), 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 June 4, 2004.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail to: *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–0600."

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0600" in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Regulation for Reconsideration of Denied Claims.

OMB Control Number: 2900–0600.

Type of Review: Extension of a currently approved collection.

Abstract: The purpose of this data collection is to provide a vehicle to request an informal review with veterans whose healthcare benefit claims were denied. Veterans who disagree with the initial decision denying their claim in whole or in part may obtain reconsideration by submitting a request in writing within one year of the date of the initial decision. The request must state why the decision is in error and include any new and relevant information not previously considered. This process reduces both formal appeals and allows decision making to be more responsive to veterans using the VA healthcare system.

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 February 9, 2004, at page 6017.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 50,826 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 101,652.

Dated: April 22, 2004.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10132 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed new collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine eligibility for aid and attendance for claimants who are patients in nursing homes.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 6, 2004.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–NEW" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Request for Nursing Home Information in Connection with Claim for Aid and Attendance, VA Form 21–0779.

OMB Control Number: 2900–NEW.

Type of Review: New collection.

Abstract: VA Form 21–0779 is used to gather the necessary information to determine eligibility and proper payment for improved pension and/or aid and attendance for veterans who are patients in nursing homes. Parents and surviving spouses entitled to service—connected death benefits and spouses of living veterans receiving service connected compensation at 30 percent or higher are also entitled to aid and attendance based on status as nursing home patients.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 8,333 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 50,000.

Dated: April 22, 2004.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10133 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0092]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 4, 2004.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., or e-mail *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–0092." Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0092" in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Counseling Record—Personal Information, VA Form 28–1902.

OMB Control Number: 2900–0092.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans and other beneficiaries complete VA Form 28–1902 to assist in an individualized counseling session or series of sessions. VA counselors (either a counseling psychologist or vocational rehabilitation counselor) use the information provided on form to evaluate veteran claimants and assist eligible veterans to plan a suitable program of vocational rehabilitation. If needed, VA must develop a program of assistance and services to improve the veteran's potential to participate in vocational rehabilitation and provide counseling services to help a veteran or other beneficiary eligible under another educational benefit chapter to select an educational, training, or employment objective.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 5, 2003, at page 62664.

Affected Public: Individuals or households.

Estimated Annual Burden: 30,000 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 60,000.

Dated: April 21, 2004.

By direction of the Secretary:

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10134 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0021]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 4, 2004.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., or e-mail *denise.mclamb@mail.va.gov*. Please refer to "OMB Control No. 2900–0021." Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0021" in any correspondence.

SUPPLEMENTARY INFORMATION:

Titles:

a. Notice of Default, VA Form 26–6850.

b. Notice of Default and Intention to Foreclose, VA Form 26–6850a.

c. Notice of Intention to Foreclose, VA Form 26–6851.

OMB Control Number: 2900–0021.

Type of Review: Extension of a currently approved collection.

Abstract: Holders of guaranteed loans are required to notify VA within 45 days of a loan default due to nonpayment of any installment for a period of 60 days from the date of the first uncured default. Holders are also required to notify VA of their intention to foreclose. After delivery of such notice to VA and 30 days has passed, the holder can begin court proceedings, give notice of sale under power of sale, or otherwise take steps to terminate the debtor's rights in the security. VA Forms 26–6850 and 26–6851 require that servicing efforts are fully explained so that VA can determine whether supplemental servicing could develop further information to justify the extension of forbearance to the veterans-borrower as opposed to foreclosure. The information provided is used to coordinate the actions of VA and the holder to ensure that all legal requirements regarding foreclosure and claim payment are met. VA Form 26–6850a is filed by holders when defaults are determined insoluble by holders at the time the notice of default is filed with VA. This form provides both notice of default and intent to foreclosure together on one form.

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 December 15, 2003, at pages 69774–69775.

Affected Public: Business or other for-profit; Individuals or households.

Estimated Annual Burden: 66,166

a. VA Form 26–6850—20,166 hours.

b. VA Form 26–6850a—26,000 hours.

c. VA Form 26–6851—20,000 hours.

Estimated Average Burden Per Respondent:

a. VA Form 26–6850—10 minutes.

b. VA Form 26–6850a—20 minutes.

c. VA Form 26–6851—15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 279,000 hours.

a. VA Form 26–6850—121,000 hours.

b. VA Form 26–6850a—78,000 hours.

c. VA Form 26–6851—80,000 hours.

Dated: April 20, 2004.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10135 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0249]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine whether a loan default is insoluble or whether an obligor has reasonable prospects for curing the default.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 6, 2004.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov*. Please refer to "OMB Control No. 2900–0249" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Loan Service Report, VA Form 26–6808.

OMB Control Number: 2900–0249.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–6808 is used when servicing delinquent guaranteed and insured loans and loans sold under 38 CFR 36.4600. With the respect to the

servicing of guaranteed and insured loans and loans sold under 38 CFR 36.4600, the holder has the primary servicing responsibility. However, VA has the responsibility to see that the servicing efforts of holders are consistent with VA policies and guidelines. In those cases in which early payment of the delinquency appears unlikely, supplemental servicing by VA will be conducted to determine whether the holder may have overlooked any relief measures. Since there are ordinarily financial losses to both the borrower and the Government resulting from the foreclosure of a guaranteed loan, supplemental servicing can protect the interest of each by assuring that appropriate relief is extended to those borrowers whose loans can be reinstated within a reasonable period of time. VA Loan Service Representatives complete VA Form 26–6808 during the course of personal contacts with delinquent obligors. The information acquired may form the basis of VA's intercession with the holder for the acceptance of specially arranged repayment plans or other forbearance aimed at assisting the obligor in retaining his or her home.

Affected Public: Individuals or households.

Estimated Annual Burden: 16,667 hours.

Estimated Average Burden Per Respondent: 25 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 40,000.

Dated: April 22, 2004.

By direction of the Secretary:

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10136 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0546]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The National Cemetery Administration (NCA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine gravesite availability.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 6, 2004.

ADDRESSES: Submit written comments on the collection of information to Mechelle Powell, National Cemetery Administration (41D1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *mechelle.powell@mail.va.gov*. Please refer to "OMB Control No. 2900–0546" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Mechelle Powell at (202) 273–5181 or FAX (202) 273–6695.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), 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, NCA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of NCA's functions, including whether the information will have practical utility; (2) the accuracy of NCA'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: Gravesite Reservation Survey (2 Year), VA Form 40–40.

OMB Control Number: 2900–0546.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form Letter 40–40 is sent biennially to individuals holding gravesite set-asides to ascertain their wish to retain their set-aside, or relinquish it. Gravesite reservation surveys are necessary as some holders become ineligible, are buried elsewhere, or simply wish to cancel a gravesite set-aside for them. The survey is conducted to assure that gravesite set-asides do not go unused.

Affected Public: Individuals or households; Business or other for-profit.

Estimated Annual Burden: 3,000.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Biennially.

Estimated Number of Respondents: 18,000.

Dated: April 21, 2004.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10137 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Summary of Precedent Opinions of the General Counsel

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Department's Office of General Counsel involving veterans' benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in future claim matters. They are being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretations regarding the legal matters at issue.

FOR FURTHER INFORMATION CONTACT: Susan P. Sokoll, Law Librarian, Department of Veterans Affairs (026H), 810 Vermont Ave., NW, Washington, DC 20420. (202) 273–6558.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(8) and 14.507 authorize the Department's Office of General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under the laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel, which must be, followed in future benefit matters and to

assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above or by accessing them on the Internet at *http://www1.va.gov/OGC/*.

VAOPGCPREC 11–2001

Question Presented

When a veteran is ineligible for burial in a national cemetery by operation of 38 U.S.C. 2411, may a headstone or marker or a memorial headstone or marker be provided under 38 U.S.C. 2306(a) or (b) for placement in a state, local, or private cemetery?

Held

A veteran who cannot qualify for a headstone or marker under 38 U.S.C. 2306(a), because he or she is not eligible for burial in a national cemetery due to 38 U.S.C. 2411, also cannot qualify for a memorial headstone or marker under U.S.C. 2306(b), in the event his or her remains are unavailable.

EFFECTIVE DATE: June 7, 2001.

VAOPGCPREC 12–2001

Question Presented

What did the United States Court of Appeals for the Federal Circuit hold in *Roberson* v. *Principi*, No. 00–7009, 2001 U.S. App. LEXIS 11008 (Fed. Cir. May 29, 2001)?

Held

The only holdings in *Roberson* v. *Principi*, No. 00–7009, 2001 U.S. App. LEXIS 11008 (Fed. Cir. May 29, 2001) are the following:

1. Once a veteran: (1) submits evidence of a medical disability; (2) makes a claim for the highest rating possible; and (3) submits evidence of unemployability, the requirement in 38 CFR 3.155(a) that an informal claim "identify the benefit sought" has been satisfied and VA must consider whether the veteran is entitled to total disability based upon individual unemployability (TDIU).

2. A veteran is not required to submit proof that he or she is 100% unemployable in order to establish an inability to maintain a substantially gainful occupation, as required for a TDIU award pursuant to 38 CFR 3. 340(a).

EFFECTIVE DATE: July 6, 2001.

VAOPGCPREC 13–2001

Question Presented

A. Whether the Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the Department of Veterans Affairs (VA) from relying on field investigation reports in determining a nonresident alien claimant's entitlement to benefits without providing the claimant with the names of informers and field investigators and complete copies of relevant documents.

B. Whether, consistent with fair process principles stated in *Thurber* v. *Brown*, 5 Vet. App. 119, 122–26 (1993), and *Austin* v. *Brown*, 6 Vet. App. 547, 550–55 (1994), the Board of Veterans' Appeals (Board), in rendering a decision regarding entitlement to veterans benefits, may rely upon information provided by informers during the course of field examinations that is not available to a claimant.

C. Whether a claimant's failure to appeal a VA decision regarding disclosure of information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, is of legal significance with regard to due process and fair process concerns in the claimant's benefit claim.

D. Whether the Board may conduct a private inspection of evidence and release to a claimant exculpatory information that was redacted by VA in response to a request for release of information pursuant to the FOIA.

Held

A. In order to decide whether disclosure of the names of informers and field investigators and complete copies of relevant documents is required to ensure fair process and compliance with established adjudication procedures (38 CFR 3.103(c) and (d)), the Board of Veterans' Appeals (Board) must consider whether a claimant's ability to rebut negative evidence or challenge the credibility of an informer's or investigator's statement would be impaired where a claimant has not had an opportunity to view the evidence or learn the name of an informer or investigator who has provided information that will be used in the adjudication of a benefit claim.

B. The Department of Veterans Affairs (VA) may assert the informer's privilege and/or the law enforcement information privilege against disclosure to a claimant of the names of informers and field investigators and complete copies of relevant documents upon which the Board intends to rely in making its decision. Where such a privilege is asserted and the Board finds that the privilege would be applicable to the information that VA seeks to withhold, the Board must balance the public interest in protecting the flow of information for purposes of preventing fraud in the payment of veterans benefits against the claimant's right to rebut or challenge the credibility of an informer's statements or information provided in an investigative report in order to decide whether disclosure to a claimant of the name of an informer or field investigator and complete copies of relevant documents upon which the Board intends to rely in making its decision is necessary in a particular case. If the Board finds that the claimant's need for the name of an informer or field investigator outweighs the public's interest in protecting the name from disclosure, the Board should disclose the name to the claimant and may consider the information provided by the informer or field investigator in deciding the claim. If the Board finds that the public's interest in protecting the name of an informer or field investigator outweighs the claimant's need for the information, the Board should not disclose the name and may consider the information provided by the informer or field investigator in deciding the claim. If the Board finds that the claimant's need and the public's interest are of equal weight, it should decide the claim without considering information derived from sources not disclosed to the claimant. Under those circumstances, the Board would have to rely upon other evidence of record in deciding the claim.

C. A claimant's failure to appeal a decision by VA regarding disclosure of public information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, is not controlling in assessing the adequacy of the procedures employed in VA's adjudication of a claim for benefits. However, there is a strong correlation between FOIA privileges relating to law enforcement and common law evidentiary privileges, and applicability of the FOIA exemptions may lend support to a claim of privilege by the Government.

D. The Board may review, in private, evidence upon which it intends to rely in order to determine whether particular information should be redacted as privileged. However, at a minimum, the claimant should be informed as fully as possible concerning the Board's action and be given an opportunity to address the issue of the need for full disclosure.

EFFECTIVE DATE: August 31, 2001.

VAOPGCPREC 14–2001

Question Presented

A. May the Board of Veterans' Appeals (Board) itself complete the development it ordered be completed by

an agency of original jurisdiction (AOJ) in a remanded case?

B. May an AOJ to which the Board has remanded a case for development return the case to the Board for completion of the development by the Board?

C. If the Board may recall a remanded case before the AOJ has completed the development ordered in the remand, must the AOJ readjudicate the case and issue a supplemental statement of the case (SSOC) as to any pertinent evidence it has received following the prior remand by the Board?

Held

A. Section 19.9(a) of title 38, Code of Federal Regulations, currently requires the Board of Veterans' Appeals (Board) to remand a case to the agency of original jurisdiction (AOJ) if the Board determines that additional evidence, clarification of the evidence, or correction of a procedural defect is essential for a proper appellate decision. Provided that § 19.9(a) is amended to permit the Board either to remand the case to the AOJ or to direct its own personnel to undertake the action necessary, the Board may itself complete the evidentiary development it ordered to be completed by the AOJ in a remanded case, subject to any regulatory requirements for vacating remand orders that may be established.

B. Section 19.38 to title 38, Code of Federal Regulations, requires the AOJ to which the Board has remanded a case to complete the development ordered in the remand. The subordinate status of AOJs relative to the Board and the nature of the statutory and regulatory adjudication and appeal scheme require that AOJs abide by the Board's decision to remand a case for development. Accordingly, an AOJ may not itself return a case remanded to it by the Board before it has completed (or attempted to complete) the development ordered in the remand. However, the Board may vacate its previous remand order, recall the remanded case, and complete the necessary development itself. Before any Board remand order is vacated, however, 38 CFR 20.904 should be amended to expressly authorize this action and, preferably, to specify standards to guide the exercise of discretion by the Board. Under such a regulation, if the Board would rather itself conduct the development of a case that it has already remanded to an AOJ, it could vacate the remand order and call the case back to the Board, regardless of whether the AOJ has completed the ordered development.

C. Section 19.31 of title 38, Code of Federal Regulations, generally requires the AOJ to issue a supplemental statement of the case (SSOC) following development pursuant to a remand by the Board unless the Board specifies that a SSOC is not required. Provided that § 19.31 is amended so as not to require a SSOC if pertinent evidence is developed pursuant to a Board remand in a case that is recalled by the Board, the AOJ need not readjudicate the case or issue a SSOC as to any such evidence. In addition, 38 CFR 20.903 should be amended to assure that the appellant is given adequate notice and an opportunity to respond if the Board intends to rely on additional evidence developed by the AOJ in a claim remanded and then recalled by the Board.

Caution: However, see *Disabled American Veterans* v. *Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), which invalidated VA regulations permitting the Board of Veterans' Appeals to consider evidence that was not already considered by the agency of original jurisdiction, without obtaining the appellant's waiver of the right to initial consideration by the agency of original jurisdiction.

EFFECTIVE DATE: December 14, 2001.

VAOPGCPREC 1–2002

Question Presented

May an individual receive concurrent Chapter 35 Survivors' and Dependents' Educational Assistance program benefits when both parents are permanently and totally (P&T) disabled due to a service-connected condition?

Held

Chapter 35 educational assistance allowance may not be paid concurrently to a child by reason of the P&T service-connected disability of more than one parent.

EFFECTIVE DATE: January 25, 2002.

VAOPGCPREC 2–2002

Question Presented:

Does 38 U.S.C. 5301(a) prohibit the Department of Veterans Affairs (VA) from deducting from benefit payments, at the direction of the beneficiary, dental-insurance premiums to be paid to a private insurer as part of the Civilian Health and Medical Program of VA (CHAMPVA)?

Held

Section 5301(a) of title 38, United States Code, prohibits the assignment of payments of Department of Veterans Affairs (VA) benefits due or to become due, except to the extent specifically authorized by law. In the absence of a specific statutory exception, VA may not deduct from VA benefits, at the direction of the beneficiary, premiums charged for dental insurance provided by a private insurer through a contract with the Department of Defense.

EFFECTIVE DATE: March 5, 2002.

VAOPGCPREC 3–2002

Question Presented

Can a Committee on Waivers and Compromises continue to consider a veteran's request for waiver of indebtedness if the veteran dies while the waiver request is pending?

Held

A Committee on Waivers and Compromises can continue consideration of a request for waiver of indebtedness brought by a veteran-debtor notwithstanding the death of the veteran-debtor while the waiver proceeding is pending.

EFFECTIVE DATE: March 7, 2002.

VAOPGCPREC 4–2002

Question Presented

Whether a former member of the Army Reserve who received two anthrax inoculations during inactive duty training and who alleges suffering from chronic fatigue and chronic Lyme-like disease as a result of these inoculations may be considered to have been disabled by an injury in determining whether the member incurred disability due to active service.

Held

If evidence establishes that an individual suffers from a disabling condition as a result of administration of an anthrax vaccination during inactive duty training, the individual may be considered disabled by an "injury" incurred during such training as the term is used in 38 U.S.C. 101 (24), which defines "active military, naval, or air service" to include any period of inactive duty training during which the individual was disabled or died from an injury incurred or aggravated in line of duty. Consequently, such an individual may be found to have incurred disability in active military, naval, or air service for purposes of disability compensation under 38 U.S.C. 1110 or 1131.

EFFECTIVE DATE: May 14, 2002.

VAOPGCPREC 5–2002

Question Presented

Whether all regulations found in Part 4 of title 38, Code of Federal Regulations, are exempt from judicial review under 38 U.S.C. 502 or 7252(c).

Held

Placement of a regulation in Part 3 or Part 4 of the CFR is not determinative of its susceptibility to judicial review. Whether a section in Part 4 of the CFR is considered part of the "schedule of ratings" must be assessed on a case-by-case basis. Generally, the prohibition on judicial review, under 38 U.S.C. 502 or 7252(c), of the schedule of ratings or disabilities refers only to the provisions that prescribe the average impairments of earning capacities, divided into ten grades of disability upon which payments of compensation are based, adopted and adjusted under 38 U.S.C. 1155.

EFFECTIVE DATE: May 17, 2002.

VAOPGCPREC 6–2002

Question Presented

A. May the Department of Veterans Affairs (VA) sever service connection of a disability erroneously and recently granted but with an effective date more than ten years earlier than the date of the decision granting service connection?

B. If such a grant of service connection is protected from severance, must VA retroactively award compensation for that disability, if otherwise in order?

Held

A. Section 1159 of title 38, United States Code, and its implementing regulation, 38 CFR 3.957, protect a grant of service connection (unless the grant was based on fraud or military records clearly show that the person concerned did not have the requisite service or character of discharge) that has been in effect for ten years or longer, as computed from the effective date of the establishment of service connection. Those provisions protect even service connection erroneously and recently granted, but with an effective date more than ten years before the date of the decision establishing service connection. The Department of Veterans Affairs (VA) may not sever such a grant of service connection (in the absence of fraud or lack of requisite service or character of discharge).

B. Sections 1110 and 1131 of title 38, United States Code, direct the payment of compensation in accordance with the provisions of chapter 11, title 38, United States Code, to a veteran with the requisite service who is disabled by a service-connected disability, unless the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs. In the absence of the veteran's own willful misconduct or abuse of alcohol or drugs, VA must pay, in accordance with the provisions of chapter 11, compensation otherwise in order for a disability that was erroneously service connected, where service connection is protected from severance.

EFFECTIVE DATE: July 11, 2002.

VAOPGCPREC 7–2002

Question Presented

A. When the benefits of a veteran's surviving spouse are terminated pursuant to 38 U.S.C. 5313B because the surviving spouse is a fugitive felon, may benefits be paid to the surviving spouse's dependent children?

B. When the benefits of a veteran's child are terminated pursuant to 38 U.S.C. 5313B because the child is a fugitive felon, and there are other children of the veteran in receipt of benefits, how are the other children's benefits affected?

Held

A. If a surviving spouse of a veteran becomes a fugitive felon and consequently loses eligibility for dependency and indemnity compensation (DIC) or improved death pension benefits by operation of 38 U.S.C. 5313B, additional benefits payable to the surviving spouse for children of the veteran would cease. Statutes governing DIC, 38 U.S.C. 1313(a), and improved death pension, 38 U.S.C. 1542, provide independent eligibility for a veteran's children where there is no surviving spouse eligible for benefits. Thus, the children may receive benefits in their own right.

B. If a veteran's child in receipt of improved death pension benefits loses eligibility for those benefits by operation of 38 U.S.C. 5313B upon becoming a fugitive felon, the improved pension benefits payable to other children of the veteran would not be affected. Similarly, in the case of DIC, as long as the child who loses eligibility under 38 U.S.C. 5313B continues to meet the definition of child for title 38 purposes, the shares of other children receiving DIC will not increase.

EFFECTIVE DATE: December 2, 2002.

VAOPGCPREC 1–2003

Question Presented

A. What effect does the decision of the United States Court of Appeals for the Federal Circuit in *Disabled American Veterans* v. *Secretary of Veterans Affairs,* Case Nos. 02–7304, –7305, –7316 (Fed. Cir. May 1, 2003) (*DAV* decision), have on the authority of the Board of Veterans' Appeals (Board) to develop evidence with respect to cases pending before the Board on appeal?

B. May the Board adjudicate claims where new evidence has been obtained if the appellant waives initial consideration of the new evidence by first-tier adjudicators in the Veterans Benefits Administration (VBA)?

C. What effect does the *DAV* decision have on the Board's authority to send claimants the notice required by 38 U.S.C. 5103(a) in cases pending before the Board on appeal?

D. Is the Board required to identify and readjudicate any claims decided before May 1, 2003 (the date of the *DAV* decision) in which the Board applied the regulatory provisions that the Federal Circuit held invalid in the *DAV* decision?

Held

A. The decision of the United States Court of Appeals for the Federal Circuit in *Disabled American Veterans* v. *Secretary of Veterans Affairs,* Case Nos. 02–7304, –7305, –7316 (Fed. Cir. May 1, 2003) (DAV decision), does not prohibit the Board of Veterans' Appeals (Board) from developing evidence in a case on appeal before the Board, provided that the Board does not adjudicate the claim based on any new evidence it obtains unless the claimant waives initial consideration of such evidence by first-tier adjudicators in the Veterans Benefits Administration (VBA). Existing statutes and regulations may reasonably be construed to authorize the Board to develop evidence in such cases. If considered necessary or appropriate to clarify the Board's authority, the Secretary of Veterans Affairs may expressly delegate to the Board the authority to develop evidence in accordance with 38 U.S.C. 5103A.

B. The Board may adjudicate claims where new evidence has been obtained if the appellant waives initial consideration of the new evidence by VBA.

C. The *DAV* decision does not prohibit the Board from issuing the notice required by 38 U.S.C. 5103(a) in a case on appeal before the Board. Existing statutes and regulations may reasonably be construed to authorize the Board to provide the required notice in such cases. If considered necessary or appropriate to clarify the Board's authority, the Secretary of Veterans Affairs may expressly delegate to the Board the authority to issue notice required by 38 U.S.C. 5103(a). The content of any notice issued by the Board must adhere to the requirements of 38 U.S.C. 5103 as described by the Federal Circuit in the *DAV* decision.

D. The Board is not required to identify and readjudicate any claims decided by the Board before May 1, 2003 (the date of the *DAV* decision) in which the Board applied the regulatory provisions that the Federal Circuit held invalid in the *DAV* decision. However, if a claim was finally denied by the Board and the claimant subsequently submits requested information or evidence within one year after the date of the request, the Department of Veterans Affairs must review the claim.

EFFECTIVE DATE: May 21, 2003.

VAOPGCPREC 2–2003

Question Presented

Whether Diagnostic Code (DC) 6260, as in effect prior to June 10, 1999, and as amended as of that date, authorizes a single 10% disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head, or whether separate disability ratings for tinnitus in each ear may be assigned under that or any other diagnostic code?

Held

Diagnostic Code 6260 (currently codified at 38 CFR 4.87), as in effect prior to June 10, 1999, and as amended as of that date, authorized a single 10% disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head. Separate ratings for tinnitus for each ear may not be assigned under DC 6260 or any other diagnostic code.

EFFECTIVE DATE: May 22, 2003.

VAOPGCPREC 3–2003

Question Presented

A. Does 38 CFR 3.304(b), which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service, conflict with 38 U.S.C. 1111, which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service "and was not aggravated by such service"?

B. Does 38 CFR 3.306(b), which provides that the presumption of aggravation under 38 U.S.C. 1153 does not apply when a preexisting disability did not increase in severity during service, conflict with 38 U.S.C. 1111?

Held

A. To rebut the presumption of sound condition under 38 U.S.C. 1111, the Department of Veterans Affairs (VA) must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. The claimant is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. The provisions of 38 CFR 3.304(b) are inconsistent with 38 U.S.C. 1111 insofar as § 3.304(b) states that the presumption of sound condition may be rebutted solely by clear and unmistakable evidence that a disease or injury existed prior to service. Section 3.304(b) is therefore invalid and should not be followed.

B. The provisions of 38 CFR 3.306(b) providing that aggravation may not be conceded unless the preexisting condition increased in severity during service, are not inconsistent with 38 U.S.C. 1111. Section 3.306(b) properly implements 38 U.S.C. 1153, which provides that a preexisting injury or disease will be presumed to have been aggravated in service in cases where there was an increase in disability during service. The requirement of an increase in disability in 38 CFR 3.306(b) applies only to determinations concerning the presumption of aggravation under 38 U.S.C. 1153 and does not apply to determinations concerning the presumption of sound condition under 38 U.S.C. 1111.

EFFECTIVE DATE: July 16, 2003.

VAOPGCPREC 4–2003

Question Presented

A. Who has the authority to consider whether collection of a debt should be suspended or terminated?

B. Is a denial of suspension or termination of collection activity under 31 U.S.C. § 3711 reviewable by the Board of Veterans' Appeals (Board)?

C. If regional-office rating personnel and/or the Board have the authority to consider whether collection of a debt should be suspended or terminated, must the Department of Veterans Affairs (VA) consider this issue in all cases where a debtor has requested a waiver of overpayment?

D. If regional-office rating personnel and/or the Board have the authority to consider whether collection of a debt should be suspended or terminated, then what is the relationship between the criteria for suspending or terminating collection activity and waiving recovery of an overpayment?

Held

A. Various Department of Veterans Affairs (VA) and non-VA personnel have the authority to suspend or terminate collection action under the Federal Claims Collection Act (FCCA) on debts arising out of VA activities, depending upon the amount, nature, and status of the debt. The Department of Justice may suspend or terminate collection on debts of more than $100,000. Designated officials in VA's Office of the General Counsel may suspend or terminate collection on debts of less that $100,000 involving liability for negligent damage to or loss of Government property or for the cost of hospital, medical, surgical, or dental care of a person. The Chief of the Fiscal Activity at individual Veterans Benefits Administration or Veterans Health Administration stations and the Director of VA's Debt Management Center may suspend or terminate collection on debts of up to $100,000 arising out of the operations of their offices. The Secretary of the Treasury, a Federal debt-collection center, a private collection contractor, or the Department of Justice may suspend or terminate collection on debts that have been referred to them for servicing or litigation under the FCCA.

B. The Board of Veterans' Appeals does not have jurisdiction to review discretionary decisions by authorized VA and non-VA officials concerning suspension or termination of collection of a benefit debt.

EFFECTIVE DATE: August 28, 2003.

VAOPGCPREC 5–2003

Question Presented

May the language of 38 CFR 3.157(b)(1) that provides that the date of admission to a Department of Veterans Affairs (VA) or uniformed services hospital will be accepted as the date of receipt of a claim for an increased disability rating be construed as including the date of admission to a private hospital pursuant to the prior authorization of a contractor that administers the Department of Defense's (DoD) TRICARE program?

Held

The provision of 38 CFR 3.157(b)(1) stating that the date of admission to a "uniformed services hospital will be accepted as the date of receipt of a claim" for increased benefits is applicable to veterans hospitalized in private facilities at DoD expense under DoD's TRICARE program.

EFFECTIVE DATE: September 15, 2003.

VAOPGCPREC 6–2003

Question Presented

Under 38 U.S.C. 1103, 1110, and 1131, may service connection be established for a tobacco-related disability or death on the basis that the disability or death was secondary to a

service-connected mental disability that caused the veteran to use tobacco products?

Held

Neither 38 U.S.C. 1103(a), which prohibits service connection of a disability or death on the basis that it resulted from injury or disease attributable to the use of tobacco products by the veteran during service, nor VA's implementing regulations at 38 CFR 3.300, bar a finding of secondary service connection for a disability related to the veteran's use of tobacco products after the veteran's service, where that disability is proximately due to a service-connected disability that is not service connected on the basis of being attributable to the veteran's use of tobacco products during service. The questions that adjudicators must resolve with regard to a claim for service connection for a tobacco-related disability alleged to be secondary to a disability not service connected on the basis of being attributable to the veteran's use of tobacco products during service are: (1) Whether the service-connected disability caused the veteran to use tobacco products after service; (2) if so, whether the use of tobacco products as a result of the service-connected disability was a substantial factor in causing a secondary disability; and (3) whether the secondary disability would not have occurred but for the use of tobacco products caused by the service-connected disability. If these questions are answered in the affirmative, the secondary disability may be service connected. Further, the secondary disability may be considered as a possible basis for service connection of the veteran's death, applying the rules generally applicable in determining eligibility for dependency and indemnity compensation.

EFFECTIVE DATE: October 28, 2003.

VAOPGCPREC 7–2003

Question Presented

A. What effect does the decision of the United States Court of Appeals for the Federal Circuit in *Kuzma* v. *Principi*, 341 F.3d 1327 (Fed. Cir. 2003), have upon the rule set forth by the United States Court of Appeals for Veterans Claims (CAVC) in *Karnas* v. *Derwinski*, 1 Vet. App. 308 (1991), concerning the applicability of changes in law?

B. Do the standards governing the retroactive application of statutes and regulations differ from those governing the retroactive application of rules announced in judicial decisions?

C. How should the Department of Veterans Affairs (VA) determine whether applying a new statute or regulation to a pending claim would have a prohibited retroactive effect?

D. In determining the applicability of a change in law, is there a difference between claims that were pending before VA when the change occurred and claims that had already been decided by the Board of Veterans' Appeals (Board) and were pending on direct appeal to a court when that change occurred?

E. If certain provisions of the Veterans Claims Assistance Act of 2000 (VCAA) were held to be inapplicable to claims filed before November 9, 2000 (the date the VCAA was enacted) and still pending before VA on that date, would VA have authority, from sources other than the VCAA, to continue applying its regulations implementing the VCAA to claims filed before that date?

F. Does VAOPGCPREC 11–2000 remain viable in light of the holdings in *Kuzma, Dyment* v. *Principi*, 287 F.3d 1377 (Fed. Cir. 2002), and *Bernklau* v. *Principi*, 291 F.3d 795 (Fed. Cir. 2002)?

Held

A. In *Kuzma* v. *Principi*, 341 F.3d 1327 (Fed. Cir. 2003), the United States Court of Appeals for the Federal Circuit overruled *Karnas* v. *Derwinski*, 1 Vet. App. 308 (1991), to the extent it conflicts with the precedents of the Supreme Court and the Federal Circuit. *Karnas* is inconsistent with Supreme Court and Federal Circuit precedent insofar as *Karnas* provides that, when a statute or regulation changes while a claim is pending before the Department of Veterans Affairs (VA) or a court, whichever version of the statute or regulation is most favorable to the claimant will govern unless the statute or regulation clearly specifies otherwise. Accordingly, that rule adopted in Karnas no longer applies in determining whether a new statute or regulation applies to a pending claim. Pursuant to Supreme Court and Federal Circuit precedent, when a new statute is enacted or a new regulation is issued while a claim is pending before VA, VA must first determine whether the statute or regulation identifies the types of claims to which it applies. If the statute or regulation is silent, VA must determine whether applying the new provision to claims that were pending when it took effect would produce genuinely retroactive effects. If applying the new provision would produce such retroactive effects, VA ordinarily should not apply the new provision to the claim. If applying the new provision would not produce retroactive effects, VA ordinarily must apply the new provision.

B. Different standards govern the retroactive application of statutes and regulations and the retroactive application of rules announced in judicial decisions. As a general matter, rules announced in judicial decisions apply retroactively to all cases still open on direct review when the new rule is announced. Statutes and regulations, in contrast, are presumed not to apply in any manner that would produce genuinely retroactive effects, unless the statute or regulation itself provides for such retroactivity.

C. There is no simple test for determining whether applying a new statute or regulation to a particular claim would produce retroactive effects. Generally, a statute or regulation would have a disfavored retroactive effect if it attaches new legal consequences to events completed before its enactment or extinguishes rights that previously accrued. Provisions affecting only entitlement to prospective benefits ordinarily do not produce any retroactive effects when applied to claims that were pending when the new provision took effect. Changes in procedural rules often may be applied to pending cases without raising concerns about retroactivity, but may have a prohibited retroactive effect if applied to cases in which the procedural events governed by the new rule had previously been completed, such as cases pending on appeal to a court when a new rule of agency procedure is issued. In considering whether a new statute or regulation would produce retroactive effects, VA should consider whether the provision is substantive or procedural, whether it would impose new duties with respect to completed transactions or would only affect prospective relief, whether it would attach new legal consequences to events completed before its enactment or extinguish rights that previously accrued, and whether application of the new provision would be consistent with notions of fair notice and reasonable reliance. VA should consider the effects on the Government as well as the claimant and should consider the procedural posture of the pending claim in relation to the foregoing factors. Most statutes and regulations liberalizing the criteria for entitlement to a benefit may be applied to pending claims because they would affect only prospective relief. Statutes or regulations restricting the right to a benefit may have disfavored retroactive effects to the extent their application to a pending claim would extinguish the claimant's

right to benefits for periods before the statute or regulation took effect.

D. In determining whether application of a new statute or regulation would produce retroactive effects, there may be a difference in some circumstances between cases that were pending in different procedural postures on the date the new provision took effect. New provisions affecting procedural matters in many cases would not produce retroactive effects as applied to claims that were pending at a procedural stage to which the new provision applies, but may produce disfavored retroactive effects if applied to pending claims in which the stage of proceedings to which the new provision applies has already been completed. However, the procedural posture of the claim is not the sole determinative factor in all cases. Even among cases in the same procedural posture, distinctions may be drawn based on the circumstances of the particular case and considerations of fairness to the specific parties.

E. Even if applying the amendments made by section 3(a) of the VCAA to claims that were pending before VA on November 9, 2000, were construed to have retroactive effects on VA, VA would have the authority to apply 38 CFR 3.159, the regulation implementing these amendments, to such claims. VA has the authority to provide for the retroactive application of its procedural regulations where such regulations are beneficial to claimants and not inconsistent with the governing statutes and VA has expressly provided for their retroactive application. The provisions of § 3.159 are beneficial to claimants and not inconsistent with the VCAA or any other statute, and VA has expressly provided that they will apply to claims that were pending before VA on November 9, 2000. Consequently, VA has authority to apply its regulations implementing the VCAA to claims filed before the date of enactment of the VCAA and still pending before VA as of that date.

F. In VAOPGCPREC 11–2000, we concluded that all of the VCAA's provisions apply to claims that were filed before November 9, 2000, but had not been finally decided as of the date. Because VA's August 2001 final-rule notice amending 38 CFR 3.159 expressly and validly provided that VA's regulations implementing the VCAA will apply to all claims that were pending before VA as of November 9, 2000, any further reliance on VAOPGCPREC 11–2000 is unnecessary. We hereby withdraw VAOPGCPREC 11–2000.

EFFECTIVE DATE: November 19, 2003.

VAOPGCPREC 8–2003

Question Presented

Must the Department of Veterans Affairs (VA) notify a claimant of the information and evidence necessary to substantiate an issue first raised in a notice of disagreement (NOD) submitted in response to VA's notice of its decision on a claim for which VA has already notified the claimant of the information and evidence necessary to substantiate the claim?

Held

Under 38 U.S.C. 5103(a), the Department of Veterans Affairs (VA), upon receipt of a complete or substantially complete application, must notify the claimant of the information and evidence necessary to substantiate the claim for benefits. Under 38 U.S.C. 7105(d), upon receipt of a notice of disagreement in response to a decision on a claim, the "agency of original jurisdiction" must take development or review action it deems proper under applicable regulations and issue a statement of the case if the action does not resolve the disagreement either by grant of the benefits sought or withdrawal of the notice of disagreement. If, in response to notice of its decision on a claim for which VA has already given the section 5103(a) notice, VA receives a notice of disagreement that raises a new issue, section 7105(d) requires VA to take proper action and issue a statement of the case if the disagreement is not resolved, but section 5103(a) does not require VA to provide notice of the information and evidence necessary to substantiate the newly raised issue.

EFFECTIVE DATE: December 22, 2003.

VAOPGCPREC 9–2003

Question Presented

What is the scope of the protection provided by 38 U.S.C. 2305 in claims for burial benefits under 38 U.S.C. chapter 23?

Held

Section 2305 of title 38, United States Code, preserves rights individuals had under laws in effect on December 31, 1957, based on their status as members of particular units or organizations that fell within the scope of the laws defining classes of individuals potentially eligible for burial benefits under chapter 23 of title 38. Veterans with wartime service prior to January 1, 1958, are not exempted by section 2305 from the amendments to eligibility criteria for nonservice-connected burial and funeral allowance currently codified in 38 U.S.C. 2302(a) made by the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, which eliminated wartime service as a basis for eligibility. Burial benefits provided by operation of 38 U.S.C. 2305 are to be paid based on the rates in effect on the date of the veteran's death.

EFFECTIVE DATE: December 23, 2003.

VAOPGCPREC 1–2004

Question Presented

Does the decision of the United States Court of Appeals for Veterans Claims (CAVC) in *Pelegrini* v. *Principi*, No. 01–944, 2004 U.S. App. Vet. Claims LEXIS 11 (Jan. 13, 2004), require that notice provided under 38 U.S.C. 5103(a) contain a request that the claimant provide the Department of Veterans Affairs (VA) with any evidence in his or her possession that pertains to the claim?

Held

Under 38 U.S.C. 5103(a) and 38 CFR 3.159(b)(1), the Department of Veterans Affairs (VA), upon receipt of a complete or substantially complete application, must notify the claimant of the information and evidence necessary to substantiate the claim for benefits and must indicate which portion of that information and evidence the claimant must provide and which portion VA will attempt to obtain for the claimant. In *Pelegrini* v. *Principi*, No. 01–944, 2004 U.S. App. Vet. Claims LEXIS 11 (Jan. 13, 2004), the United States Court of Appeals for Veterans Claims (CAVC) stated that section 3.159(b)(1), explicitly, and section 5103(a), implicitly, require that VA request that the claimant provide any evidence in his or her possession that pertains to the claim. The CAVC's statement that sections 5103(a) and 3.159(b)(1) require VA to include such a request as part of the notice provided to a claimant under those provisions is *obiter dictum* and is not binding on VA. Further, section 5103(a) does not require VA to seek evidence from a claimant other than that identified by VA as necessary to substantiate the claim.

EFFECTIVE DATE: February 24, 2004.

VAOPGCPREC 2–2004

Question Presented

Whether, pursuant to 38 U.S.C. 5103(a) the Department of Veterans Affairs (VA) is required to provide notice of the information and evidence necessary to substantiate a claim for separate ratings for service-connected tinnitus in each ear.

Held

Under 38 U.S.C. 5103(a), the Department of Veterans Affairs is not required to provide notice of the information and evidence necessary to substantiate a claim for separate disability ratings for each ear for bilateral service-connected tinnitus because there is no information or evidence that could substantiate the claim, as entitlement to separate ratings is barred by current Diagnostic Code (DC) 6260 and by the previous versions of DC 6260 as interpreted by a precedent opinion of the General Counsel that is binding on all Department officials and employees.

EFFECTIVE DATE: March 9, 2004.

VAOPGCPREC 3–2004

Question Presented

Does a veteran's entitlement under 38 U.S.C. 1151(a) to compensation for a disability "as if" service connected satisfy the requirement of 38 U.S.C. 3901(1)(A) that, to be eligible for automobile benefits under chapter 39, a claimant must be entitled to compensation under chapter 11 for a disability that "is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service"?

Held

Section 1151(a) of title 38, United States Code, authorizes compensation under chapter 11 of title 38 for additional disability caused by Department of Veterans Affairs (VA) hospital care, medical or surgical treatment, or examination, or proximately caused by VA's provision of training and rehabilitation services or by participation in a compensated work therapy program, "as if" the disability were service connected. A veteran's entitlement under section 1151(a) to compensation for a disability "as if" service connected does not satisfy 38 U.S.C. 3901(1)(A)'s requirement, for eligibility for automobile benefits under chapter 39 of title 38, United States Code, of entitlement to compensation under chapter 11 for a disability that "is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service."

EFFECTIVE DATE: March 9, 2004.

Dated: April 28, 2004.

By Direction of the Secretary.

Tim S. McClain,

General Counsel.

[FR Doc. 04–10131 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register
Vol. 69, No. 87
Wednesday, May 5, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 239, 240 and 249

[Release Nos. 33–8407; 34–49566; File No. S7–19–04]

RIN 3235-AH88

Use of Form S-8 and Form 8-K by Shell Companies

Correction

In proposed rule document 04–8963 beginning on page 21650 in the issue of Wednesday, April 21, 2004, make the following corrections:

1. On page 21652, in the first column, in footnote 24, in the fourth line "footnotes , 54 and 57 below" should read "footnotes 31, 54 and 57 below ".

2. On page 21654, in the first column, in footnote 48, in the first line "*See* footnote for" should read "*See* footnote 23 for".

[FR Doc. C4–8963 Filed 5–4–04; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Wednesday,
May 5, 2004

Part II

Environmental Protection Agency

40 CFR Part 51

Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[FRL–7653–6]

RIN 2060–AJ31

Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On July 1, 1999, EPA promulgated regulations to address regional haze, (64 FR 3714). These regulations were challenged, and on May 24, 2002, the U.S. Court of Appeals for the District of Columbia Circuit issued a ruling vacating the regional haze rule in part and sustaining it in part. *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002). Today's proposed rule addresses the court's ruling in that case.

In addition, prior to the court's decision, EPA had proposed guidelines for implementation of the best available retrofit technology (BART) requirements under the regional haze rule, (66 FR 38108; July 20, 2001). The proposed guidelines were intended to clarify the requirements of the regional haze rule's BART provisions. We proposed to add the guidelines and also proposed to add regulatory text requiring that these guidelines be used for addressing BART determinations under the regional haze rule. In addition, we proposed one revision to guidelines issued in 1980 for facilities contributing to "reasonably attributable" visibility impairment.

In the American Corn Growers case, the court vacated and remanded the BART provisions of the regional haze rule. To respond to the court's ruling, we are proposing new BART provisions and reproposing the BART guidelines. The American Corn Growers court also remanded to the Agency its decision to extend the deadline for the submittal of regional haze plans. Subsequently, Congress amended the deadlines for regional haze plans (Consolidated Appropriations Act for Fiscal Year 2004, Public Law 108–199, January 23, 2004). We are proposing to amend the rule to conform to the new statutory deadlines.

DATES: Comments on this proposal must be received by July 6, 2004.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2002–0076 by one of the following methods:

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

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

E-mail: http://www.epa.gov/edocket.

Fax: 202–566–1741.

Mail: OAR Docket, Environmental Protection Agency, Mailcode: B102, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of 2 copies.

Hand Delivery: EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. 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. OAR–2002–0076. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

For additional instructions on submitting comments, go to unit II of the **SUPPLEMENTARY INFORMATION** section of this document.

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

FOR FURTHER INFORMATION CONTACT: Kathy Kaufman at 919–541–0102 or by e-mail at *Kaufman.Kathy@epa.gov* or Todd Hawes at 919–541–5591 or by e-mail *Hawes.Todd@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Regulated Entities

The promulgation of the proposed rule would affect the following: State and local permitting authorities and Indian Tribes containing major stationary sources of pollution affecting visibility in federally protected scenic areas.

This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This list gives examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should examine the applicability criteria in Part II of this preamble. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. What Should I Consider as I Prepare My Comments for EPA?

1. Submitting CBI. Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that

is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

A. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

B. 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.

C. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

D. Describe any assumptions and provide any technical information and/or data that you used.

E. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

F. Provide specific examples to illustrate your concerns, and suggest alternatives.

G. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

H. Make sure to submit your comments by the comment period deadline identified.

Outline. The contents of today's preamble are listed in the following outline.

I. Overview of Today's Proposed Actions

Today's rulemaking provides for the following proposed changes to the regional haze regulations:

(1) Revised regulatory text in response to the American Corn Growers court's remand, to require that the BART determination includes an analysis of the degree of visibility improvement resulting from the use of control technology at each source subject to BART,

(2) revised regulatory text in 40 CFR 51.308(b) and deletion of 40 CFR 51.308(c) Options for regional planning in response to Congressional legislation amending the deadlines for submittal of regional haze implementation plans. This provision had provided for an alternative process for States to submit regional haze implementation plans in attainment areas,

(3) BART guidelines, contained in a new appendix Y to 40 CFR part 51,

(4) new and revised regulatory text, to be added to 40 CFR 51.308(e) to require the use of appendix Y in establishing BART emission limits, and

(5) revised regulatory language at 51.302 to clarify the relationship between New Source Performance Standards (NSPS) and BART for reasonably attributable visibility impairment.

How This Preamble Is Structured. Section II provides background on the regional haze rule, the D.C. Circuit Court decision which remanded parts of the rule, and the proposed changes to the rule and reproposal of the BART guidelines in response to the remand. Section III discusses in more detail the reproposed BART guidelines, including changes from the July 2001 proposal based the court decision and certain comments that we received on the initial proposal. Section IV provides a discussion of how this rulemaking complies with the requirements of Statutory and Executive Order Reviews.

II. Background

A. Regional Haze Rule

In 1999, we published a final rule to address a type of visibility impairment known as regional haze (64 FR 35714; July 1, 1999). The regional haze rule requires States to submit implementation plans (SIPs) to address regional haze visibility impairment in 156 Federally-protected parks and wilderness areas. These 156 scenic areas are called "mandatory Class I Federal areas" in the Clean Air Act (CAA),[1] but are referred to simply as "Class I areas" in today's rulemaking. The 1999 rule was issued to fulfill a long-standing EPA commitment to address regional haze under the authority and requirements of sections 169A and 169B of the CAA.

As required by the CAA, we included in the final regional haze rule a requirement for BART for certain large stationary sources that were put in place between 1962 and 1977. We discussed these requirements in detail in the preamble to the final rule (64 FR 35737–35743). The regulatory requirements for BART were codified at 40 CFR 51.308(e), and in definitions that appear in 40 CFR 51.301.

The CAA, in sections 169A(b)(2)(A) and in 169A(g)(7), uses the term "major stationary source" to describe those sources that are the focus of the BART requirement. To avoid confusion with other CAA requirements which also use the term "major stationary source" to refer to a somewhat different population of sources, the regional haze rule uses the term "BART-eligible source" to describe these sources. The BART-eligible sources are those sources which have the potential to emit 250 tons or more of a visibility-impairing air pollutant, were put in place between August 7, 1962 and August 7, 1977, and whose operations fall within one or more of 26 specifically listed source categories. Under the CAA, BART is required for any BART-eligible source which "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area." Accordingly, for stationary sources meeting these criteria, States must address the BART requirement when they develop their regional haze SIPs.

Section 169A(g)(7) of the CAA requires that States must consider the following factors in making BART determinations:

(1) The costs of compliance,

(2) The energy and nonair quality environmental impacts of compliance,

(3) Any existing pollution control technology in use at the source,

(4) The remaining useful life of the source, and

(5) The degree of improvement in visibility which may reasonably be

[1] See, *e.g.*, CAA Section 169A(a)(1).

anticipated to result from the use of such technology.

These statutory factors for BART were codified at 40 CFR 51.308(e)(1)(ii).

In the preamble to the regional haze rule, we committed to issuing further guidelines to clarify the requirements of the BART provision. The purpose of this proposed rulemaking is to fulfill this commitment by providing guidelines for States to use in identifying their BART-eligible sources, in identifying which of those sources must undergo a detailed BART analysis (*i.e.*, which are "sources subject to BART"), and in conducting the technical analysis of possible controls in light of the statutory factors listed above ("the BART determination").

B. Partial Remand of the Regional Haze Rule in American Corn Growers

In response to challenges to the regional haze rule by various petitioners, the D.C. Circuit in American Corn Growers *et al.* v. EPA, 291 F.3d 1 (2002) issued a ruling striking down the regional haze rule in part, and upholding it in part. This section discusses the court's opinion in that case, as background for the discussion of specific changes to the regional haze rule and the BART guidelines presented in the next two sections, respectively.

We explained in the preamble to the 1999 regional haze rule that the BART requirements in section 169A(b)(2)(A) of the CAA demonstrate Congress' intent to focus attention directly on the problem of pollution from a specific set of existing sources (64 FR 35737). The CAA requires that any of these existing sources "which, as determined by the State, emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility [in a Class I area]," shall install the best available retrofit technology for controlling emissions.[2] In determining BART, the CAA requires the State to consider several factors that are set forth in section 169(g)(2) of the CAA, including the degree of improvement in visibility which may reasonably result from the use of such technology.

The regional haze rule addresses visibility impairment resulting from emissions from a multitude of sources located across a wide geographic area. Because the problem of regional haze is caused in large part by the long-range transport of emissions from multiple sources, and for certain technical and other reasons explained in that rulemaking, we had adopted an approach that required States to look at the contribution of all BART sources to the problem of regional haze in determining both applicability and the appropriate level of control. Specifically, we had concluded that if a source potentially subject to BART is located within an upwind area from which pollutants may be transported downwind to a Class I area, that source "may reasonably be anticipated to cause or contribute" to visibility impairment in the Class I area. Similarly, we had also concluded that in weighing the factors set forth in the statute for determining BART, the States should consider the collective impact of BART sources on visibility. In particular, in considering the degree of visibility improvement that could reasonably be anticipated to result from the use of such technology, we stated that the State should consider the degree of improvement in visibility that would result from the cumulative impact of applying controls to all sources subject to BART. We had concluded that the States should use this analysis to determine the appropriate BART emission limitations for specific sources.[3]

In American Corn Growers v. EPA, industry petitioners challenged EPA's interpretation of both these aspects of the BART determination process and raised other challenges to the rule. While rejecting industry's other challenges, the court in American Corn Growers concluded that the BART provisions in the 1999 regional haze rule were inconsistent with the provisions in the CAA "giving the states broad authority over BART determinations." 291 F.3d at 8. Specifically, with respect to the test for determining whether a source is subject to BART, the court held that the method that EPA had prescribed for determining which eligible sources are subject to BART illegally constrained the authority Congress had conferred on the States. Id. However, the court expressly declined to hold that the general collective contribution approach to determining BART applicability was necessarily inconsistent with the CAA, were it not for the infringement on State authority. Id. at 9. Rather, the court stated that the collective contribution approach may have been acceptable if EPA had allowed for a State exemption process based on an individualized contribution determination. Id. at 12.

The court in American Corn Growers also found that EPA's interpretation of the CAA requiring the States to consider the degree of improvement in visibility that would result from the cumulative impact of applying controls in determining BART was inconsistent with the language of the Act. 291 F.3d at 8. Based on its review of the statute, the court concluded that the five statutory factors in section 169A(g)(2) "were meant to be considered together by the states." Id. at 6.

Finally, the court remanded the schedule in the regional haze rule for the submission of implementation plans for areas that commit to regional planning, indicating that the use of such a "committal SIP" does not appear to satisfy statutory requirements. The court declined to vacate the provision, however, in light of the need to change SIP requirements in order to satisfy the ruling on the BART issue. Id. at 15.

C. Proposed Changes in the Visibility Regulations

Today's proposed rule responds to the American Corn Growers court's decision on the BART provisions by proposing changes to the regional haze rule at 40 CFR 51.308, and by reproposing the BART guidelines. This section outlines the changes to the regional haze rule due to the court's remand and to subsequent Congressional action regarding deadlines for the submission of regional haze implementation plans. It also explains the minor change we are proposing to the section of the regulation governing the use of the 1980 BART guidelines when conducting BART analyses for certain power plants for reasonably attributable (*i.e.*, localized) visibility impairment.

1. Determination of Which Sources Are Subject to BART

Today's proposed action addresses the American Corn Growers court's vacature of the requirement in the regional haze rule requiring States to assess visibility impacts on a cumulative basis in determining which sources are subject to BART. Because this requirement was found only in the preamble to the 1999 regional haze rule (see 291 F.3rd at 6, citing 64 FR 35741), no changes to the regulations are required. Instead, this issue is addressed in the BART guidelines, which provide States with a number of options for determining which BART-eligible sources "may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area." These options have been designed to address the holding of American Corn Growers by eliminating the previous constraint on State discretion, as explained in

[2] CAA Sections 169A(b)(2) and (g)(7).

[3] See 66 FR 35737–35743 for a discussion of the rationale for the BART requirements in the 1999 regional haze rule.

further detail in sections II.D. and III below.

2. Consideration of Anticipated Visibility Improvements in BART Determinations

Pursuant to the remand in American Corn Growers, we are proposing to amend the regional haze rule to require the States to consider the degree of visibility improvement resulting from a source's installation and operation of retrofit technology, along with the other statutory factors set out in CAA section 169A(g)(2), when making a BART determination. This would be accomplished by listing the visibility improvement factor with the other statutory BART determination factors in section 308(e)(1)(A), so that States will be required to consider all five factors, including visibility impacts, on an individual source basis when making each individual source BART determination.

In addition, Section 308(e)(1)(B), which formerly required States to assess visibility on a cumulative basis (*i.e.*, for all BART-eligible sources), would be replaced with a requirement to use the BART guidelines at appendix Y. The guidelines, as will be explained in the next section and in greater detail in section III, provide for source-specific analysis of anticipated improvement in visibility. These changes, therefore, address the court's holding with respect to the isolation of the visibility improvement factor at this stage of the BART analysis.

3. Implementation Plan Deadlines

As noted above, the 1999 regional haze rule contained a committal SIP mechanism (section 308(c)) which the American Corn Growers court remanded without vacating. This mechanism was intended to allow states to harmonize regional haze SIP submittals for all areas within the state. At the time the rule was promulgated, the deadline for regional haze SIPs varied depending on the $PM_{2.5}$ attainment or nonattainment status of the area.[4]

In the Omnibus Appropriations Act of 2004,[5] Congress harmonized both designations and regional haze SIP deadlines. Under the Omnibus Appropriations Act, we are required to promulgate $PM_{2.5}$ designations for all areas of each state no later than December 31, 2004. Designations will become effective 30 days afterward, or no later than January 31, 2005. The Omnibus Appropriations Act further provides that regional haze SIPs, for each entire state, are then due not later than 3 years after promulgation of the $PM_{2.5}$ designation.[6] Thus, regional haze SIPs are due no later than January, 31, 2008. We are proposing to amend 40 CFR 51.308(b) and 51.308(c) to comport with the new statutory deadlines, and to eliminate the "comittal" SIP provision.

We are also proposing to amend certain sections of 40 CFR 51.309 to comport with the new statutory deadlines. Under Section 309 as currently codified, the initial SIPs for states utilizing Section 309 were due in 2003, and a second set of SIPs for those states are due no later than December 31, 2008. This date was designed to coincide with the latest date Section 308 SIPs could be due under the statutory scheme prior to amendment by the Omnibus Act. The Omnibus Amendments contain a "no preclusion" provision, clarifying that nothing therein precludes the submission of section 309 SIPs by December 31, 2003.[7] The "no preclusion" provision does not expressly provide that the later (currently 2008) section 309 deadlines are not precluded. There is therefore some ambiguity as to whether the 3-year-after-designation deadline applies to subsequent section 309 SIPs. We believe that policy interests of certainty, clarity, and coordination of efforts are best served by establishing consistent deadlines for SIPs under sections 308 and 309 where appropriate, and by avoiding any ambiguity regarding future section 309 SIP deadlines. Therefore, we are proposing to amend sections 309(d)(4)(v), 309(g)(2), and 309(g)(3), by replacing "December 31, 2008" with "January 31, 2008", to coincide with section 308 SIPs.[8]

4. Proposed Revisions to the 1980 BART Guidelines

Background. One of the primary purposes of this reproposal is to provide BART guidelines for the regional haze program. As described in the 2001 proposed BART guidelines (66 FR 38108, 38109), however, we are also proposing to make limited revisions to longstanding guidelines for BART under the 1980 visibility regulations for localized visibility impairment that is "reasonably attributable" to one or a few sources.[9] The visibility regulations require States to use a 1980 guidelines document when conducting BART analyses for certain power plants for reasonably attributable visibility impairment. While the analytical process set forth in these guidelines is still generally acceptable for conducting BART analyses for "reasonably attributable" visibility impairment, there are statements in the 1980 BART Guidelines that could be read to indicate that the NSPS may be considered to represent best control for existing sources. While this may have been the case in 1980 (*e.g.*, the NSPS for sulfur dioxide (SO_2) from boilers had been recently issued in June 1979), best control levels for recent plant retrofits have exceeded NSPS levels. Therefore, we are proposing to amend this provision of the 1980 visibility regulations to clarify that BART should not be interpreted under the 1980 regulations to preclude control options which are more stringent than NSPS standards.

D. Reproposal of the BART Guidelines

Prior to the American Corn Growers decision, we had proposed guidelines for the regional haze BART process. Specifically, on July 20, 2001, the proposed BART guidelines were published in the **Federal Register** (66 FR 13108–13135). We requested written

[4] Transportation Equity Act for the 21st Century, Pub. L. 105–178, 112 Stat. 107, 463 (1998) (TEA–21).

[5] Consolidated Appropriations Act for Fiscal Year 2004, Pub. L. 108–199, January 23, 2004.

[6] CAA Section 107(d)(7)(A), as amended by the Consolidated Appropriations Act for Fiscal Year 2004, now reads: "In General.—Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in Paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 169B(e)(1) (referred to in this paragraph as 'regional haze requirements')."

[7] CAA section 107(d)(7)(B) "No Preclusion of Other Provisions.—Nothing in this paragraph precludes the implementation of of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States."

[8] These are the section of 309 establishing deadlines for SIP revisions which contain major new policy initiatives which should, for efficiency, be coordinated with the development of section 308 SIPs; specifically long term strategies and BART requirements for stationary source NO_X and PM, if determined to be necessary (section 309(d)(4)(v)), and reasonable progress provisions for additional (non-Colorado Plateau) class I areas (section 309(g)(2)–(g)(3)).

We are aware that 2008 deadlines also appear in section 309(d)(10) (progress reports) and section 309(b)(6) (mobile source tracking and revisions if necessary). We are not proposing to amend these sections because they are part of a scheme establishing check points for § 309 strategies in 2008, 2013, and 2018, rather than development of new strategies, and thus do not require integration with § 308 SIPs.

[9] U.S. Environmental Protection Agency, *Guidelines for Determining Best Available Retrofit Technology for Coal-fired Power Plants and Other Existing Stationary Facilities*, EPA–450/3–80–009b, Office of Air Quality Planning and Standards, Research Triangle Park, N.C., November 1980 (1980 BART Guidelines).

comments on the proposal and conducted two public hearings. The deadline for written comments was extended from September 18, 2001 to October 5, 2001 in a separate **Federal Register** notice (66 FR 50135).

Public hearings were held on August 21, 2001 in Alexandria, Virginia and on August 27, 2001 in Chicago, Illinois. Transcripts for these public hearings are available in the public docket for the regulation (Docket A–2000–28, Docket numbers IV–F–01 and IV–F–02). Oral testimony in both public hearings was predominantly from private citizens supportive of the proposed BART guidelines.

We received written comments on the package from many citizens and stakeholder groups.

Today, we are reproposing the BART guidelines to take into account the changes that we are proposing to make to the regional haze rule. Although in reproposing the BART guidelines we have taken into account some of the comments that we received in response to the 2001 action, much of what is set forth in the BART guidelines proposed today is identical to the earlier proposal. Both for those proposed requirements in the BART guidelines which are unchanged from the 2001 proposal, as well as for those that we have changed since 2001, you do not need to resubmit comments unless you have additional information that you would like us to consider, because we will carefully consider all comments previously submitted during the comment period on the 2001 proposal in making our final decision on the BART guidelines.

The proposed BART process is set forth in the BART guidelines we are reproposing today in response to the remand. The rest of this section provides an overview of this proposed BART process. The overview summarizes both (1) the process for determining which BART-eligible sources may be reasonably anticipated to cause or contribute to visibility impairment, and thus should be subject to BART, and (2) the process for evaluating visibility impacts for an individual source's BART determination. (We will discuss these issues in further detail in section III below.)

The BART Process

The process of establishing BART emission limitations can be logically broken down into three steps: First, States identify those sources which meet the definition of "BART-eligible source" set forth in 40 CFR 51.301.[10] Second, States determine whether such sources "emit[] any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility [in a Class I area.]" A source which fits this description is "subject to BART." Third, for each source subject to BART, States then identify the appropriate type and the level of control for reducing emissions.

Identifying BART-Eligible Sources

The CAA defines BART-eligible sources as those sources which fall within one of 26 specific source categories, were built during the 15-year window of time from 1962 to 1977, and have potential emissions greater than 250 tons per year. The remand did not address the step of identifying BART-eligible sources, which is conceptually the simplest of the three steps.

Sources Reasonably Anticipated To Cause or Contribute To Visibility Impairment (Sources Subject to BART)

As we noted in the preamble to the 1999 regional haze rule, defining the individual contributions of specific sources of the problem of regional haze can be time-consuming and expensive. Moreover, Congress established a very low threshold in the CAA for determining whether a source is subject to BART. We are accordingly proposing several approaches for States for making the determination of whether a source "emits any pollutants which may reasonably be anticipated to cause or contribute to any visibility impairment." The first two of these approaches would allow States to avoid undertaking unnecessary and costly studies of an individual source's contribution to haze by allowing States to adopt more streamlined processes for determining whether, or which, BART-eligible sources are subject to BART.

In 1999, we adopted an applicability test that looked to the collective contribution of emissions from an area. In particular, we stated that if "a State should find that a BART-eligible source is "reasonably anticipated to cause or contribute" to regional haze if it can be shown that the source emits pollutants within a geographic area from which pollutants can be emitted and transported downwind to a Class I area."[11] Under today's proposal, a State has the discretion to consider that all BART-eligible sources within the State are "reasonably anticipated to cause or contribute" to some degree of visibility impairment in a Class I area.

This option is consistent with the American Corn Growers court's decision. As previously noted, the court's concern with our original approach governing BART applicability determinations was that it would have "tie[d] the states" hands and force[d] them to require BART controls at sources without any empirical evidence of the particular source's contribution to visibility impairment." 291 F.3d at 8. By the same rationale, we believe it would be an impermissible constraint of State authority to force States to conduct individualized analysis in order to determine that a BART-eligible source "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I] area."[12] In this respect, we believe that it is important to note that the court in American Corn Growers expressly declined to hold that consideration of visibility impact on a cumulative basis would be invalid in all circumstances. 291 F.3d at 9. Given the court's emphasis on the importance of the role of the States in making BART determinations, we believe that a State's decision to use a cumulative analysis at the eligibility stage would be consistent with the CAA and the findings of the D.C. Circuit.

We believe there is ample technical evidence supporting a finding by a State that all BART-eligible sources within the State are subject to BART, without further analysis at that stage in the process.[13] Any potential for inequity towards sources would be addressed at the BART determination stage, where we are proposing to require the individualized consideration of a source's contribution in establishing BART emission limits.

The reasoning underlying this approach is discussed in more detail in section III below.

We are also proposing to provide States with the option of performing an analysis to show that the full group of BART-eligible sources in a State cumulatively do not cause or contribute

[10] "BART-eligible source" is defined as a stationary source of air pollutants that falls within one of 26 listed categories which was put into operation between August 7, 1962 and August 7, 1977, with the potential to emit 250 tons per year of any air pollutant. CAA §§ 169(b)(2)(A) and (g)(7); 40 CFR § 51.301.

[11] 64 FR 335740, July 1, 1999. The regional haze rule discusses at length why we believe that States should draw this conclusion. 64 FR 35739–40.

[12] CAA § 169A(b)(2)(A).

[13] See 64 FR 35714, 35721. See also July 29, 1997 memorandum to the regional haze docket A–95–38, "Supporting Information for Proposed Applicability of Regional Haze Regulations," by Richard Damberg, EPA, Office of Air Quality Planning and Standards.

to any visibility impairment in Class I areas. We anticipate that in most, if not all States, the BART-eligible sources are likely to cause or contribute to some visibility impairment in Class I areas. However, it is possible that using a cumulative approach, a State could show that its BART sources do not collectively pose a measurable problem.

Finally, we are also proposing that States may consider the individualized contribution of a BART-eligible source to determine whether a specific source is subject to BART. Specifically, States may choose to undertake an analysis of each BART-eligible source in the State in considering whether each such source meets the test set forth in the CAA of "emit[ting] any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I] area." Alternatively, States may choose to presume that all BART-eligible sources within the State meet this applicability test, but provide sources with the ability to demonstrate on a case by case basis that this is not the case. This approach is consistent with the D.C. Circuit's statement that a collective contribution approach may be appropriate so long as the States are allowed to exempt sources on the basis of an individualized contribution determination. 291 F.3d at 8.

For assessing the impact of BART-eligible sources located greater than 50 kilometers (km) from a Class I area, we are proposing that the States use an air quality model able to estimate a single source's contribution to visibility impairment. We are also requesting comment on methods appropriate for Class I areas closer than 50 km; and on other potential methods of assessing a source's individualized contribution to regional haze visibility impairment. (This is explained in greater detail in section III below).

The BART Determination

The State must determine the appropriate level of BART control for each source subject to BART. Section 169A(g)(7) of the CAA requires States to consider the following factors in making BART determinations: (1) The costs of compliance, (2) the energy and nonair quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. The remand did not address the first four steps of the BART determination (the "engineering analysis"). The remand did address the final step, mandating that EPA must provide a way for States to take into account the degree of improvement in visibility that would result from imposition of BART on each individual source.

The BART engineering analysis, comprising the first four factors, is addressed in detail in section IV below, and is substantially similar to the engineering analysis in the original BART guidelines proposed in July, 2001. Section IV also contains a detailed discussion of available and cost-effective controls for reducing SO_2 and nitrogen oxicdes (NO_X) emissions from large coal-fired electric generating units (EGUs).

For assessing the fifth factor, the degree of improvement in visibility from various BART control levels, we are proposing that States require individual sources to run CALPUFF, or other EPA-approved model, using site-specific data. To estimate a source's impact on visibility, the source would run the model using current allowable emissions, and then again at the post-control emissions level (or levels) being assessed. Results would then be tabulated for the average of the 20% worst modeled days at each receptor. The difference in the resulting level of impairment predicted is the degree of improvement in visibility expected.

Alternatively, we request comment on the option of using the hourly modeled impacts from CALPUFF and assessing the improvement in visibility based on the number of hours above a visibility threshold for the pre- and post-control emission rates.

III. Detailed Discussion of Reproposed BART Guidelines

A. Introduction

In this section of the preamble, we discuss the details of the reproposed BART guidelines where we are proposing to make changes to, or to clarify, the BART guidelines proposed in July, 2001. As noted in section II, we will be reviewing the comments received during the comment period on the 2001 proposal and responding to those comments when we issue a final guideline. For each provision of the guidelines that we are changing or clarifying, we provide discussion of, as appropriate:

—Background information,

—What we proposed in the July 2001 action,

—A summary or partial summary of the comments received on the provision, and

—The changes or clarifications that we are proposing and the reasons for these changes or clarifications.

B. How To Identify BART-Eligible Sources

The CAA, in section 169A(g)(7), provides a specific list of the types of "major stationary sources" that are covered by the BART requirement. Our visibility regulations include this same list in 40 CFR 51.301 in the definition of the term "existing stationary facility" and by reference, "BART-eligible source." Because the terms "major stationary source" and "existing stationary facility" are general in nature and used for other air quality programs, we decided to eliminate any potential confusion by using the term "BART-eligible source" in the regional haze portions of the visibility regulations that were published in 1999. As defined in 40 CFR 51.301, a "BART-eligible source" means the same thing as an "existing stationary facility" as defined in EPA's 1980 visibility regulations, and means the same thing as a "major stationary source" as defined in CAA section 169A(g)(7).

Section II of the reproposed BART guidelines contains a step-by-step process for identifying stationary sources that are "BART-eligible" under the definitions in the regional haze rule. Today's action reproposing the BART guidelines includes the same four basic steps as in the proposed rule. The four basic steps are:

Step 1: Identify the emission units in the BART categories

Step 2: Identify the start-up dates of those emission units

Step 3: Compare the potential emissions from units identified in Steps 1 and 2 to the 250 ton/yr cutoff

Step 4: Identify the emission units and pollutants that constitute the BART-eligible source.

We received a number of comments on this proposed approach to identifying BART-eligible sources. In this section of the preamble, we discuss some of the previously submitted comments and any changes we are proposing in light of these comments.

Step 1: Identify the emission units in the BART cateories.

Background. The CAA uses the following 26 source category titles to describe the types of stationary sources that are BART-eligible:

(1) Fossil-fuel fired steam electric plants of more than 250 million British thermal units (BTU) per hour heat input,

(2) Coal cleaning plants (thermal dryers),

(3) Kraft pulp mills,
(4) Portland cement plants,
(5) Primary zinc smelters,
(6) Iron and steel mill plants,
(7) Primary aluminum ore reduction plants,
(8) Primary copper smelters,
(9) Municipal incinerators capable of charging more than 250 tons of refuse per day,
(10) Hydrofluoric, sulfuric, and nitric acid plants,
(11) Petroleum refineries,
(12) Lime plants,
(13) Phosphate rock processing plants,
(14) Coke oven batteries,
(15) Sulfur recovery plants,
(16) Carbon black plants (furnace process),
(17) Primary lead smelters,
(18) Fuel conversion plants,
(19) Sintering plants,
(20) Secondary metal production facilities,
(21) Chemical process plants,
(22) Fossil-fuel boilers of more than 250 million BTUs per hour heat input,
(23) Petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels,
(24) Taconite ore processing facilities,
(25) Glass fiber processing plants, and
(26) Charcoal production facilities.

Most of the source category titles are general descriptors that are inclusive of all the operations at a given plant. Some plant sites may have more than one of the categories present. Examples of this would include plants with both "petroleum refineries" and "sulfur recovery plants," or with both "iron and steel mill plants" and "sintering plants." On the other hand, some plant sites may include some emissions units meeting one of these 26 descriptions, but other emissions units that do not.

2001 Proposed Rule. In the 2001 proposed BART guidelines, we noted that the category titles were generally clear and we proposed to clarify a few issues, including interpretations where we believed there were ambiguities in the source category titles. We requested comment on whether any other clarifications were needed. The 2001 proposed guidelines clarified that in identifying emissions units for inclusion as a BART-eligible source, States should identify all emissions units at a plant site meeting one or more of the source category descriptions. The 2001 proposed rule provided specific interpretations for five of the 26 source category titles:

(1) "Steam electric plants of more than 250 million BTU/hr heat input." The 2001 proposal noted that because the category title refers to "plants," boiler capacities must be aggregated to determine whether the 250 million BTU/hr threshold is reached.

(2) "Fossil-fuel boilers of more than 250 million BTU/hr heat input." We proposed two options for interpreting this source category title. The first option, the approach used in the regulations for prevention of significant deterioration (PSD) program, would be to aggregate boiler capacities to determine whether the 250 million BTU/hr threshold is reached. Under the second option, only those boilers that are individually greater than 250 million BTU/hr would fall within the BART source category.

(3) "Petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels." In the 2001 proposal, we noted our interpretation that the 300,000 barrel cutoff refers to total, facility-wide tank capacity for tanks that were put in place within the 1962–1977 time period, and includes gasoline and other petroleum-derived liquids.

(4) "Phosphate rock processing plants." In the 2001 proposal, we noted that this category descriptor should be interpreted broadly to include all types of phosphate rock processing facilities, including elemental phosphorous plants as well as fertilizer production plants.

(5) "Charcoal production facilities." In the 2001 proposal, we noted information provided by the National Association of Manufacturers (NAM) on the legislative history for this source category. In its letter, NAM suggested that the legislative history supported a conclusion that BART should cover only a subset of the charcoal production industry. While we indicated that we did not agree with this assessment, we requested comment on whether and how the information cited by NAM is relevant to the interpretation of this or other categories.

Finally, in the 2001 proposal, we requested comment generally on whether any additional source category titles needed clarification.

Comments on the 2001 Proposal. We received a number of comments related to the interpretation of the source category titles. Some of these comments related to the category-specific clarifications we provided in the proposed guidelines. In addition, there were a few comments in response to our request for additional category titles needing clarification. In this section, we only discuss the previously submitted comments that have led to the changes we are proposing in today's action.

We received many comments related to our interpretation of the term "fossil-fuel boilers of more than 250 million BTUs per hour heat input." A number of comments from environmental groups and States were supportive of an interpretation which would require States to compare the aggregate capacities of boilers against the 250 million BTU/hr cutoff. These comments agreed with our assessment that this would promote consistency with the PSD program. Environmental group comments also noted that the plural term "boilers" was used in the CAA, rather than the singular term "any boiler."

Many commenters from industry groups and some State agencies supported the alternative interpretation of the category, which would require States to consider as BART-eligible only those boilers which are individually greater than 250 million BTU/hr. These commenters generally asserted that this was the plain reading of the source category title, and also that such an approach would be consistent with EPA programs such as NSPS and the NO_X SIP Call.[14] These commenters noted that, unlike the PSD program, circumvention of the requirements is not possible because BART only applies to boilers already in existence. Other commenters noted that aggregation of boilers may result in inclusion of very small boilers for which BART controls would not be cost effective.

In addition to the general comments on the interpretation of the size cutoff for boilers, we received comments on two other aspects of the term "fossil fuel boilers." Some boilers burn solid fuels that are not fossil fuels, such as wood products. A number of industry commenters suggested that we should interpret the term "fossil fuel" as it was interpreted for the NO_X SIP Call, which treats as "fossil fuel" only those boilers that burn more than 50 percent fossil fuels, on an annual heat input basis. One commenter noted as an example that a boiler that has fossil fuel capacity greater than 250 million BTU/hr, but that only burns such fuels during startup and shutdown, should not be considered as a "fossil fuel fired boiler" for purposes of BART. Comments from the paper industry requested that EPA clarify in the guidelines that a multi-fuel boiler, with a capacity of greater than or equal to 250 million Btu/hr, would not be considered BART-eligible if the boiler is subject to an enforceable limitation that would prohibit combustion at greater than 250 million BTU/hr.

[14] The NO_X SIP call requires a number of Eastern States to reduce the Summertime emissions of NO_X from sources within these States. 63 FR 57356 (Oct. 27, 1998).

Several commenters requested that we provide a specific interpretation for the term "secondary metal production facilities." The commenters requested that we formally define the term to include only those facilities within the Standard Industrial Classification (SIC) code 3341, "Secondary Smelting and Refining of Nonferrous Metals." Also, the commenters recommended that a "Secondary Metal Production Facility" be defined to mean one or more emission units that derive more than fifty percent of the metal(s) it produces from purchased scrap and dross.

Reproposal. After considering these comments, we are proposing some changes to the source category definitions.

We agree that the interpretation of "fossil-fuel boilers of more than 250 million BTU/hr heat input" is best read to include only those boilers at a power plant individually greater than 250 million BTU/hr. We agree with comments that this interpretation is a better reading of the category title than the alternative under which States would compare the cumulative boiler capacity over all boilers at a power plant to the 250 million BTU/hr cutoff. We do not agree with comments that any particular meaning can be taken from the use of the plural word "boilers" in the category title. On the other hand, if a boiler smaller than 250 million BTU/hr is an integral part of an industrial process in a BART source category other than electric utilities—for example, part of the process description at a chemical process plant—then we believe that the boiler should be considered for controls as part of the BART source. The logic here is that a State should consider all emission points at an integral industrial process to be part of the BART-eligible source, so that later, when making the actual BART determination, the State would be certain that it has not prematurely ruled out any sensible control options for that process as a whole. That way the State will have retained as much discretion as possible to require control on all or part of an industrial process, on a case-by-case basis, considering all of the BART factors.

We do not believe that this interpretation is likely to have a substantial impact on the amount of BART emissions reductions achieved, because smaller boilers are generally less cost effective to control. Also, we believe that covering only individual utility boilers greater than 250 million BTU/hr may help address States' concerns over the implementation burden of the program.

We also agree with the two clarifications suggested by commenters relating to the term "fossil fuel." We propose to add a statement to the reproposed guidelines clarifying that "fossil fuel boilers" refers to boilers burning greater than 50 percent fossil fuels. We believe that this is a reasonable approach to interpreting the definition in the CAA. Also, we agree that enforceable operational limits for a multi-fuel boiler would be relevant to determining whether its "fossil fuel" capacity exceeds 250 million BTU/hr and that it would be reasonable for States to take such limitations into account. We are proposing to add this clarification to the BART guidelines.

We also wish to clarify that, consistent with other EPA rules, the definition of "steam electric plants of more than 250 million BTU/hr heat input" refers only to plants that generate electricity for sale. We are proposing to add this clarfication to the BART guidelines.

The reproposed guidelines do not take a position on the recommendations in the comments regarding "petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels." We believe that this question is largely moot given that these storage and transfer facilities are already subject to maximum achievable control technology (MACT) standards and in many cases stringent SIP regulations related to ozone nonattainment. Regardless of the interpretation, we believe that it is unlikely that BART emissions limitations will require further controls.

We have reviewed comments suggesting that "secondary metal production facilities" may be interpreted to include only those facilities within SIC code 3341. We note that the term "secondary metal production" is broader than SIC code 3341. "Secondary metal production" would include secondary ferrous metals facilities such as secondary iron and steel facilities. On the other hand, SIC code 3341 includes only nonferrous metals facilities such as secondary copper, aluminum and lead facilities. We believe, however, that secondary iron and steel facilities are also included within the broad category "iron and steel mill plants." Accordingly, we are proposing that in identifying unique "secondary metal production" facilities that are not in any other BART category, States may identify those unique facilities based upon SIC code 3341.

Step 2: Identify the start-up dates of those emission units. The EPA interpretation of the terms "in existence" and "in operation."

Background. Step 2 in the proposed process for identifying BART-eligible sources would be to identify all emissions units within the listed categories which met the two tests in the definitions in the regional haze rule: (1) The unit was "in existence on August 7, 1977 and (2) the unit began operation after August 7, 1962. Our visibility regulations define "in existence" and "in operation" in 40 CFR 51.301. We are proposing to retain the same definitions of "in existence" and "in operation" as we had included in the 2001 proposal. The term "in existence" includes sources not yet in operation where the owner or operator has not begun operating but which has:

—Obtained all necessary preconstruction approvals,
—Began on-site construction, or
—Entered into binding agreements or contractual obligations to begin construction of the facility within a reasonable time period.

In contrast, the term "in operation" includes only sources which are actually operating. In the reproposed BART guidelines, as in the previous proposal, we provide examples that illustrate the definitions in the regional haze rule.

We also wish to eliminate any confusion over power plants having boilers built both before 1962 and boilers built within the 1962–1977 time period. The BART guidelines would not require States to find that all boilers at a facility are BART-eligible if one or more boilers at the facility were put in place between the 1962 and 1977 dates. Under Step 2 of the proposed process for identifying BART-eligible sources, States would identify *only* those boilers that were put in place within the 1962–1977 time period. Only those boilers are carried over to Step 3, and only those boilers would be subject to a BART engineering analysis. We have included clarifying language in the reproposed guidelines on this issue.

Step 3: Compare the potential emissions from the units identified in steps 1 and 2 to the 250 ton/yr cutoff.

Background. Under the definition of "major stationary source" in CAA section 169A(g)(7) and the corresponding definition of "BART-eligible source" in the regional haze rule, BART applies only to a stationary source if it meets the category description and time window criteria described above, and only if it has the potential to emit 250 tons or more of "any pollutant."

There are two issues needing clarification with respect to the 250 tons per year threshold—one regarding what pollutants should be addressed, and two, the definition of stationary source.

What Pollutants Should I Address?

2001 Proposed Rule. The 2001 proposal clarified that the 250 tons per year cutoff applies only to visibility-impairing pollutants and included a list of pollutants to address: SO_2, NO_X, particulate matter, volatile organic compounds (VOC), and ammonia.

Comments. We received a number of comments related to the proposed inclusion of ammonia. One comment cited three reasons for not including ammonia on the list of visibility-impairing pollutants. First, the commenters believed that we had provided no scientific basis for suggesting that ammonia contributes to visibility impairment. Second, the commenters believed that we should not include ammonia on the list of pollutants without fully discussing the implications for other programs. For example, if ammonia became a "regulated pollutant" under the CAA based upon its inclusion in the guidance, the commenters believed that there would be implications for PSD and other program requirements. Third, the commenters believed that inclusion of ammonia would have the unintended consequence of discouraging selective catalytic reduction (SCR) as a control measure for NO_X, because of the unavoidable but small amount of "ammonia slip" that occurs in using SCR technology.

Reproposal. Based on the comments received on ammonia, and based on our current state of knowledge regarding the role of ammonia in $PM_{2.5}$ formation and the effects on regional haze that would be expected from reductions in ammonia emissions, we believe that ammonia should not be included on the list at this time.

The following is a our rationale for proposing not to include ammonia. Ammonia is a gas and does not impair visibility directly. It can, however, react with acidic particles or gases in the air to form ammonium compounds. The most common acidic substances with which ammonia reacts are sulfuric acid and nitric acid, which in turn are formed from the reaction of SO_2 and NO_X with other substances in the atmosphere. Because ammonia generally forms visibility-impairing fine particles in the presence of acidic particles or gases, reductions in SO_2 and NO_X emissions will tend to reduce concentrations of ammonia-based particles in the air.

In other words, to reduce ammonium fine particles, States may either require the reduction of ammonia or of SO_2 and NO_X emissions. In determining the proper approach to reducing ammonium, it is worth noting that as SO_2 and NO_X emissions are decreased, the marginal effectiveness of hypothetical ammonia controls will also tend to decrease.

The available ammonia emissions inventory is uncertain, although EPA and other organizations are pursuing improvements. Consequently, compared to the case for SO_2 and NO_X, the ability to identify opportunities for emissions control and to quantify the effects of such actions in advance is limited.[15]

Because of the uncertainties in assessing the impact of ammonia emissions reductions on visibility, and because $PM_{2.5}$ will decrease due to SO_2 and NO_X controls, we are proposing not to include ammonia on the pollutant list at this time. We request comment on this determination.

Also included in the original pollutant list are VOCs. We propose that VOCs remain on the list.

Our understanding of the relationship between VOC emissions and the formation of $PM_{2.5}$ is rapidly evolving. We recognize that VOC emissions are most likely to contribute to particle formation, and thus to visibility impairment, in the presence of NO_X. In rural areas, anthropogenic VOC emissions generally do not appear likely to be a significant contributor to $PM_{2.5}$ formation,[16] while VOC emissions in urban areas are likely to be a contributor to $PM_{2.5}$ formation. This is because VOC emissions are most often present with NO_X emissions in urban areas. In rural areas, by contrast, VOC emissions are not as often present with NO_X emissions.

We also recognize that some specific uncertainties about VOCs remain. For example, only certain organic gases are precursors to $PM_{2.5}$, but available inventories cover VOC as an aggregate. It is therefore difficult to estimate emissions of the precursor compounds from these inventories. In addition, available models for estimating air quality from individual source emissions have more uncertainty in predicting ambient $PM_{2.5}$ changes from reductions in emissions of organic gases.

Finally, we recognize that many industrial sources and most mobile sources of organic gases have been subjected to VOC control requirements that have the effect of reducing emissions of the particular compounds that are $PM_{2.5}$ precursors. Given that fact, as well as the uncertainties about VOCs outlined above, we request comment on the level of discretion States should exercise in making BART determinations. Specifically, we request comment on whether States should focus greater control requirements on VOC emissions from BART sources in urban areas. We also request comment on the circumstances under which, in rural areas, for sources subject to BART, States may determine that BART would be no control for VOC.

What Is a "Stationary Source?"

The definition of "building, structure or facility" in the regional haze rule is based, in part, upon grouping of pollutant-emitting activities by 2-digit category according to the SIC Manual. As in the NSR program, however, facilities that convey, store or otherwise assist in the production of the principal product, are considered to fall within the same industrial grouping as the primary facility. Despite this general rule, however, we would like to clarify that in practice, this so-called "support facility" test for BART is narrower than for other programs. We are proposing to add language to the guidelines noting that emission units at a plant, even if they are a "support facility" for purposes of other programs, would not be considered for BART-eligibility unless they were within one of the 26 listed source categories, and unless they were put in place within the 1962 to 1977 time period. For example, a mine, even if a "support facility" for a power plant, would not be considered for BART eligibility.

Step 4: Identify the emission units and pollutants that constitute the BART-eligible source.

Background. The final step in the identification of BART-eligible sources would be to use the results from the previous three steps to identify the universe of equipment that is BART-eligible. If the total allowable emissions from the stationary source exceed a potential to emit of 250 tons per year for any individual visibility-impairing pollutant, then that collection of emissions units is a BART-eligible source. A BART analysis would be required for each visibility-impairing pollutant emitted from this collection of emissions units.

[15] For a more in-depth discussion of the contribution of ammonia emissions from stationary sources to long-range transport of $PM_{2.5}$, *see* discussion in the proposed Interstaste Air Quality Rule (IAQR): 69 FR 4566, January 30, 2004.

[16] *See* discussion in the NO_X SIP call at 63 Fed. Reg. 57,356 (Oct. 27, 1998).

2001 Proposed Rule. The 2001 proposed guidelines included two examples to clarify this point. In the first example, a source has two emissions units having cumulative emissions exceeding 250 tons for SO_2, but not for NO_X and particulate matter (PM). For this example, we noted that BART would be required for all three pollutants. In the second example, the source has potential emissions that are less than 250 tons for each individual pollutant, but more than 250 tons from the sum over all pollutants. For this second example, we noted that the source would not be BART-eligible.

Reproposal. We received comments on the 2001 proposal suggesting that some BART-eligible sources emit visibility-impairing pollutants at levels that would make a de minimis contribution to regional haze. For example, a source may be BART-eligible because it emits 500 tons per year of one visibility-impairing pollutant, but it may also emit only one ton per year of another pollutant, the emission of which would have little effect on regional emissions loadings and visibility impairment. A 1 ton/yr amount from a given BART-eligible source would likely represent a de minimis fraction of a total regional inventory.

As noted previously, we believe that once a source is BART-eligible according to the definition in CAA section 169A(g)(7), CAA section 169A(b)(2)(A) requires BART for "any" visibility-impairing pollutant regardless of the amount. Notwithstanding this apparent directive, we are proposing to provide the States with the flexibility to identify de minimis levels of pollutants at BART-eligible sources. We believe that it would be appropriate for States to have this flexibility once they have collected more information on the BART population. We also agree with comments that sources emitting pollutants at values considered de minimis under the PSD program could be de minimis for BART as well. Accordingly, the reproposal includes a provision that any de minimis values that States adopt should not be higher than the PSD levels: 40 tons per year for SO_2, NO_X and VOC, and 15 tons/yr for PM_{10}. We request comment on this provision, and on the idea of including de minimis values. Finally, if a commenter contends that ammonia should be included as a precursor to $PM_{2.5}$, then the commenter should also comment on an appropriate de minimis value for ammonia.

C. How To Determine Which BART-Eligible Sources Are Subject to BART

Background. Section 169A of the Act establishes a low triggering threshold for determining whether a BART eligible source is required to procure and install appropriate retrofit technology. States must determine whether BART eligible sources emit "any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in [a Class I] area." In the Regional Haze Rule, we interpreted these statutory provisions as requiring a State to find that a BART-eligible source is "reasonably anticipated to cause or contribute" to regional haze if it can be shown that the source emits pollutants within a geographic area from which pollutants can be emitted and transported downwind to a Class I area.[17]

Reproposal. As explained earlier, as part of the BART process, a State identifies and lists all "BART-eligible" sources. The State must then determine which of those BART-eligible sources may "emit any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I] area." A source which fits this description is "subject to BART." This section explains our proposed process for determining which BART-eligible sources should be subject to BART. We request comment on all aspects of this process.

Determining Which Sources Are Reasonably Anticipated To Cause or Contribute To Visibility Impairment (Sources Subject to BART)

Three options are proposed. First, the State may choose to consider that all BART-eligible sources in the State are subject to BART (*i.e.*, that none are exempt). As explained previously, we believe this conclusion is reasonable in light of currently available information [reference 1999 study]. We also believe that given American Corn Growers' emphasis on State's prerogatives in making BART determinations, we may lack the authority to deny this option to States.

Second, the State may choose to demonstrate, using a cumulative approach, that none of its BART-eligible sources contribute to visibility impairment. We propose that States should have the option of performing an analysis to show that the full group of BART-eligible sources in a State cumulatively do not cause or contribute to any visibility impairment in Class I areas. We request comment on the types of analyses that could be used. For instance, one approach may be for States to use a regional scale grid model[18] to demonstrate that its BART-eligible sources do not cause or contribute to regional haze. We anticipate that in most, if not all States, the BART-eligible sources are likely to cause or contribute to visibility impairment in Class I areas. However, it is possible that, using regional scale modeling, a State could show that its BART sources do not collectively cause or contribute to visibility impairment. In such a case, a State could complete its BART analysis relatively quickly, without the need for investing in studies of source-specific contributions to regional haze. At this time, we are neither requiring nor encouraging all States to undertake a cumulative approach.

Finally, the State may choose to determine which sources are subject to BART through the use of an individual exemption process, described below.

Individualized Source Exemption Process

We are proposing to provide States with the option of determining which sources are subject to BART through the use of an individualized exemption process. For this option, we propose that States use an air quality model for an individual source to demonstrate no contribution to visibility impairment in a Class I area. We also request comment on alternative approaches that may be used in lieu of this approach, or as a first step in the process by which States may determine which BART-eligible sources, if any, to exempt.

For modeling an individual BART-eligible source located more than 50 km from a Class I area, we propose that an air quality model, such as CALPUFF, be used. The CALPUFF system consists of a diagnostic meteorological model, a gaussian puff dispersion model with algorithms for chemical transformation and complex terrain, and a post processor for calculating concentration fields and visibility impacts. CALPUFF was incorporated into the "Guideline on Air Quality Models" (the Guideline) (40

[17] 64 FR at 35740.

[18] For regional haze applications, regional scale modeling typically involves use of a photochemical grid model that is capable of simulating aerosol chemistry, transport, and deposition of airborne pollutants, including particulate matter and ozone. Regional scale air quality models are generally applied for geographic scales ranging from a multi-state to the continental scale. Such modeling may not be appropriate for all States, as regional models are most applicable to situations involving multiple BART-eligible sources. Because of the design and intended applications of grid models, they may not be appropriate for all BART assessments, so States should consult with the appropriate EPA Regional Office prior to carrying out any such modeling.

CFR Part 51, Appendix W) in April 2003.

Traditionally, EPA has used transport and diffusion modeling to predict the effect of directly emitted $PM_{2.5}$ emissions on $PM_{2.5}$ ambient concentrations. To simulate the effect of precursor pollutant emissions on $PM_{2.5}$ concentrations requires air quality modeling that not only addresses transport and diffusion, but also chemical transformations. While we believe that it is technically feasible to model secondary PM formation, and there is at least one model, described above, which incorporates algorithms for estimating secondary transformation, we have not yet fully tested such modeling to determine whether its application is justified as a sole determinant of air quality impacts involving secondary transformation. However, where the statutory criteria for determining regulatory applicability involve relatively low thresholds, or where regulatory decisions involve considerations of multiple factors including, but not limited to, model results, we believe transport and diffusion models such as CALPUFF can be appropriate regulatory tools for evaluating air quality impacts involving secondary transformation. Consequently, we believe its use by States to assess whether a source is reasonably anticipated to cause or contribute to impairment of visibility in Class I areas is reasonable.

We are proposing that a CALPUFF assessment of an individual source be used as the preferred approach for determining whether a BART-eligible source may be exempt from BART. The CALPUFF assessment is specific to each source, taking into account the individual source's emission characteristics, location, and particular meteorological, topographical, and climatological conditions, any of which may have an impact on the transport of $PM_{2.5}$ and its precursors. Thus, this approach may be more determinative than a non-modeling approach in determining which sources are not contributing to visibility impairment in a Class I area.

Results from the CALPUFF assessment would be used to determine the source's impact on visibility in a Class I area. If a source has an estimated impact on visibility that is lower than the established threshold (described in the section below), then the State may choose to exempt the source from further BART analysis. If the source's impact is equal to or greater than the threshold, the State would determine that the source is subject to BART.

The State or source would apply CALPUFF for source-receptor distances greater than 50 km, since CALPUFF is generally intended for use on scales from 50 km from a source to hundreds of kilometers. However as the modeling domain increases in size, the requirements for experience in the application of CALPUFF becomes more demanding (*e.g.*, in processing and quality assurance of the meteorology, in understanding the implications of the various model processing options). Therefore we propose that any application of CALPUFF for distances greater than 200 km requires development of a written modeling protocol describing the methods and procedures to be followed, and that the protocol be approved by the appropriate reviewing authority. For source-receptor distances less than 50 km, we are recommending that States use their discretion for determining visibility impacts giving consideration to both CALPUFF and other EPA-approved methods. For example, States would have the option of exempting these sources if air quality modeling results, using an appropriate local-scale model such as PLUVUEII,[19] show that their emissions are below a level that would be reasonably anticipated to cause or contribute to visibility impairment in any Class I area.

Metric for Visibility Degradation

In providing an individual source exemption option, a metric is needed to assess a source's contribution to visibility degradation. The metric we are using in the regional haze rule is the deciview, which is derived directly from light extinction, an index commonly used to measure visibility degradation.

As outlined in the 1999 Regional Haze rule (64 FR 35725–35727, July 1, 1999), a one deciview change in haziness is a small but noticeable change in haziness under most circumstances when viewing scenes in a Class I area. The deciview can be used to express changes in visibility impairment that correspond to a human perception in a linear, one for one, manner. The deciview concept was introduced in 1994 in an article appearing in a peer-reviewed journal (Pitchford and Malm, Atmospheric Environment, 28 (5), 1994). We believe that visible changes of less than one deciview are likely to be perceptible in some cases, especially where the scene being viewed is highly sensitive to small amounts of pollution. We acknowledge that for other types of scenes, with other site-specific conditions, a change of more than one deciview might be required in order for the change to be perceptible.

Threshold Levels

A 1991 report from the National Acid Precipitation Assessment Program (NAPAP) states that "changes in light extinction of 5% will evoke a just noticeable change in most landscapes." [20] Converting a 5 percent change in light extinction to a change in deciviews yields a change of approximately 0.5 deciviews. This is a natural breakpoint at which to set the exemption level, since visibility degradation may begin to be recognized by human observer at this extinction level.[21] Thus, we are proposing a 0.5 deciview change as the threshold for determining that an individual source is causing visibility impairment at a Class I area. This level would be calculated by measuring the air quality screening modeling results for an individual source against natural visibility conditions. Natural visibility conditions are those conditions that are estimated to exist in a given Class I area in the absence of human-caused impairment.[22] We believe that measuring against natural visibility conditions is appropriate because the ultimate goal of the regional haze program is a return to natural conditions. Additionally, regional haze strategies are developed to make reasonable progress towards this goal, and visibility degradation and improvement are appropriately measured against natural conditions.

We also request comment on using a threshold that is more or less than 0.5 deciviews. Given uncertainties over the deciview change that is perceptible, and the modeling of a source's contribution to haze in a Class I area, a different threshold may be appropriate. Furthermore, we recognize that there may be situations where impacts from

[19] PLUVUEII is a model used for estimating visual range reduction and atmospheric discoloration caused by plumes resulting from the emissions of particles, nitrogen oxides, and sulfur oxides from a single source. The model predicts the transport, dispersion, chemicals reactions, optical effects and surface deposition of point or area source emissions. It is available at *http://www.epa.gov/scram001/tt22.htm#pluvue.*

[20] National Acid Precipitation Assessment Program (NAPAP). Acid Deposition: State of Science and Technology Report 24, Visibility: Existing and Historical Conditions—Causes and Effects, Washington, DC, 1991. See Appendix D, p. 24–D2.

[21] Ibid.

[22] U.S. EPA. September 2003. Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule. *http://www.epa.gov//ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf* This document has estimates of default conditions as well as measures to develop refined estimates of natural conditions.

more than one BART-eligible source, when taken together, would adversely affect visibility at a particular Class I area even though the impact of each individual source would be below the visibility threshold. In this case, there would be a noticeable impact on visibility from BART-eligible sources because of the contribution of multiple sources, yet impacts from an individual source alone would not be noticeable. Given the statutory language that a source "which may reasonably be anticipated to cause or contribute to visibility impairment" is subject to BART,[23] a lower threshold may be appropriate as it would effectuate Congress's intent that the BART applicability test not establish a high hurdle. We accordingly request comment on what threshold would be appropriate to address these issues.

Alternative Approaches to the Assessment Using CALPUFF

The CALPUFF assessment described previously can be a time-consuming and data-intensive approach; we are concerned about the resource burdens this might pose for States and sources. Therefore, we are also considering alternative approaches that would be credible and require fewer resources. These approaches could serve as a first step in the process for determining whether a source contributes to visibility impairment in a Class I area. We are considering several alternative approaches for making this exemption determination. These approaches, in no particular order, include: (1) A simpler screening assessment using CALPUFF (2) look-up tables (*i.e.*, tables that require emissions and distance information for making an exemption determination), (3) source ranking, and (4) using Emissions divided by Distance, known as the Q/D method.

Each approach has strengths and limitations. We request comment on all of these approaches. A more complete and detailed explanation of the four alternative approaches, including examples, is available in a memo to the docket.[24]

A Screening Assessment Using CALPUFF

We are proposing that CALPUFF be run in a screening assessment to evaluate individual sources. This approach would be less data- and time-intensive than running CALPUFF in the assessment described previously due to greatly simplified preparation and processing of input data. This simpler screening assessment utilizes source and receptor location, as well as meteorological, topographical and climatological conditions from a regionally-specific profile. However, like the assessment described previously, this screening assessment also utilizes the individual source's particular emission characteristics. The table below illustrates the differences between the screening assessment of the kind described previously as the preferred approach and the simpler, more generalized screening assessment.

Type	CALPUFF Assessment	CALPUFF Screening Assessment.
Model used	CALPUFF	CALPUFF.
Input meteorology	Process 5 years of location-specific, meteorology data.	Representative met location (data already processed).
Terrain included	Site-specific terrain included	No (assumed flat).
Source-Receptor distances	Source to Class I area receptor	Source to Class I area receptor.
Location of Visibility impact	Maximum impact at receptor using appropriate distance and direction from source.	Maximum impact in any direction at source-receptor distance.

Results from this screening assessment would be used to determine the source's impact on visibility in a Class I area. If a source has an estimated impact on visibility that is lower than the established threshold, the State may choose to exempt the source from further BART analysis. If the source's impact is equal to or greater than the threshold, the State would determine that the source is subject to BART. The source would then have the option of performing the screening assessment described previously as the preferred approach to demonstrate that its visibility impacts do not exceed the threshold level and that it qualifies for exemption.

We request comment on the use of this approach as an assessment of individual source impacts on visibility.

Look-Up Tables Developed From Screening-Level Air Quality Modeling

For even greater ease of use, look-up tables could be developed for application in the individual source exemption process. Under this approach, a State or source would use a look-up table developed by EPA to determine the source's predicted impact on a Class I area and, consequently, its exemption status. The State or source would use the source's emissions information and distance from a Class I area to determine if it is exempt from BART.

The look-up tables could be developed by first using CALPUFF in screening assessments to estimate levels of visibility impairment (in deciviews) associated with different combinations of distance to a Class I area and tons per year of emissions. A table would show the distance from the representative BART-eligible source to a Class I area and the associated allowable emissions of visibility-impairing pollutants (*e.g.*, SO_2, NO_X, and direct $PM_{2.5}$) at that distance that will yield a modeled impact of 0.5 deciviews. A State or source could "look up" a source's distance and emission combination and compare its allowable emissions of visibility-impairing pollutants to the table to make the BART exemption determination for the source.

If a BART-eligible source has emissions of visibility-impairing pollutants that are less than the emissions shown on the table for sources that are the same distance as the source from a Class I area, the State could exempt the source from BART. Alternatively, if a BART-eligible source's emissions of visibility-impairing pollutants are greater than the emissions shown on the table, the State could determine that the source is subject to BART. The source would have the option of running the CALPUFF model, or other EPA-approved model, to demonstrate that its visibility impacts do not exceed a change in light extinction of 0.5 deciviews and that it qualifies for exemption.

An example of a look-up table for EGUs is shown in the technical memo

[23] CAA § 169A(b)(2) (emphasis added).

[24] Memorandum to the docket: Summary of Alternative Approaches for Individual Source BART exemptions, Todd Hawes, March 12, 2004. Docket No. OAR–2002–0076.

to the docket.[25] A more in-depth discussion of the look-up table development is given in the Summary of Technical Analysis for the Proposed Rule.[26] The advantages of the look-up tables are that they are easy to use and no modeling would be required. However, they may be too general to represent all source categories. For instance, the source category in the example is for EGUs. Another source category will likely have entirely different source and emissions characteristics which may require development of a separate look-up table. Several sets of look-up tables requiring several sets of assumptions would be cumbersome and complex.

Source Ranking

A source ranking approach is another possible option for determining whether an individual source may be exempted from BART. This approach would require a separate analysis for each Class I area.

First, a State would determine the universe of BART-eligible sources within a prescribed distance from the Class I area. Then, using a pre-determined common metric, such as total emissions of visibility impairing pollutants at each source, a State would sort the sources in descending order according to the metric and determine the cumulative frequency (a running total or percentage) of the ranked sources according to the chosen metric. The sources that fall below a pre-determined frequency level could be presumed to be insignificant contributors, and the State could exempt them from BART. A source that falls above the pre-determined frequency level would be subject to BART. The source would have the option of running the CALPUFF screening model, or other EPA-approved model, to demonstrate that its visibility impacts do not exceed the threshold level and that it qualifies for exemption. A more complete and detailed explanation of this approach, including an example, is available in a memo to the docket.[27]

We request comment on the source ranking approach and on an appropriate frequency level for determining individual source exemption.

Emissions Divided by Distance (Q/D) Method

Another option for exemption for which we request comment is a non-modeling based approach identified as Q/D (with "Q" being allowable emissions, in tons per year, and "D" representing the distance, in km, to the nearest Class I area, multiplied by a prescribed constant). The method, originally developed by the North Carolina Department of Environment and Natural Resources, is a tool to eliminate distant, insignificant emission sources from ambient assessments submitted under the Prevention of Significant Deterioration (PSD) program.[28] The Q/D method determines a source to be insignificant if the allowable emissions in tons per year (Q) divided by a constant times the distance in kilometers (D) is greater than a value of 1. For example, North Carolina uses a constant of 20, which was determined empirically. Therefore, a source could be considered insignificant if its emissions divided by 20 times its distance, in km, from the nearest Class I area is greater than 1. For this application for determining exemption from BART, the combined emissions of SO_2, NO_X, and $PM_{2.5}$ of a BART-eligible unit could be divided by the distance to the nearest Class I area. If that quotient is less than 1, the source would not be subject to BART. If a source is not found to be exempt under this approach, the CALPUFF screening analysis could still be used for an exemption determination.

We request comment on the Q/D method, including comment on what value for the constant would be appropriate and why.

D. The BART Determination Process

Background. Section 169A(g)(7) of the CAA requires States to consider the following factors in making BART determinations: (1) The costs of compliance, (2) the energy and nonair quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. The D.C. Circuit's decision did not address the first four steps of the BART determination (the "engineering analysis"), which are discussed in detail in the guideline. The court's opinion did address the final step, mandating that the degree of improvement in visibility that would result from imposition of BART on each individual source be taken into account in determining BART.

2001 Proposed Rule. Section IV of the 2001 proposed BART guidelines was entitled "Engineering Analysis of BART Options." The purpose of this section was to address the requirement in 40 CFR 51.308(e)(1)(ii)(B) in the regional haze rule that States identify the "best system of continuous emissions control technology" taking into account "the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, and the remaining useful life of the source." Thus, in the 2001 proposed guidelines, section IV addressed four of the five statutory factors to be considered in the BART determination. Section V, "Consideration of Visibility Impacts," contained a consolidated discussion, addressing visibility considerations in deciding both which BART-eligible sources should be subject to BART, as well as the fifth statutory factor—assessing the degree of visibility improvement which may reasonably be anticipated to result from control technology.

Reproposal. In the proposed guidelines, we are adding a fifth step to the Engineering Analysis. The five proposed steps in the engineering analysis are as follows:

1—Identify all available retrofit control technologies,

2—Eliminate technically infeasible options,

3—Rank remaining control technologies by control effectiveness,

4—Evaluate impacts and document the results, and

5—Evaluate the visibility impacts of applying controls.

In this portion of the preamble, we discuss a number of other issues.

1. How does BART relate to maximum achievable control technology (MACT) standards developed under CAA section 112?

In the 2001 proposed rule, we did not provide any discussion of the relationship of BART controls to MACT requirements. A number of commenters suggested that there are cases where additional controls beyond MACT are not warranted. We believe that for VOC and PM sources subject to MACT standards, States may streamline the BART analysis by including a discussion of the MACT controls and whether any major new technologies

[25] *Ibid.*

[26] Summary of Technical Analyses for the Proposed Rule, Mark Evangelista, U.S. Environmental Protection Agency, April 12, 2004, Docket No. OAR–2002–0076.

[27] Memorandum to the docket: Summary of Alternative Approaches for Individual Source BART Exemptions, Todd Hawes, March 12, 2004. Docket No. OAR–2002–0076.

[28] A Screening Method for PSD, Memorandum from Bruce P. Miller, U.S. Environmental Protection Agency, to Eldewins Haynes, North Carolina Department of Natural Resources and Community Development, September 12, 1985, Docket No. OAR–2002–0076.

have been developed subsequent to the MACT standards.

We believe that there are many sources, particularly sources of VOC and PM emissions, that are well-controlled because they are regulated by the MACT standards. Examples of MACT sources which effectively control VOC and PM emissions include (among others) secondary lead facilities, organic chemical plants subject to the hazardous organic national emissions standard for hazardous air pollutants (HON), pharmaceutical production facilities, and equipment leaks and wastewater operations at petroleum refineries. (We believe this is also true for emissions standards developed for municipal waste incinerators under the CAA amendments of 1990.) In many cases, it will be unlikely that States will identify emission controls more stringent than the MACT standards without identifying control options that would cost many thousands of dollars per ton. Unless there are new technologies subsequent to the MACT standards which would lead to cost-effective increases in the level of control, we believe that States may conclude that a source meeting MACT standards in these cases will satisfy the BART requirement.

The reproposed guidelines have been revised to include the discussion of MACT standards. The reproposed guidelines would require that a State identify any source where they are relying on MACT standards to achieve a BART level of control. Moreover, the reproposed guidelines would require a State to provide the public with a discussion of its decision to rely on a MACT standard as BART for a given source and pollutant.

2. How do I identify all available retrofit emission control techniques?

2001 Proposed Rule. In the 2001 proposed guidelines, we discussed a number of concepts regarding the identification of "all available" retrofit technologies. This discussion noted that "all" means a reasonable set of technologies. For example, the guidelines noted that it is not necessary to list all permutations of available control levels that exist for a given technology—the list is complete if it includes the maximum level of control each technology is capable of achieving.

The proposed guidelines made clear that the list of "available" technologies should reflect a comprehensive review, including technologies applied outside of the United States, and including technologies that may have only been applied previously to new sources. The proposed guidelines noted that control measures could include add-on control devices, switching to inherently lower-emitting processes, or a combination of the two. The proposed guidelines stated that BART did not require a source to undertake a complete replacement of the source with a lower-emitting design. The guidelines included a list of references which are available for identifying possible control measures, noting that the list was not necessarily all-inclusive. Finally, this passage of the proposed guidelines noted that sources with existing control devices in place must consider any available options for improving the performance of those control devices.

Comments. We received a few comments on this part of the 2001 proposal. Some comments recommended that controls typically used at new sources, such as those representing best available control technology (BACT) or lowest acheiveable emission rate (LAER), would be more stringent than BART should require. One commenter representing a utility company noted that the requirement to consider all controls, including those outside of the United States, could be burdensome to States. This commenter recommended that the analysis be limited to a "reasonable range" of technologies.

Reproposal. We are proposing to amend the language in the BART guidelines on the topic of identification of "all" retrofit technologies. We do not believe that it is necessary that States conduct detailed evaluations of control measures that are very unlikely to be selected as BART. Accordingly, we believe that, in order to reduce the administrative burden, States may consider developing screening levels based on the "cost effectiveness" of emissions control (*i.e.* the cost of emission control technology per each ton of emissions reduced). We view such dollar/ton screening levels as criteria for rejecting control options for consideration on the basis of costs and not as the sole basis for a BART decision. The overall BART decision must be made in consideration of all of the statutory factors.

We also recognize that there may be cases where States may wish to consider control measures above whatever screening levels they may establish. For example, the effect of nitrate particles varies and there are a few areas where nitrates are likely to be more important than for the rest of the nation. Also, a few sources may emit levels of NO_X higher than the presumptive control level of 0.2 lbs/MMBtu, even after consideration of all available control technologies (such as low NO_X burners and other combustion controls) below any established screening levels (see discussion in section III. 6. below).

Within the above constraints, we believe that the BART analysis should begin with a comprehensive review of those technologies that could be used to reduce emissions from a given BART-eligible source. We note that this analysis may be limited to a reasonable range of options and need not consider all permutations of control levels for a given technology.

In this proposal, we are seeking comment on two alternative approaches for conducting a BART engineering analysis. We prefer the first approach. Under this first alternative, the BART analysis would be very similar to the BACT review as described in the New Source Review Workshop Manual (Draft, October 1990). Consistent with the Workshop Manual, the BART engineering analysis would be a process which provides that all available control technologies be ranked in descending order of control effectiveness. Under this option, you must first examine the most stringent alternative. That alternative is selected as the "best" unless you demonstrate and document that the alternative cannot be justified based upon technical considerations, costs, energy impacts, and non-air quality environmental impacts. If you eliminate the most stringent technology in this fashion, you then consider the next most stringent alternative, and so on.

We also request comment on an alternative decision-making approach that would not necessarily begin with an evaluation of the most stringent control option. Under this approach, you would have more choices in the way you structure your BART analysis. For example, you could choose to begin the BART determination process by evaluating the least stringent technically feasible control option or an intermediate control option drawn from the range of technically feasible control alternatives. Under this approach, you would then consider the additional emission reductions, costs, and other effects (if any) of successively more stringent control options. Under such an approach, you would still be required to (1) display and rank all of the options in order of control effectiveness, including the most stringent control option, and to identify the average and incremental costs of each option; (2) consider the energy and non-air quality environmental impacts of each option; and (3) provide a justification for adopting the control technology that you select as the "best" level of control, including an explanation as to why you rejected other more stringent control

technologies. While both approaches require essentially the same parameters and analyses, we prefer the first approach described above, because we believe it may be more straightforward to implement than the alternative and would tend to give more thorough consideration to stringent control alternatives.

3. Consideration of Nonair Quality Environmental Impacts

2001 Proposed Rule. The 2001 proposal called for States to address environmental impacts other than air quality, and energy impacts, due to controlling emissions of the pollutant in question. Such environmental impacts include solid or hazardous waste generation and discharges of polluted water from a control device.

The proposed guidelines contained a number of examples of the types of nonair quality impacts that should be considered. The guidelines noted that States should take into account that there are beneficial nonair quality environmental impacts that could result from control measures. For example, control measures under consideration for BART may reduce acid deposition.

The guidelines clarified that the procedure for conducting an analysis of nonair quality environmental impacts should be based on a consideration of site-specific circumstances. Under the proposed guidelines, in Step 3 it would not be necessary to perform this analysis of environmental impacts for the entire list of technologies, if a State proposes to adopt the most stringent alternative. Instead, the analysis need only address those control alternatives with any significant or unusual environmental impacts that have the potential to affect the selection or elimination of a control alternative.

Comments. One utility commenter requested that EPA better clarify the BART determination factors other than costs of compliance. A State commenter wanted EPA to explain the bounds of a nonair quality review on environmental effects, citing possible requirements to assess statewide water quality standards as an example of how broad and open-ended the analysis could be. Several environmental groups asked us to be more specific with respect to consideration of the beneficial nonair quality related effects of implementing emissions controls as part of the BART determination. The comments pointed out that acid and total nitrogen loading affects water quality in rivers, lakes, coastal waters and also affects soil chemistry. These comments point out that these impacts can be magnified at higher elevations due to direct cloud deposition. Acidic deposition and increased nitrogen loading appear to be linked to damage to forested ecosystems, such as declines in sensitive tree species, death of aquatic organisms and poor water quality. Some comments pointed out that even a qualitative assessment of these beneficial impacts can inform the BART determination and should be part of the process. Comments from several Midwestern States requested that the guidelines provide that incompatibility with control for another pollutant, such as mercury, should be a criterion for rejecting (or modifying) a BART control option.

Reproposal. The Guidelines discussion of energy impacts remains the same as the discussion in the 2001 proposal. For nonair quality impacts, we agree that more clarification is needed. We do not see this factor as requiring an open-ended analysis of every affected nonair resource. We also do agree with commenters that the nonair quality assessment should include the beneficial effects of control options being considered in the BART determination. Both quantitative and qualitative information can be used in this assessment. We do not view this factor as requiring States to conduct an analysis of every possibly affected nonair quality effect, but rather as requiring States to consider clearly documented nonair quality effects. Moreover, we expect the Federal Land Managers to provide available information for assessing the ability of emission controls to reduce impacts on forests, soils, native species and other resources through the consultation requirement for regional haze SIP development contained in 40 CFR 51.308(i)(2)of the regional haze rule. This information should identify the specific nonair quality effects to consider and specific criteria for evaluating their significance, so that States are not faced with open-ended analyses.

States should also consider other information on beneficial effects which include specific data on nonair quality concerns made available to them, such as through public comments, in making the BART determination. We also agree with the Midwestern States comments that when controls for a visibility-impairing pollutant are shown to be incompatible with control of another air pollutant, this may create air quality or nonair quality related environmental concerns that should be taken into account in comparing control alternatives. At the same time, we note that it is important to evaluate fully and document the magnitude and nature of the concern identified. The mere presence of an actual or theoretical concern should not be cited as the reason for eliminating an option. Also, once a source-specific BART determination is made for two regulated pollutants, if the result is two different BART technologies that do not work well together, a State could then substitute a different technology or combination of technologies that achieve at least the same emissions reductions for each pollutant.

4. Evaluating the Significance of the Costs of Control

2001 Proposed Rule. The 2001 proposed rule requested comment on evaluating the significance of the costs of compliance—specifically, on whether the guidelines should contain specific criteria, and on whether such criteria would improve implementation of the BART requirement.

Comments. A few industry commenters, and two State commenters, suggested that specific criteria for evaluating cost, or for comparing cost with visibility benefits, should be included, but did not suggest what those specific criteria should be. Several environmental groups and environmental consulting firms suggested that specific cost criteria would not improve BART determinations, because BART sources and source categories vary considerably.

Reproposal. We are proposing a sequential process for conducting the impacts analysis that includes a complete evaluation of the costs of control. For evaluating the significance of the costs of control, we continue to request comment on whether such criteria would improve implementation of the BART requirement. If commenters believe such criteria are warranted, we request comment on what criteria would be appropriate. For example, we request comment on whether it would be helpful to include criteria such as those in the work of the Western Regional Air Partnership (WRAP),[29] wherein a system is described which views as "low cost" those controls with an average cost effectiveness below $500/ton, as "moderate" those controls with an average cost effectiveness between $500 to $3000 per ton, and as "high" those controls with an average cost effectiveness greater than $3000 per ton.

[29] *Technicol Support Documentotion. Voluntory Emissions Reduction Progrom for Mojor Industrial Sources of Sulfur Dioxide in Nine Western Stotes ond o Backstop Morket Troding Progrom. An Annex to the Report of the Grand Canyon Visibility Tronsport Commission.* Section 6A.

5. Sulfur Dioxide Controls for Utility Boilers

2001 Proposed Rule. In the 2001 proposed guidelines, we cited a report by EPA's Office of Research and Development to support a presumption that, for utility boilers where there is no existing control technology in place, a 90–95 percent reduction in SO2 is generally cost effective to achieve using scrubbers. This document is entitled *Controlling* SO_2 Emissions: A Review of Technologies, EPA–600/R–00–093. We also provided, in a memorandum to the docket for the proposal, calculations showing scrubber costs of about $200–$1000 per ton of SO_2 removed for the 90–95 percent control levels. The proposal made clear that we would allow States to consider case-by-case variations (for example, type of fuel used, severe space limitations, and presence of existing control equipment) that could affect the costs of applying retrofit controls. We requested comments on whether the 90–95 percent presumption is appropriate or whether another presumption should be established instead.

Comments. We received many comments on the 90–95% control presumption for utility boilers.

Many utility industry comments were critical of the presumptive level. These comments did not address whether the 90–95 percent level was achievable, nor did they address EPA's cost calculations. Instead, the comments were generally critical of the provision as a Federal mandate that would reduce State flexibility in making BART determinations.

Comments from States in the Northeast and from environmental groups were generally supportive of the presumptive levels of control. Some of these comments expressed concerns that the technology may advance to greater levels of achievable control before BART decisions are made. Accordingly, those comments recommended that we add language to the final guidelines to ensure that the 90–95 percent level would not be considered to represent the maximum level of control that States could consider.

Comments from several Midwestern States recommended that the presumptive level be expressed as a performance level, for example as a pounds/million BTU level, rather than as a percent control level. These comments expressed concerns that facilities which have already reduced emissions for purposes of the acid rain program could inappropriately be treated in the same way as those that had not yet reduced their emissions.

Reproposal. In today's action reproposing the BART guidelines, we are proposing a level of SO_2 control that is generally achievable for electric generating units (EGU)s of a certain size. Specifically, we are proposing that in establishing BART emission limits, States, as a general matter, must require owners and operators of greater than 750 MW power plants to meet specific control levels of either 95 percent control, or controls in the range of .1 to .15 lbs/MMBtu, on each EGU greater than 250 MW. We are proposing to establish such a default requirement based on the consideration of certain factors discussed below. Although we believe that this level of control is likely appropriate for all greater than 750 MW power plants subject to BART, a State may establish a different level of control if the State can demonstrate that an alternative determination is justified based on a consideration of the evidence before it. In addition, for power plants 750 MW and less in size, we are establishing a rebuttable presumption that States should require any EGU between 250 MW and 750 MW in size to meet these same control levels.

This presumption would apply unless the State has persuasive evidence that an alternative determination is justified. Our intent is that it should be extremely difficult to justify a BART determination less than the default control level for a plant greater than 750 MW, and just slightly less difficult for a plant 750 MW or smaller.

As stated earlier, by specifically singling out, in section 169A of the CAA, a specific set of existing sources to be addressed by the States (or the Administrator) in their plans, Congress clearly signaled through the BART requirements a particular concern that the States and EPA focus on pollution from these sources. The CAA gives the States the authority "to decide which sources impair visibility and what BART controls should apply to those sources." American Corn Growers v. EPA, 291 F.3d at 8. However, section 169A further states that "[i]n the case of a fossil-fuel fired generating plant having a total generating capacity in excess of 750 MW, the [BART] emission limitations * * * shall be determined pursuant to guidelines' issued by EPA. This language, and the legislative history, indicate that although Congress generally left the determination of BART emission limits to the States (subject to the requirements of EPA's implementing regulations), it intended EPA to take a more active role in the process of establishing BART emission limits for large power plants. Furthermore, the legislative history from 1977 makes clear that Congress understood 25 years ago that a specific type of SO_2 controls (flue gas desulfurization (FGD) or "scrubbers") was readily available for these plants. We believe it is consistent with Congress' mandate that EPA establish guidelines for determining BART emission limitations for this category of sources and, given the availability and low cost of controls for these sources, for EPA to require that these power plants meet specific control levels, unless the State has persuasive evidence that an alternative determination is justified.

In addition to the statutory language and the legislative history, we believe that requiring specific BART emission limitations for greater than 750 MW power plants in most cases is supported by sound policy considerations and a careful review of the information we have regarding these sources' emissions, costs of control, and impacts on visibility. First, sulfates resulting from SO_2 emissions are an important contributor to visibility impairment nationwide, and preliminary data that we have suggests that the estimated 28 BART-eligible EGUs located at 750 MW power plants emit over one million tons of SO_2 per year, or, on an individual EGU basis, an average of over 39,000 tons of SO_2 per year.[30] In other words, these sources are some of the largest emitters of SO_2 in the United States.

Second, as discussed below, highly effective control technologies (*i.e.*, FGD) are available to control SO_2 emissions from utility boilers; the average costs per ton of emissions removed from such EGUs (usually between $200 and $1300 per ton) are well within the levels considered for application under many CAA regulatory programs. Based on the cost models in the *Controlling SO_2 Emissions* report,[31] for example, it appears that, where there is no existing control technology in place, 95 percent control can generally be achieved at EGUs using coal with relatively high

[30] See *http://www.epa.gov/airmarkets/epoipm/results2003.html*. This is the Table of Parsed Run Data for EPA Modeling Applications Using IPM. Most of the 750 MW power plants addressed by this provision contain one or more 250 MW boilers constructed between 1962 and 1977. Thus, on average, most (each) plant emits far more than 39,000 tons per year of SO_2 from units covered by the BART requirement.

[31] Documentation of the presumption that 90–95 percent control is achievable is contained in a recent report entitled *Controlling SO_2 Emissions: A Review of Technologies*, EPA–600/R–00–093, available on the internet at *http://www.epo.gov/ORD/WebPubs/so2*. This report summarizes percentage controls for FGD systems worldwide, provides detailed methods for evaluating costs, and explains the reasons why costs have been decreasing with time.

sulfur content at cost-effectiveness values cited above.[32] Similarly, for EGUs using relatively low sulfur coal, reducing SO_2 emission levels to 0.1 to 0.15 lbs/MMBtu is also cost-effective as compared to other measures to reduce pollution, falling within the same range of cost effectiveness as that discussed above.[33]

Third, we believe that individual BART-eligible EGUs subject to this provision contribute substantially to visibility impairment in Class I areas. For example, based on modeling runs using CALPUFF for a typical 250 MW EGU, modeling results have shown visibility effects greater than 7 deciviews at Class I areas at distances of 200 km.[34] At 90 percent control for a 250 MW source, the maximum modeled impact would improve to 1.3 deciviews. A 95 percent control level would yield further substantial improvement in visibility to just under 1 deciview. Note however that even at a 95 percent control level, just one source can have maximum impacts above the threshold of the visible range (0.5 deciviews) and may still impair visibility at the nearest Class I area.

Therefore considering the range of the costs of compliance for these sources and the degree of improvement in visibility that may be anticipated from the use of the highly effective control technologies that are available for these sources, we have determined that it is appropriate to establish in these guidelines specific control levels for States to use in determining BART for these sources. We are proposing that as a general matter, States must find that for EGUs greater than 250 MW at 750 MW power plants subject to BART, the appropriate BART emission limitation reflects either at least 95 percent control, or a comparable performance level of 0.1 to 0.15 lbs of SO_2 per million BTU range, unless the State has persuasive evidence (as discussed below) that an alternative determination is justified.

We are proposing a performance level as an alternative to a percentage reduction to account for the difference between coal with higher, as opposed to lower, sulfur content. As noted, we received comments on the proposed 2001 BART guidelines that the control technology presumption should be expressed as a performance level (lb/million BTU) rather than as a percentage control. In response to these comments, we are taking into account the fact that the actual level of performance after application of scrubber technologies will be influenced not only by the percentage control, but also by the sulfur content of the fuel used.

As discussed above, we believe that this proposal of 95 percent control, or a comparable performance level of 0.1 to 0.15 lbs of SO_2 per million BTU, represents controls that are achievable at reasonable cost-effectiveness levels. These control levels are functionally equivalent to the 90–95% control levels contained in the 2001 proposal. However the choice between 95 percent and an emission rate in the range of 0.1 to 0.15 lbs/MMBtu better reflects a recognition of the differences in overall emissions that are achievable by using different coal types. For example, coal boilers in the West generally use lower sulfur content Western coals. The low end of the range in the 2001 proposal recognized that dry scrubbers employed in the West would have difficulty achieving a 95% level of control. However, the 2001 proposal did not explicitly recognize that 90% control in the West may actually represent a lower overall sulfur emission rate, given the lower sulfur content in the coal used. Conversely, wet scrubbers employed in the East could easily get 95% control or more. But because Eastern coal boilers generally use higher sulfur content Eastern coals, the overall sulfur emission rate might still remain higher in the East than in the West.

While emission rates vary by both sulfur content and scrubber type, the following table illustrates demonstrated control efficiencies for the West and East.

Emission Rates and Scrubber Control Percentages for Bituminous Coal

EMISSION RATES AND SCRUBBER CONTROL PERCENTAGES FOR BITUMINOUS COAL

Sulfur Coal (percent)	Scrubber (percent)	SO_2/MMBtu (lbs)
WEST		
0.7	90	0.10
1.0	90	0.15
EAST		
2.5	95	0.18
2.5	96	0.15

Assume: 13,000 lb Coal/Btu and 1 MW = 10.5×10^6 Btu/hr, from AP–42 [35]

We request comment on whether these control levels are appropriate, or whether different levels should be established instead. We also request comment on which specific target number in the 0.1 to 0.15 lb/million BTU range should be considered to represent BART, especially for those EGUs that cannot achieve 95 percent control. For whatever target levels commenters wish to offer, they should provide documentation supporting the basis for their proposals.

Although we are proposing to establish a requirement that these control levels are BART for 250 MW EGUs at greater than 750 MW power plants that are subject to BART, States would still have the ability to take into account any unique circumstances that support an alternative determination. The CAA identifies five factors that the States generally must consider in making a BART determination. CAA section 169A(g)(2). If, in any specific case, the State finds that these factors demonstrate that the presumed control levels do not represent BART, we propose that the State may make a reasoned determination as to the appropriate level of control. If a State chooses to deviate from the required level, it must provide documentation supporting and explaining its determination.

Nevertheless, we believe that it would be extremely difficult to argue, in any instance, that the above control levels should not be determined to be BART for these units at these large power plants. For the reasons outlined above, we believe that only in extremely rare and unique circumstances could a State determine that such controls are not cost effective, or that the visibility impact of such a plant does not warrant

[32] We have used the cost models in the *Controlling SO_2 Emissions* report to calculate cost-effectiveness ($/ton) estimates for FGD technologies for a number of example cases. (See note to docket A–2000–28 from Tim Smith, EPA/OAPS, December 29, 2000). We also believe it is reasonable to expect States to consider the maximum level that these scrubbers are capable of achieving. Thus, for example, we believe that a scrubber installation which allowed part of the flue gas stream to bypass the scrubber and remain uncontrolled, or be controlled to a lesser degree, should not be considered to represent BART.

[33] Ibid.

[34] Summary of Technical Analyses for the Proposed Rule, Mark Evangelista, U.S. Environmental Protection Agency, April 12, 2004, Docket No. OAR–2002–0076.

[35] Examples of SO_2 control calculations for various sulfur contents in bituminous coal, Note from Todd Hawes to Docket OAR–2002–0076, April 8, 2004.

such controls. We also believe that only under extreme circumstances would consideration of any of the remaining three factors (energy and nonair quality environmental impacts, existing pollution control technology in place, and remaining useful life of the source) suggest that these control levels are too stringent to be determined to be BART. For example, a source might show proof that it will be shutting down within the next 5 years. Or a source might be located in a remote desert area, where use of water for FGD would deplete an aquifer. As discussed above, however, in the vast majority of cases, we believe that these control levels should be considered to represent BART.

In addition, the control levels at issue are based on our understanding of the current capabilities of scrubbers, as well as the costs faced by the utility industry for installing these controls. We recognize that it is possible that capabilities of scrubber technologies may improve and it is likely that scrubber costs will continue to decline as scrubber technologies improve.[36] [37] Accordingly, we have added a brief discussion to the reproposed guidelines to ensure that States take into account updated information on scrubber performance as scrubber technology improves.

We also believe that States should find that the control levels described above are cost effective for all utility boilers greater than 250 MW in size, regardless of the size of the power plant at which they are located. There appears to be no significant difference in utility boilers at power plants that are greater than 750 MW, and those 750 MW or less, other than the number of boilers located at the facility. For the most part, plants greater than 750 MW generally consist of multiple units, many of which are smaller than 750 MW each.[38] Absent unusual circumstances which would lead to substantially higher costs than for typical facilities, a utility boiler greater than 250 MW in size should be able to achieve either a 95 percent reduction in SO_2 emissions or a comparable performance level of 0.1 to 0.15 lbs/MMBtu at a very reasonable cost. We request comment on whether this level of control is reasonable for such sources. Such unusual circumstances could be similar to the examples cited above with regard to greater than 750 MW plants (that a source might show proof that it will be shutting down within the next 5 years, or a source might be located in a remote desert area, where use of water for FGD would deplete an aquifer.) Although the hurdle for not achieving the default control level for greater than 750 MW plants is intended to be higher than the hurdle for less than 750 MW plants, we are unable to think of an example that would apply to 250 MW units and above at one size plant but not the other. We request comment on any such examples that might exist.

6. Nitrogen Oxide Controls for Utility Boilers

Background. In addition to being a major source of SO_2 emissions, EGUs and other combustion units are a major source of NO_X emissions. NO_X emissions also contribute to regional haze, both through formation of light scattering nitrate particles in a manner similar to sulfate formation from SO_2 emissions, but also through promoting the formation of sulfate particles. Based on an examination of the contribution to haze in Class I areas from the IMPROVE network, SO_2 emissions comprise the most significant contribution. However, in some areas and at some times, the NO_X contribution can be greater than the SO_2 contribution. Also, NO_X emissions can be an important direct and indirect contributor to PM2.5 formation. In addition, in areas with high EGU SO_2 and NO_X contributions, a reduction only of SO_2 emissions would result in nitrate 'substitution' for sulfates, reducing the regional haze benefits.[39]

2001 Proposed Rule. In discussing the process for identifying all available retrofit emission control techniques in the 2001 proposed guidelines, we identified general information sources that address NO_X control strategies (66 FR 38123). The proposed guidelines, however, did not contain a detailed discussion of available NO_X control strategies for utilities.

Comments. We received several comments from environmental and multi-state organizations requesting that we specifically address technologies for control of NO_X at BART sources. These commenters provided information showing that NO_X emissions result in the formation of visibility-impairing nitrate particles. In addition, these commenters requested that we establish a presumptive 90 percent removal of emissions of NO_X from currently uncontrolled utility boilers. The commenters provided information regarding the level of visibility impairment in Class I areas, as well as in urban areas, created by secondary particles related to emissions of NO_X. The commenters noted that, while nitrate contributes less to visibility impairment, relative to sulfate, on the worst impaired days in summer, it has a more significant role in visibility impairment in winter when some of the worst days occur. In addition, the commenters point out that major reductions in SO_2 emissions, and the ammonium sulfate particles they create in the atmosphere, could lead to increases in nitrate particles. The reason for this is that reductions in ammonium sulfate particles could "free up" ammonia, making it available to form ammonium nitrate particles. The commenters argued that BART should control SO_2 and NO_X simultaneously.

In addition to direct visibility concerns in and around Class I areas, commenters stated that NO_X emissions reductions would contribute to improved public health. One commenter noted that reductions of NO_X emissions from BART sources would result in enhanced benefits to ecosystems in high elevation Class I areas. Another commenter noted increasing trends in particulate nitrate concentrations at several Class I areas and suggested that EPA conduct a review of technologies, similar to the ORD report on SO_2 emissions controls, to be used as basis for a presumptive level of control.

Reproposal. We agree that emissions of NO_X from sources subject to BART, and the resulting nitrate particles formed by NO_X in the atmosphere, should be appropriately addressed in a BART analysis. We also agree with commenters that greater control of SO_2 at large coal-fired utility plants may result in greater availability of NO_X in the atmosphere. Recent data from EPA's IMPROVE monitoring networks confirms that the contribution of

[36] Zipper and Gilroy, Sulfur Dioxide Emissions and Market Effects under the Clean Air Act Acid Rain Program (Air and Waste Management Association, 1998, vol. 48, pp. 829–37) shows that capital costs for FGD fell by 50 percent between 1989 and 1996. See *http://www.awma.org/journal/ShowAbstract.asp?Year=1998&PaperID=748.*

[37] See also, Market-Based Advanced Coal Power Systems—Final Report (Office of Fossil Energy, US Department of Energy, 1999), section 1, at *http://fossil.energy.gov/programs/powersystems/publications/marketbasedsystems/.*

[38] See *http://www.epa.gov/airmarkets/epaimp/#documentation.* This is the NEEDS (National Electric Energy System) Database for IPM V.2.1, NEEDS (National Electric Energy System) Database for IPM 2003. The NEEDS database contains the generation unit records used to construct the "Model" plants that represent existing and planned/committed units in EPA modeling applications of IPM. NEEDS includes basic geographic, operating, air emissions, and other data on all the generation units that are represented by "model" plants in EPA's v. 2.1 update of IPM. See Chapter 4 of the Documentation Report (link) for a discussion of the data sources underlying NEEDS.

[39] See *http://vista.cira.colostate.edu/improve/Publications/Reports/2000/PDF/Cahpter3final100.pdf.* These are summary statistics of exctinction by species from the IMPROVE network.

nitrates to visibility impairment is significant, and may be increasing, at a number of sites in the West.[40]

The approach to assessing the available methods for removal of NO_X differs from the approach used to assess controls for removal of SO_2. The engineering approach for removal of SO_2 from existing combustion sources is generally removal technology applied to the flue gas stream. For reducing emissions of NO_X at existing combustion sources, there are two somewhat distinct engineering approaches available.[41] One is to use combustion modifications (including careful control of combustion air and/or low-NO_X burners) and the other is removal technology applied to the flue gas stream (selective catalytic reduction (SCR) or selective non-catalytic reduction (SNCR)). These overall techniques can be applied alone or in combination.

Unlike the methods for controlling SO_2, which overall fall within a fairly narrow range of cost effectiveness and control efficiencies, the removal efficiencies and costs associated with the two overall categories of control techniques for NO_X vary considerably, depending upon the design and operating parameters of the particular boiler being analyzed.[42] In general combustion controls and low-NO_X burners are cost effective for utility boilers burning sub-bituminous coal, and may be less cost effective for units burning lignite.[43]

In this rulemaking, we are proposing that States, in establishing BART emission limits for NO_X, must, as a general matter, require sources to determine BART as discussed below. For sources currently using controls such as SCR to reduce NO_X emissions during part of the year, we are proposing that a State should presume in a BART determination that using these same controls year-round would be cost effective.[44] As the most significant costs associated with SCR are capital costs, the additional costs of operating this control technology throughout the year would be relatively modest.[45]

For all other power plants subject to BART, we believe that States should require the lowest emission rate that can be achieved without the installation of post-combustion controls. Thus, we are proposing that the States must, as a general matter, require these sources to achieve a control level of 0.2 lbs/MMBtu.[46] We are proposing to establish such a presumption because for most of the utilities subject to this rule, a 0.2 lb/MMBtu emission rate can be generally achieved through the use of combustion controls or low-NO_X burners. We request comment on this emission rate. We also request comment on whether another emission rate higher or lower than 0.2 lb/MMBtu reflects an emission rate that can generally be achieved through the use of combustion controls or low-NO_X burners. These controls are applicable to most EGUs, are relatively inexpensive,[47] and are already widely applied. We recognize that a small number of the largest power plants may need to install an SCR unit to meet this control level. In such relatively rare cases, a State, at its discretion, may find SCR to be appropriate if the source causes visibility impacts sufficiently large to warrant the additional capital cost.

Notwithstanding the general assessment presented above, we ask for comment in particular on the question of what rate of NO_X emissions can be achieved with low NO_X burners or advanced combustion controls on certain specific types of boilers. For instance, we recognize that some wall-fired dry bottom boilers may not be able to meet an emissions rate of 0.2 lb/MMBtu without post-combustion controls. Similarly, we also recognize that, without post-combustion controls, wet bottom, cyclone, and cell burners probably cannot achieve a rate of 0.2 lb/MMBtu due to unique design and operational characteristics, such as relatively small furnace size or relatively large heat release rate. We also seek comment on the impact of coal rank on NO_X emissions rates that can be achieved without post-combustion controls.

If you choose to comment on any of these issues, please provide data or technical information supporting your comments and recommendations.

We believe that States should determine in almost every case that these control levels represent a reasonable determination of BART for large EGUs. As discussed above, achieving these emissions reductions is generally cost effective. In addition, as commenters on the 2001 guideline noted, nitrates contribute significantly to regional haze. Thus, a State considering the costs of meeting these control levels and the degree of improvement in visibility should, in most instances, find that at a minimum, these controls represent BART. We acknowledge that there could be unique or extreme circumstances, for those few of the largest EGUs that cannot achieve 0.2 lbs/MMBtu without SCR or SNCR, under which a State might find SCR or SNCR to be unreasonable. We request comment on what specific circumstances might exist, if any, to justify a lesser degree of control. Commenters should provide documentation for any such examples.

7. Consideration of Visibility Impacts.

2001 Proposed Rule. Under the 2001 proposed guidelines, States would have been required to use a regional modeling analysis to assess the cumulative impact on visibility of the controls selected in the engineering analysis. States would use this cumulative impact assessment to make a determination of whether the controls, in their entirety, provide a sufficient visibility improvement to justify installation.

Comments. We received many comments regarding the cumulative nature of our process for considering the degree of visibility improvement. These commenters believed that the degree of visibility analysis should consider source-specific visibility impacts. These commenters also asserted that our process was not consistent with the requirements for BART in the CAA.

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[40] See *http://wrapair.org/forums/ioc/meetings/030728/index.html* (especially presentation by John Vimont, National Park Service).

[41] An overview of NO_X control technologies is available at the following Web site: *http://www.fetc.doe.gov/coalpower/environment/nox/index.html.*

[42] See *http://www.epa.gov/ttn/catc/products.html#cccinfo* (EPA Air Pollution Control Cost Manual), section 4 (NO_X controls), chapter 2.

[43] See *http://www.epa.gov/airmarkets/epa-ipm/#documentation.* This is the NEEDS Database for IPM V.2.1, the NEEDS Database for IPM 2003. The NEEDS database contains the generation unit records used to construct the "model" plants that represent existing and planned/committed units in EPA modeling applications of IPM. The NEEDS database includes basic geographic, operating, air emissions, and other data on all the generation units that are represented by "model" plants in EPA's v. 2.1 update of IPM. See Chapter 4 of the Documentation Report for a discussion of the data sources underlying NEEDS. Data on units, their controls and characteristics are also part of the NEEDS database.

[44] In 1998, we issued a rule requiring a number of Eastern States to reduce the summertime emissions of NO_X from sources within these States. 63 FR 57356, October 27, 1998). As a result of this rule, 19 States and the District of Columbia have required power plants to reduce NO_X emissions seasonally.

[45] See Status Report on NO_X Control Technologies and Cost-Effectiveness for Utility Boilers, Northeast States for Coordinated Air Use Management and Mid-Atlantic Regional Air Management Association, June 1998, at: *http://www.nescaum.org/pdf/execsum_nox.pdf.*

[46] The EPA Clean Air Market Division's "Cost Tool" gives information on control effectiveness (dollar/ton removed) and overall NO_X control efficiencies for various control technologies.

[47] *http://www.epa.gov/airmarkets/epa-ipm/#documentation* This is the Documentation Report (2003 Analyses), and Documentation Report (V. 2.1 Update). Data on units, their controls and characteristics are also part of the NEEDS database, referenced above.

Reproposal. The fifth statutory factor addresses the degree of improvement in visibility which may reasonably be anticipated to result from the use of control technology. The American Corn Growers decision, discussed in detail in section II above, vacated the approach in the regional haze rule of requiring States to assess the degree of visibility improvement from the imposition of controls on all sources subject to BART in a State. We understand the court decision to require that we allow for an analysis of impacts that focuses on each individual source undergoing a BART determination.

Therefore, this reproposal focuses on the use of single source emissions modeling for assessing the degree of improvement in visibility from various BART control levels. For the purpose of the BART determination, a State or individual source would run the CALPUFF model, or other EPA-approved model, using source-specific and site-specific data. We recognize that such models may be useful in analyses where modeling results alone are not determinative of regulatory consequences. We believe that CALPUFF is based on sufficiently sound technical grounds to inform regulatory decisions that are based on a cumulative weight of evidence such as the statutorily-defined factors for consideration in assessing BART for regional haze.

For sources subject to BART that are located greater than or equal to 50 km from all receptors in a Class I area, the State or source would run the model at the current allowable emissions level, and then again at the post-control emissions level (or levels) being assessed. Results would be tabulated for the average of the 20% worst modeled days at each receptor. The difference in the resulting level of impairment predicted is the degree of improvement in visibility expected. For example, if the average impact from the 20% worst days for a source's pre-control emission rate for a particular receptor is a change of 1.0 deciviews, and its post-control impact is 0.4 deciviews, the net visibility improvement is 0.6 deciviews (60 percent). All receptors in the Class I area should be analyzed.

For sources subject to BART that are located less than 50 km from a Class I area, the State would use its discretion in determining visibility impacts for current allowable versus post-control emissions giving consideration to both CALPUFF and other EPA-approved methods such as PLUVUEII.[48] We request comment on this and other possible approaches to calculating the degree of visibility improvement expected for sources located less than 50 km from a Class I area.

We also note that the proposed methodology is for Regional Haze Rule BART determination only; other metrics may be used for BART determinations made in response to certification of impairment by a Federal Land Manager.

Alternatively, we are requesting comment on the option of using the hourly modeled impacts from CALPUFF and assessing the improvement in visibility based on the number of hours above the 0.5 deciview threshold for the pre- and post-control emission rates. We also request comment on combinations of the proposed and alternative options above. For example, the deciview change for each hour of the 20% worst modeled days could be assessed. Finally, we request comment on the use of the simpler screening version of CALPUFF to do the analysis.

E. Trading Program Guidance

Background. The regional haze rule allows States the option of implementing an emissions trading program or other alternative measure instead of requiring BART (40 CFR 51.308(e)(2)). This option provides the opportunity for achieving better environmental results at a lower cost than under a source-by-source BART requirement. A trading program must include participation by BART sources, but may also include sources that are not subject to BART.

2001 Proposed Rule. In the 2001 proposed guidance, we provided an overview of the steps involved in developing a trading program consistent with 40 CFR 51.308(e)(2). We focused this discussion on emission cap and trade programs which we believe will be the most common type of economic incentive program (EIP) developed as an alternative to BART. The BART guidelines discussed three basic steps for cap and trade programs: (1) Developing emission budgets; (2) allocating emission allowances to individual sources; and (3) developing a system for tracking individual source emissions and allowances.

The proposal noted that an emissions budget generally represents a total emissions amount for a single pollutant such as SO_2. As noted in the preamble to the regional haze rule (64 FR 35743, July 1, 1999), we believe that unresolved technical difficulties generally preclude interpollutant trading for addressing visibility impairment.

Once an emissions budget or "cap" is set, the next step in an emission trading program alternative to BART is to issue allowances to individual sources, consistent with the cap. Once the allowances are established, it is also necessary to have in place a tracking system to ensure that the allowances are met.

In the 2001 proposed guidelines, we did not include detailed recommendations on how to allocate emissions or how to develop a tracking system. We noted that it would not be appropriate for us to require a particular process and criteria for individual source allocations. The 2001 proposal noted that we did, however, agree to provide information on allocation processes to State and local agencies.

Comments. Regarding the sources to include in a trading program, some commenters suggested that a trading program could be expanded beyond the set of BART-eligible sources.

With regard to the geographic area covered by a trading program for BART, the WRAP enquired whether the backstop emissions trading program under section 309 of the regional haze rule could be expanded to other western States when they submit their section 308 SIPs.

Comments from the environmental officials for Indian Tribes suggested that the guidelines should ensure that some number of allowances are set aside for Tribes. Otherwise, the commenters believed that a trading program may perpetuate historical barriers to economic development in Indian country.

Reproposal. The reproposed guidelines largely reflect the same overall approach and level of detail as the 2001 proposal. We continue to believe that the trading program alternative provided by the regional haze rule can serve to reduce the administrative burden of the program while providing greater long-term environmental benefits. We discuss specific issues below.

Consistent with the regional haze rule, we propose that the guidelines continue to require participation by BART sources and allow for the option of additional participation. We note that by enlarging the universe of sources affected, it will be more likely that more sources with relatively low-cost emission reduction potential will be included. Therefore broader participation in the program is likely to

[48] PLUVUEII is a model used for estimating visual range reduction and atmospheric discoloration caused by plumes resulting from the emissions of particles, nitrogen oxices, and sulfur oxides from a single source. The model predicts the transport, dispersion, chemical reactions, optical effects and surface deposition of point or area source emissions. It is available at *http://www.epa.gov/scram001/tt22.htm#pluvue*.

provide greater opportunities for emissions trading and cost savings. In addition, regional trading programs can potentially lower transaction costs and produce efficiencies by creating uniform requirements for firms which operate sources in multiple states. Therefore, we believe that States should consider whether it is appropriate to design and implement a trading program in conjunction with other States. Consistent with this overall approach, in the proposed Interstate Air Quality rule (IAQR) (69 FR 4566, January 30, 2004), we requested comment on whether compliance with the IAQR by affected EGUs in affected States would satisfy, for those sources, the BART requirements of the CAA, provided that a State imposes the full amount of SO_2 and NO_X emissions reductions on EGUs that the IAQR deemed highly cost effective. We are in the process of evaluating those comments. Based on our current evaluation, we believe the IAQR, as proposed, is clearly better than BART for those affected EGUs in the affected States which we propose to cover under the IAQR. We thus expect that the final IAQR would satisfy the BART requirements for affected EGUs that are covered pursuant to the final IAQR.

We continue to believe that there are no legal or regulatory obstacles to expanding the WRAP trading program to other States in the WRAP area, provided that technical analyses support such a plan.[49] Consistent with the regional haze rule, such a program must demonstrate greater reasonable progress for the Class I areas affected by sources in those States. We continue to request comment on how greater reasonable progress could be demonstrated, including in particular on whether overall visibility improvements across Class I areas, on balance, would be sufficient to determine that such a trading program is "better than BART."

Finally, in 1980, we published regulations addressing visibility impairment from one or more sources close to a Class I area. This type of visibility impairment is referred to as "reasonably attributable" impairment under the 1980 regulations. These regulations included a requirement for BART to address reasonably attributable impairment in 40 CFR 51.302. Given that these requirements remain in place even after publication of the regional haze rule, one issue needing clarification in the BART guidelines is the interface between these BART requirements established in 1980 and the requirements for BART under the regional haze program, and between the 1980 BART requirements and the provisions of a trading program alternative to BART.

We believe that the proposed guidelines appropriately clarify that the 1980 provisions for reasonably attributable impairment, including the BART requirement, remain in effect until the BART requirement is satisfied. We believe that it is relatively unlikely that many—if any—sources will be found to be subject to the 1980 BART requirement, given that Federal Land Managers (FLMs) have certified impairment on only a few occasions since 1980. Nonetheless, if evidence were to suggest that an individual source was causing localized visibility impairment, we believe that it would be improper to remove FLMs' and States' ability to craft a solution using the tools provided by our visibility regulations. We note that the regional haze rule includes provisions allowing "geographic enhancements" to trading programs that can address local visibility concerns up front. Accordingly, we continue to believe that States and FLMs have the ability to provide assurances to sources that any trading program established for regional haze will satisfy all of the BART provisions in EPA's visibility regulations.

[49] Letter from Lydia Wegman to Rick Sprott, Director, Utah Division of Air Quality, July 31, 2002.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action," thus EPA has submitted this rule to OMB for review. The drafts of the rules submitted to OMB, the documents accompanying such drafts, written comments thereon, written responses by EPA, and identification of the changes made in response to OMB suggestions or recommendations are available for public inspection at EPA's Air and Radiation Docket and Information Center (Docket Number OAR–2002–0076). The EPA has prepared the document entitled "Regulatory Impact Analysis of the Proposed Guidelines for Best Available Retrofit Technology Determinations Under the Regional Haze Regulations' (RIA) to address the requirements of this executive order.

The RIA presents estimates of the health and welfare benefits and the estimated costs of the BART reproposal in 2015 and the estimated benefits and costs of the recently signed IAQR proposal (69 FR 4566, January 30, 2004). Reviewing these results, it is important to recognize that the BART and IAQR proposals are likely to be overlapping actions that address many of the same power plants. However, IAQR as proposed will affect a 29 State and the District of Columbia region in the eastern U.S., and the BART rule is applicable nationwide. In the proposed IAQR, we requested comment on whether compliance with the IAQR by affected EGUs in affected States would satisfy, for those sources, the BART requirements of the CAA, provided that a State imposes the full amount of SO_2 and NO_X emissions reductions on EGUs that the IAQR deemed highly cost effective. We are in the process of evaluating those comments. Based on our current evaluation, we believe the IAQR, as proposed, is clearly better than BART for those affected EGUs in the affected States which we propose to cover under the IAQR. We thus expect that the final IAQR would satisfy the BART requirements for affected EGUs that are covered pursuant to the final IAQR. EPA projects that both of these rules are likely to achieve significant health and welfare benefits. The BART analysis presented here is limited to the electric utility sector because of limitations in the data currently available on non-EGU sources. It is also important to note that States will make the ultimate decisions as to how the BART requirements are implemented.

Thus, the analysis results reported reflect the EPA's best estimate of the benefits and costs of this State determined process.

Significant health and welfare benefits are likely to occur as a result of this rule. Based upon EPA estimates, thousands of premature deaths and other serious health effects would be prevented each year. The EPA estimates monetized annual benefits of approximately $44 billion (assuming a 7 percent discount rate) or $47 billion (assuming a 3 percent discount rate) in 2015 (1999$). Table IV–1 presents the primary estimates of reduced incidence of PM health effects for 2015 for the source-specific BART proposal and the IAQR proposed rule. Specifically, the table lists the PM-related benefits associated with the reduction of ambient PM.

In interpreting the results, it is important to keep in mind the limited set of effects we are able to monetize. Thus, the benefits reported for this rule are understated due to the omissions listed in Table II–4.

Nonetheless, the benefits quantified and monetized are substantial both in incidence and dollar value. In 2015, we estimate that reduction in exposure to $PM_{2.5}$ from the BART rule will result in approximately 7,400 fewer premature deaths annually associated with $PM_{2.5}$, as well as 3,900 fewer cases of chronic bronchitis, 9,800 fewer nonfatal heart attacks (acute myocardial infarctions), 6,000 fewer hospitalizations (for respiratory and cardiovascular disease combined), and significant reductions in days of restricted activity due to respiratory illness (with an estimate of 4.4 million fewer cases). We also estimate substantial health improvements for children from reductions in upper and lower respiratory illnesses, acute bronchitis, and asthma attacks.

Table IV–2 presents the estimated monetary value of reductions in the incidence of health and welfare effects. PM-related health benefits are estimated to be approximately $43 billion (assuming a 7 percent discount rate) or $46 billion (assuming a 3 percent discount rate) in 2015. Estimated annual visibility benefits in the U.S. brought about by the BART rule due to visibility improvements in federal Class I areas in the Southeast, Southwest, and California are estimated to be approximately $940 million in 2015. All monetized estimated values are stated in 1999$. Table IV–2 shows the total annual monetized benefits for the year 2015. This table also indicates with a "B" those additional health and environmental effects that we were unable to quantify or monetize. These effects are additive to the estimate of total benefits, and the EPA believes there is considerable value to the public of the benefits that could not be monetized.

TABLE IV–1.—ESTIMATED REDUCTIONS IN INCIDENCE OF HEALTH EFFECTS OF THE BART RULE

[In 2015]

Endpoint	Constituent	BART	IAQR proposal
Premature Mortality—adult	$PM_{2.5}$	7,400	13,000
Mortality-infant	$PM_{2.5}$	17	29
Chronic bronchitis	$PM_{2.5}$	3,900	6,900
Acute myocardial infarction—total	$PM_{2.5}$	9,800	18,000
Hospital admissions—respiratory	$PM_{2.5}$	3,200	*8,100
Hospital admissions—cardiovascular	$PM_{2.5}$	2,800	5,000
Emergency room visits, respiratory	$PM_{2.5}$	5,300	9,400*
Acute bronchitis	$PM_{2.5}$	9,000	16,000
Lower respiratory symptoms	$PM_{2.5}$	110,000	190,000
Upper respiratory symptoms	$PM_{2.5}$	350,000	620,000
Asthma exacerbation	$PM_{2.5}$	150,000	240,000
Acute respiratory symptoms (MRADs)	$PM_{2.5}$	4,400,000	8,500,000*
Work loss days	$PM_{2.5}$	740,000	1,300,000
School loss days	O^3	**	390,000

MRADs = minor restricted activity days.

*Includes estimates for ozone health effects. Although ozone health benefits occur with the BART proposal, ozone health effects are not estimated.

** School loss days are not estimated for BART.

A listing of the benefit categories that could not be quantified or monetized in our estimate is provided in Table IV–3. Major benefits not quantified for this proposed rule include ozone health benefits, the value of increases in yields of agricultural crops and commercial forests, the value of improvements in visibility in places where people live and work and recreational areas outside of federal Class I areas, and the value of reductions in nitrogen and acid deposition and the resulting changes in ecosystem functions.

In summary, EPA's primary estimate of the annual benefits of the rule is approximately $44 + B billion (assuming a 7% discount rate) or $47 + B billion (assuming a 3 percent discount rate) in 2015. These estimates account for growth in the willingness to pay for reductions in environmental health risks due to growth in real gross domestic product (GDP) per capita between the present and 2015.

TABLE IV–2.—RESULTS OF HUMAN HEALTH AND WELFARE BENEFITS VALUATION FOR THE PROPOSED BART RULE

[Millions of 1999 dollars] [a b]

Endpoint	BART	IAQR Proposal[f]
Premature mortality[c]		
Long-term exposure, (adults, >30yrs)		
3% discount rate	$43,000	$77,000
7% discount rate	40,000	72,000

TABLE IV–2.—RESULTS OF HUMAN HEALTH AND WELFARE BENEFITS VALUATION FOR THE PROPOSED BART RULE—Continued

[Millions of 1999 dollars][a b]

Endpoint	BART	IAQR Proposal[f]
Long-term exposure (child, < 1 yr)	100	180
Chronic bronchitis (adults, 26 and over)	1,500	2,700
Non-fatal myocardial infarctions		
3% discount rate	810	1,500
7% discount rate	790	1,400
Hospital Admissions from Respiratory Causes	55	[e]130
Hospital Admissions from Cardiovascular Causes	59	110
Emergency Room Visits for Asthma	1.5	[e] 2.6
Acute bronchitis (children, 8–12)	3.3	5.7
Lower respiratory symptoms (children, 7–14)	1.7	3.0
Upper respiratory symptoms (asthmatic children, 9–11)	16	17
Asthma exacerbations	5.8	10
Work loss days (adults, 18–65)	97	170
Minor restricted activity days (adults, age 18–65)	230	[e] 440
School absence days (children, age 6–11)	[e]	28
Worker productivity (outdoor workers, age 18–65)	[e]	17
Recreational visibility (SE, SW, and CA Class I areas)	940	1,400
Monetized Total[d].		
Base estimate		
3% discount rate	47,000 + B	[e]84,000
7% discount rate	44,000 + B	[e]79,000

[a] Monetary benefits are rounded to two significant digits.

[b] Monetary benefits are adjusted to account for growth in real GDP per capita between 1990 and the analysis year (2015).

[c] Valuation assumes the 5 year distributed lag structure described earlier. Results reflect the use of two different discount rates; a 3 percent rate that is recommended by EPA's Guidelines for Preparing Economic Analyses (U.S. EPA, 2000b) and OMB's Circular A–4 (OMB, 2003) and 7 percent which is also recommended by OMB's Circular A–4 (OMB, 2003).

[d] B represents the monetary value of the nonmonetized health and welfare benefits. A detailed listing of unquantified PM, ozone, and mercury related health effects is provided in Table IV–4.

[e] Results presented for the IAQR proposal include benefits associated with modeled ozone reductions. Ozone-related benefits are not generated for BART.

[f] The estimated benefits for the IAQR proposal are based upon a control scenario for EGU sources only in the 29 State + DC proposed IAQR region.

Costs of the Proposed BART Rule

EPA modeled the costs and economic impacts to the EGU sector anticipated to result from the source-specific BART requirements. Modeling assumptions for the SO_2 affected units included the choice of meeting a 0.1 lbs/mmBtu emission rate or achieving 90 percent reductions from base case emissions. Affected units were also required to meet a 0.2 lbs/mmBtu emission rate limit for NO_X. In the model, EPA required controls only on BART-eligible units, a subset representing 179 GW out of about 305 GW total coal-fired U.S. generation. BART-eligible units were defined as units greater than 250 MW that were online after August 7, 1962 and under construction prior to August 7, 1977. No additional necessary controls were assumed for any units within the five WRAP 309 States of UT, AZ, WY, OR or NM that have existing agreements to achieve reduction goals. Also, because of modeling limitations, no additional reductions were assumed from units with existing scrubbers, even if they were performing at less than 90 percent removal. This assumption, the assumption of 90 percent removal rather than the proposed 95 percent removal rate, and an analysis that focuses on EGU sources only, are limitations of the analysis that would tend to understate the estimated costs, emission reductions, and benefits of the rule.

Based upon the foregoing modeling assumptions, the EPA estimates the annual costs of the BART rule to be $3.9 billion in 2015 (1999 dollars). The costs are estimated using a discount rate that approximates the cost of capital for firms in the EGU industry and ranges from 5.34 to 6.74 percent.

Benefit-Cost Comparison

The estimated annual social benefits of the BART rule are compared to the annual estimated cost to implement the proposed rule in Table IV–3.

TABLE IV–3.—SUMMARY OF ANNUAL BENEFITS, COSTS, AND NET BENEFITS OF THE BART RULE IN 2015

[Billions of 1999 dollars]

Description	BART	IAQR proposal[e]
Social costs[a]	$3.9	$3.7
Social benefits[b c]	47+B	84+B
Ozone-related benefits	f	[f] 0.1
PM-related health benefits	46	82.3
Visibility benefits	0.9	1.4
Net benefits (benefits-costs)[a b c d]	43+B	80+B
Net benefits (benefits-costs)[a c d g]	40+B	75+B

[a] Note that costs are the annual total costs of reducing pollutants including NO_X and SO_2. Costs of the rules are estimated using the Integrated Planning Model (IPM) assuming discount rates that approximate the cost of capital for firms operating EGUs ranging from 5.34 to 6.74 percent.

[b] As the table indicates, total benefits are driven primarily by PM-related health benefits. Benefits in this table are associated with NO_X and SO_2 reductions. Benefits presented assume a 3% discount rate for monetization.

[c] Not all possible benefits or disbenefits are quantified and monetized in this analysis. B is the sum of all unquantified benefits and disbenefits. Potential benefit categories that have not been quantified and monetized are listed in Table IV–4.

[d] Net benefits are rounded to the nearest billion. Columnar totals may not sum due to rounding.

[e] The estimated IAQR proposal benefits and costs relate to a control strategy for EGU sources only in the 29 + DC State IAQR proposed region.

[f] Ozone health benefits will result from the BART rule and IAQR proposal, but monetary benefits are estimated for the IAQR proposal only.

[g] Benefits presented assume a 7% discount rate for monetization.

EPA estimates the costs of implementing the rule at $3.9 billion in 2015. Thus, the annual quantified net benefits (social benefits minus social costs) of the program in 2015 are approximately $40 + B billion (assuming a 7 percent discount rate for benefits) or $43 + B billion (assuming a 3 percent discount rate for benefits). Therefore, implementation of the proposed rule is expected to provide society with a net gain in social welfare based on economic efficiency criteria.

Every benefit-cost analysis examining the potential effects of a change in environmental protection requirements is limited to some extent by data gaps, limitations in model capabilities (such as geographic coverage), and uncertainties in the underlying scientific and economic studies used toconfigure the benefit and cost models.

TABLE IV–4.—ADDITIONAL NONMONETIZED BENEFITS OF THE BART RULE

Pollutant	Unquantified effects
Ozone Health	Premature mortality[a].
	Increased airway responsiveness to stimuli.
	Inflammation in the lung.
	Chronic respiratory damage.
	Premature aging of the lungs.
	Acute inflammation and respiratory cell damage.
	Increased susceptibility to respiratory infection.
	Non-asthma respiratory emergency room visits.
Ozone Welfare	Decreased yields for commercial forests.
	Decreased yields for fruits and vegetables.
	Decreased yields for commercial and non-commercial crops.
	Damage to urban ornamental plants.
	Impacts on recreational demand from damaged forest aesthetics.
	Damage to ecosystem functions.
PM Health	Low birth weight.
	Changes in pulmonary function.
	Chronic respiratory diseases other than chronic bronchitis.
	Morphological changes.
	Altered host defense mechanisms.
	Non-asthma respiratory emergency room visits.
PM Welfare	Visibility in many Class I areas.
	Residential and recreational visibility in non-Class I areas.
	Soiling and materials damage.
	Damage to ecosystem functions.
Nitrogen and Sulfate Deposition Welfare.	Impacts of acidic sulfate and nitrate deposition on commercial forests.
	Impacts of acidic deposition to commercial freshwater fishing.
	Impacts of acidic deposition to recreation in terrestrial ecosystems.
	Reduced existence values for currently healthy ecosystems.
	Impacts of nitrogen deposition on commercial fishing, agriculture, and forests.
	Impacts of nitrogen deposition on recreation in estuarine ecosystems.
	Damage to ecosystem functions.
Mercury Health	Neurological disorders.
	Learning disabilities.
	Developmental delays.
	Potential cardiovascular effects*.
	Altered blood pressure regulation*.
	Increased heart rate variability*.
	Myocardial infarction*.
	Potential reproductive effects*.
Mercury Deposition Welfare	Impact on birds and mammals (e.g., reproductive effects).
	Impacts to commercial, subsistence, and recreational fishing.
	Reduced existence values for currently healthy ecosystems.

[a] Premature mortality associated with ozone is not separately included in this analysis.
* These are potential effects as the literature is either contradictory or incomplete.

Deficiencies in the scientific literature often result in the inability to estimate quantitative changes in health and environmental effects, such as potential increases in fish populations due to reductions in nitrogen loadings in sensitive estuaries. Deficiencies in the economics literature often result in the inability to assign economic values even to those health and environmental outcomes that can be quantified. Although these general uncertainties in the underlying scientific and economics literatures (that can cause the valuations to be higher or lower) are discussed in detail in the economic analyses and its supporting documents and references, the key uncertainties that have a bearing on the results of the benefit-cost analysis of this proposed rule include the following:

- The exclusion of potentially significant benefit categories (such as health and ecological benefits of ozone),
- Errors in measurement and projection for variables such as population growth and baseline incidence rates,

- Uncertainties in the estimation of future-year emissions inventories and air quality,
- Variability in the estimated relationships of health and welfare effects to changes in pollutant concentrations,
- Uncertainties in exposure estimation,
- Uncertainties in the size of the effect estimates linking air pollution and health endpoints,
- Uncertainties about relative toxicity of different components within the complex mixture,
- Uncertainties in quantifying visibility benefits, and
- Uncertainties associated with the effect of potential future actions to limit emissions.

Despite these uncertainties, we believe the benefit-cost analysis provides a reasonable indication of the expected economic benefits and costs of the proposed rulemaking in future years under a set of reasonable assumptions.

In addition, in valuing reductions in premature fatalities associated with PM, we used a value of $5.5 million per statistical life. This represents a central value consistent with a range of values from $1 to $10 million suggested by recent meta-analyses of the wage-risk value of statistical life (VSL) literature.[50]

The benefits estimates generated for the proposed BART rule are subject to a number of assumptions and uncertainties, that are discussed throughout the RIA document. As Table IV–2 indicates, total benefits are driven primarily by the reduction in premature fatalities each year, that account for a significant portion of total benefits. For example, key assumptions underlying the primary estimate for the premature mortality category include the following:

(1) Inhalation of fine particles is causally associated with premature death at concentrations near those experienced by most Americans on a daily basis. Although biological mechanisms for this effect have not yet been definitively established, the weight of the available epidemiological evidence supports an assumption of causality.

(2) All fine particles, regardless of their chemical composition, are equally potent in causing premature mortality. This is an important assumption, because PM produced via transported precursors emitted from EGUs may differ significantly from direct PM released from automotive engines and other industrial sources, but no clear scientific grounds exist for supporting differential effects estimates by particle type.

(3) The C–R function for fine particles is approximately linear within the range of ambient concentrations under consideration. Thus, the estimates include health benefits from reducing fine particles in areas with varied concentrations of PM, including both regions that are in attainment with fine particle standard and those that do not meet the standard.

Although recognizing the difficulties, assumptions, and inherent uncertainties in the overall enterprise, these analyses are based on peer-reviewed scientific literature and up-to-date assessment tools, and we believe the results are highly useful in assessing this proposal.

We were unable to quantify or monetize a number of health and environmental effects. A full appreciation of the overall economic consequences of today's action requires consideration of all benefits and costs expected to result from the proposed rule, not just those benefits and costs that could be expressed here in dollar terms. A listing of the benefit categories that could not be quantified or monetized in our estimate is provided in Table IV–4. These effects are denoted by "B" in Table IV–3 above and are additive to the estimates of benefits.

The Regulatory Impact Analysis (RIA) supporting this proposal is subject to OMB's new Circular A–4, Guidelines for the Conduct of Regulatory Analysis. These guidelines set forth a number of analytical requirements, most of which overlap with EPA's own Economic Guidelines. Because of the consent decree deadline for proposing this rule, the Agency has not yet completed all the analyses called for in EPA's and OMB's guidelines. Thus, the Agency will be conducting additional analytical work and including the results of this work in the public docket. We will publish a notice of data availability (NODA) to advise the public when these materials are available. In particular, the Agency plans to conduct and make available the following analyses:

(1) Quantitative Analysis of Uncertainty. This rule will have economic impacts (benefits plus costs) that total more than $1 billion per year. Circular A–4 calls for a formal quantitative analysis of the relevant uncertainties about benefits and costs for such rules.

(2) Cost-effectiveness analysis. In addition to the benefit-cost analysis, EPA will conduct a cost-effectiveness analysis because the primary benefits of this rule are improved public health.

(3) Analysis of all regulated entities. Because the Agency already has extensive data about electric generating units, the current RIA includes a detailed analysis of the power sector. The Agency intends to gather additional data about BART-eligible sources in other sectors and conduct a more complete analysis of the costs, benefits, and cost-effectiveness of controls on non-EGU sources covered by the rule.

(4) Options and incremental analysis. The proposed rule identifies the proposed IAQR as an additional regulation that will likely affect the number of EGUs that will be covered by this rule. We currently believe that the IAQR, as proposed, is "better than BART" for those affected EGUs in the affected States that we propose to cover under the IAQR. We thus expect that the final IAQR would satisfy this rule for affected EGUs that are covered pursuant to the final IAQR. EPA intends to assess the incremental costs and benefits of this rule, assuming that the IAQR, as proposed, is in place.

B. Paperwork Reduction Act

Today's proposal clarifies but does not modify the information collection requirements for BART. Therefore, this action does not impose any new information collection burden. However, the OMB has previously approved the information collection requirements contained in the existing regulations [40 CFR Part 51] under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0421, EPA ICR number 1813.04. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

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

[50] Mrozek, J.R. and L.O. Taylor, What determines the value of a life? A Meta Analysis, Journal of Policy Analysis and Management 21 (2), pp. 253–270.

information; and transmit or otherwise disclose the information.

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

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administrations' 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.

In the July 1, 1999 regional haze rule (64 FR 35760) and in the July 20, 2001 BART guidelines proposal (66 FR 38110) the EPA determined that it was not necessary to prepare a regulatory flexibility analysis in connection with either action. The EPA also determined that the 1999 regional haze rule and the 2001 BART guidelines proposal would not have a significant economic impact on a substantial number of small entities because neither would establish requirements applicable to small entities. After considering the economic impacts of today's proposed rule on small entities, we certify that this action, proposing new regulations to address the BART requirements remanded by the D.C. Circuit and reproposing the 2001 BART guidelines proposal, will not have a significant economic impact on a substantial number of small entities.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (Public Law 104–121) (SBREFA), provides that whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available an initial regulatory flexibility analysis, unless it certifies that the rule, if promulgated, will not have "a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule. *See* Motor and Equip. Mfrs. Ass'n v. Nichols, 142 F. 3d 449 (D.C. Cir., 1998); United Distribution Cos. v. FERC, 88 F. 3d 1105, 1170 (D.C. Cir., 1996); Mid-Tex Elec. Co-op, Inc. v. FERC, 773 F . 2d 327, 342 (D.C. Cir., 1985) (agency's certification need only consider the rule's impact on entities subject to the rule).

Similar to the discussion in the proposed and final regional haze rules, today's reproposal of the BART rules and guidelines would not establish requirements applicable to small entities. The proposed rule would apply to States, not to small entities. The BART requirements in the regional haze rule require BART determinations for a select list of major stationary sources defined by section 169A(g)(7) of the CAA. However, as noted in the proposed and final regional haze rules, the State's determination of BART for regional haze involves some State discretion in considering a number of factors set forth in section 169A(g)(2), including the costs of compliance. Further, the final regional haze rule allows States to adopt alternative measures in lieu of requiring the installation and operation of BART at these major stationary sources. As a result, the potential consequences of the BART provisions of the regional haze rule (as clarified in today's reproposal of the BART guidelines) at specific sources are speculative. Any requirements for BART will be established by State rulemakings. The States would accordingly exercise substantial intervening discretion in implementing the BART requirements of the regional haze rule and today's proposed guidelines. In addition, we note that most sources potentially affected by the BART requirements in section 169A of the CAA are large industrial plants. Of these, we would expect few, if any, to be considered small entities. We request comment on issues regarding small entities that States might encounter when implementing the BART provisions.

Although not required, a small business impact analysis was conducted for entities owning potentially affected BART-eligible EGUs. We found that 66 entities (companies or governments) currently own the EGU units subject to BART. Of these 66 entities, only two are considered small. One of the entities is a small government and the other an investor-owned company. The BART rule is not anticipated to have an impact on the government entity. The small business may experience a cost-to-sales impact of approximately 4 percent.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final 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 $100,000,000 or more * * * in any one year." A "Federal mandate" is defined under section 421(6), 2 U.S.C. 658(6), to include a "Federal intergovernmental mandate." A "Federal intergovernmental mandate," in turn, is defined to include a regulation that "would impose an enforceable duty upon State, local, or tribal governments," section 421(5)(A)(I), 2 U.S.C. 658(5)(A)(I). A "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector," with certain exceptions, section 421(7)(A), 2 U.S.C. 658(7)(A).

Before promulgating an EPA rule for which a written statement is needed under section 202 of UMRA, section 205, 2 U.S.C. 1535, of 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 RIA prepared by EPA and placed in the docket for this rulemaking is consistent with the requirements of section 202 of the UMRA. Furthermore, EPA is not directly establishing any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. Thus, EPA is not obligated to develop under section 203 of the UMRA a small government agency plan. Further, EPA carried out consultations with the governmental entities affected by this rule in a manner consistent with the intergovernmental consultation provisions of section 204 of the UMRA.

The EPA also believes that today's proposal meets the UMRA requirement in section 205 to select the least costly and burdensome alternative in light of

the statutory mandate for BART. As explained above, we are proposing the BART rule and guideline following the D.C. Circuit's remand of the BART provisions in the 1999 regional haze rule. The 1999 regional haze rule provides substantial flexibility to the States, allowing them to adopt alternative measures such as a trading program in lieu of requiring the installation and operation of BART. Today's reproposal does not restrict the ability of the States to adopt such alternatives measures. The regional haze rule accordingly already provides an alternative to BART that gives States the ability to chose the least costly and least burdensome alternative.

The EPA is not reaching a final conclusion as to the applicability of UMRA to today's rulemaking action. The reasons for this are discussed in the 1999 regional haze rule (64 FR 35762) and in the 2001 BART guidelines proposal (66 FR 38111–38112). Notwithstanding this, the discussion in chapter 8 of the RIA constitutes the UMRA statement that would be required by UMRA if its statutory provisions applied. Consequently, we continue to believe that it is not necessary to reach a conclusion as to the applicability of the UMRA requirements.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications' are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless EPA consults with State and local officials early in the process of developing the proposed regulation.

We have concluded that today's action, reproposing the BART guidelines, will not have federalism implications, as specified in section 6 of the Executive Order 13132 (64 FR 43255, August 10, 1999), because it will not have substantial direct effects on the States, nor substantially alter the relationship or the distribution of power and responsibilities between the States and the Federal government. Nonetheless, we consulted with a wide scope of State and local officials, including the National Governors Association, National League of Cities, National Conference of State Legislatures, U. S. Conference of Mayors, National Association of Counties, Council of State Governments, International City/County Management Association, and National Association of Towns and Townships, during the course of developing this rule.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications."

This proposed rule does not have Tribal implications as defined by Executive Order 13175. It does not have a substantial direct effect on one or more Indian Tribes. Furthermore, this proposed rule does not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the TAR establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and this proposed rule does nothing to modify that relationship. Because this proposed rule does not have Tribal implications, Executive Order 13175 does not apply.

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

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, Section 5–501 of the Order directs the Agency to evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The BART proposed rule and guideline are not subject to the Executive Order because it does not involve decisions on environmental health or safety risks that may disproportionately affect children. The EPA believes that the emissions reductions from the strategies proposed in this rulemaking will further improve air quality and will further improve children's health.

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

We have conducted a Regulatory Impact Analysis for this reproposed rule, that includes an analysis of energy impacts and is contained in the docket (Docket No. OAR–2002–0076). According to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use", this proposed rule is significant because it has a greater than a 1 percent impact on the cost of energy production. We are reproposing today's rule following the D.C. Circuit's remand of the BART provisions in the 1999 regional haze rule. The 1999 regional haze rule provides substantial flexibility to the States, allowing them to adopt alternative measures such as a trading program in lieu of requiring the installation and operation of BART. This rulemaking does not restrict the ability of the States to adopt alternative measures. The regional haze rule accordingly already provides an alternative to BART that reduces the overall cost of the regulation and its impact on the energy supply. The BART proposal itself offers flexibility by offering the choice of meeting SO_2 requirements between an emission rate and a removal rate.

For a State that chooses to require case-by-case BART, today's rule would establish default levels of controls for SO_2 and NO_X for EGUs that the State finds are subject to BART. Based on its consideration of various factors set forth in the regulations, however, a State may conclude that a different level of control is appropriate. The States will accordingly exercise substantial intervening discretion in implementing the final rule. Additionally, we have assessed that the proposed compliance dates will provide adequate time for EGUs to install the required emission controls.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104–113, § 12(d)(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 VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the EPA decides not to use VCS.

This action does not involve technical standards; thus, EPA did not consider the use of any VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations," requires federal agencies to consider the impact of programs, policies, and activities on minority populations and low-income populations. According to EPA guidance [51], agencies are to assess whether minority or low-income populations face risks or a rate of exposure to hazards that are significant and that "appreciably exceed or is likely to appreciably exceed the risk or rate to the general population or to the appropriate comparison group." (EPA, 1998)

In accordance with E.O. 12898, the Agency has considered whether this proposed rule may have disproportionate negative impacts on minority or low income populations. Because the Agency expects this proposed rule to lead to reductions in pollutant loadings and exposures generally, negative impacts to these sub-populations that appreciably exceed similar impacts to the general population are not expected.

List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Nitrogen dioxide, Particulate matter, Sulfur oxides, Volatile organic compounds.

[51] U.S. Environmental Protection Agency, 1998. Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses. Office of Federal Activities, Washington, DC, April, 1998.

Dated: April 15, 2004.

Michael O. Leavitt,

Administrator.

For the reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7410–7671q.

2. Section 51.302 is amended by revising paragraph (c)(4)(iii) to read as follows:

§ 51.302 Implementation control strategies for reasonably attributable visibility impairment.

* * * * *

(c) * * *

(4) * * *

(iii) BART must be determined for fossil-fuel fired generating plants having a total generating capacity in excess of 750 megawatts pursuant to "Guidelines for Determining Best Available Retrofit Technology for Coal-fired Power Plants and Other Existing Stationary Facilities" (1980), which is incorporated by reference, exclusive of appendix E, which was published in the **Federal Register** on February 6, 1980 (45 FR 8210), except that options more stringent than NSPS must be considered. Establishing a BART emission limitation equivalent to the NSPS level of control is not a sufficient basis to avoid the detailed analysis of control options required by the guidelines. It is EPA publication No. 450/3–80–009b and is for sale from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

* * * * *

3. Section 51.308 is amended by revising paragraphs (b), (c), and (e)(1)(ii) to read as follows:

§ 51.308 Regional haze program requirements.

* * * * *

(b) *When are the first implementation plans due under the regional haze program?* Except as provided in § 51.309(c), each State identified in § 51.300(b)(3) must submit, for the entire State, an implementation plan for regional haze meeting the requirements of paragraphs (d) and (e) of this section no later than 3 years after the date on which the Administrator promulgates for the State the designation for the $PM_{2.5}$ National Ambient Air Quality Standard at 40 CFR Part 81.

(c) In no event may the State's regional haze implementation plan be submitted later than January 31, 2008.

* * * * *

(e) * * *

(1) * * *

(ii) A determination of BART for each BART-eligible source in the State that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area. All such sources are subject to BART.

(A) The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART within the State. In this analysis, the State must take into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

(B) Appendix Y of this part provides guidelines for conducting the analyses under paragraphs (e)(1)(ii) and (e)(1)(ii)(A) of this section. All BART determinations that are required in paragraph (e)(1) of this section must be made pursuant to the guidelines in appendix Y of this part.

* * * * *

4. Section 51.309 is amended by revising paragraphs (d)(4)(v), (g)(2), and (g)(3) to read as follows:

§ 51.309 Requirements Related to the Grand Canyon Visibility Transport Commission

* * * * *

(d) * * *

(4) * * *

(v) Provisions for stationary source NO_X and PM. The plan submission must include a report which assesses emissions control strategies for stationary source NO_X and PM, and the degree of visibility improvement that would result from such strategies. In the report, the State must evaluate and discuss the need to establish emission milestones for NO_X and PM to avoid any net increase in these pollutants from stationary sources within the transport region, and to support potential future development and implementation of a multipollutant and possibly multisource market-based program. The plan

submission must provide for an implementation plan revision, containing any necessary long-term strategies and BART requirements for stationary source PM and NO_X (including enforceable limitations, compliance schedules, and other measures) by no later than January 31, 2008.

* * * * *

(g) * * *

(2) In a plan submitted no later than January 31, 2008, provide a demonstration of expected visibility conditions for the most impaired and least impaired days at the additional mandatory Class I Federal area(s) based on emissions projections from the long-term strategies in the implementation plan. This demonstration may be based on assessments conducted by the States and/or a regional planning body.

(3) In a plan submitted no later than January 31, 2008, provide revisions to the plan submitted under (c) of this section, including provisions to establish reasonable progress goals and implement any additional measures necessary to demonstrate reasonable progress for the additional mandatory Federal Class I areas. These revisions must comply with the provisions of § 51.308(d)(1)–(4).

* * * * *

5. Appendix Y to Part 51 to read is added to read as follows:

Appendix Y to Part 51—Guidelines for BART Determinations Under the Regional Haze Rule

Table of Contents

I. Introduction and Overview

A. What Is the Purpose of the Guidelines?

The Clean Air Act (CAA), in sections 169A and 169B, contains requirements for the protection of visibility in 156 scenic areas across the United States. To meet the CAA's requirements, we published regulations to protect against a particular type of visibility impairment known as "regional haze." The regional haze rule is found in this part (40 CFR part 51), in §§ 51.300 through 51.309. These regulations require, in § 51.308(e), that certain types of existing stationary sources of air pollutants install best available retrofit technology (BART). The guidelines are designed to help States and others (1) identify those sources that must comply with the BART requirement, and (2) determine the level of control technology that represents BART for each source.

B. What Does the CAA Require Generally for Improving Visibility?

Section 169A of the CAA, added to the CAA by the 1977 amendments, requires States to protect and improve visibility in certain scenic areas of national importance. The scenic areas protected by section 169A are called "mandatory Class I Federal Areas." In these guidelines, we refer to these as "Class I areas." There are 156 Class I areas, including 47 national parks (under the jurisdiction of the Department of Interior—National Park Service), 108 wilderness areas (under the jurisdiction of the Department of Interior—Fish and Wildlife Service or the Department of Agriculture—U.S. Forest Service), and one International Park (under the jurisdiction of the Roosevelt-Campobello International Commission). The Federal Agency with jurisdiction over a particular Class I area is referred to in the CAA as the Federal Land Manager. A complete list of the Class I areas is contained in 40 CFR part 81, §§ 81.401 through 81.437, and you can find a map of the Class I areas at the following internet site: *http://*

www.epa.gov/ttn/oarpg/ t1/fr_notices/ classimp.gif.

The CAA establishes a national goal of eliminating man-made visibility impairment from all Class I areas. As part of the plan for achieving this goal, the visibility protection provisions in the CAA mandate that EPA issue regulations requiring that States adopt measures in their State Implementation Plans (SIPs), including long-term strategies, to provide for reasonable progress towards this national goal. The CAA also requires States to coordinate with the Federal Land Managers as they develop their strategies for addressing visibility.

C. What Is the BART Requirement in the CAA?

1. Under section 169A(b)(2)(A) of the CAA, States must require certain existing stationary sources to install BART. The BART requirement applies to "major stationary sources" from 26 identified source categories which have the potential to emit 250 tons per year or more of any air pollutant. The CAA requires only sources which were put in place during a specific 15-year time interval to install BART. The BART requirement applies to sources that existed as of the date of the 1977 CAA amendments (that is, August 7, 1977) but which had not been in operation for more than 15 years (that is, not in operation as of August 7, 1962).

2. The CAA requires BART when any source meeting the above description "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility" in any Class I area. In identifying a level of control as BART, States are required by section 169A(g) of the CAA to consider:

(a) The costs of compliance,

(b) The energy and non-air quality environmental impacts of compliance,

(c) Any existing pollution control technology in use at the source,

(d) The remaining useful life of the source, and

(e) The degree of visibility improvement which may reasonably be anticipated from the use of BART.

3. The CAA further requires States to make BART emission limitations part of their SIPs. As with any SIP revision, States must provide an opportunity for public comment on the BART determinations, and EPA's action on any SIP revision will be subject to judicial review.

D. What Types of Visibility Problems Does EPA Address in Its Regulations?

1. We addressed the problem of visibility in two phases. In 1980, we published regulations addressing what we termed "reasonably attributable" visibility impairment. Reasonably attributable visibility impairment is the result of emissions from one or a few sources that are generally located in close proximity to a specific Class I area. The regulations addressing reasonably attributable visibility impairment are published in §§ 51.300 through 51.307.

2. On July 1, 1999, we amended these regulations to address the second, more common, type of visibility impairment known as "regional haze." Regional haze is the result of the collective contribution of many sources over a broad region. The regional haze rule slightly modified 40 CFR 51.300 through 51.307, including the addition of a few definitions in § 51.301, and added new §§ 51.308 and 51.309.

E. What Are the BART Requirements in EPA's Regional Haze Regulations?

1. In the July 1, 1999 rulemaking, we added a BART requirement for regional haze. You will find the BART requirements in 40 CFR 51.308(e). Definitions of terms used in 40 CFR 51.308(e)(1) are found in § 51.301.

2. As we discuss in detail in these guidelines, the regional haze rule codifies and clarifies the BART provisions in the CAA. The rule requires that States identify and list "BART-eligible sources," that is, that States identify and list those sources that fall within the 26 source categories, that were put in place during the 15-year window of time from 1962 to 1977, and that have potential emissions greater than 250 tons per year. Once the State has identified the BART-eligible sources, the next step is to identify those BART-eligible sources that may "emit any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility." Under the rule, a source which fits this description is "subject to BART." For each source subject to BART, States must identify the level of control representing BART based upon the following factors:

—paragraph 308(e)(1)(ii)(A) provides that States must identify the best system of continuous emission control technology for each source subject to BART taking into account the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of visibility improvement that may be expected from available control technology.

3. After a State has identified the level of control representing BART (if any), it must establish an emission limit representing BART and must ensure compliance with that requirement no later than 5 years after EPA approves the SIP. States may establish design, equipment, work practice or other operational standards when limitations on measurement technologies make emission standards infeasible.

F. Do States Have an Alternative To Requiring BART Controls at Specific Facilities?

1. States are given the option under 40 CFR 51.308(e)(2) of adopting an alternative approach to requiring controls on a case-by-case basis for each source subject to BART. If a State chooses to adopt alternative measures, such as an emissions trading program, under 40 CFR 51.308(e)(2)(i) the State must demonstrate that any such alternative will achieve greater "reasonable progress" than would have resulted from installation of BART from all sources subject to BART. Such a demonstration must include:

(a) A list of all BART-eligible sources;

(b) An analysis of the best system of continuous emission control technology available for all sources subject to BART, taking into account the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, and the remaining useful life of the source. Unlike the analysis for BART under 40 CFR 51.308(e)(1), which requires that these factors be considered on a case-by-case basis, States may consider these factors on a category-wide basis, as appropriate, in evaluating alternatives to BART;

(c) An analysis of the degree of visibility improvement that would result from the alternative program in each affected Class I area.

States must ensure that a trading program or other such measure includes all BART-eligible sources, unless a source has installed BART, or plans to install BART consistent with 51.308(e)(1).[1] A trading program also

[1] As noted in the preamble to the regional haze rule, States need not include a BART-eligible source in the trading program if the source already has installed BART-level pollution control technology and the emission limit is a federally enforceable requirement (64 FR 35742). We clarify in these guidelines that States may also elect to allow a source the option of installing BART-level controls within the 5-year period for compliance with the BART requirement [*see* section VI of these guidelines] rather than participating in a trading program.

may include sources not subject to BART. A State may also work together with other States to develop a common trading program. Under 40 CFR 51.308(e)(2) States must also include in their SIPs details on how they would implement the emission trading program or other alternative measure. States must provide a detailed description of the program, including schedules for compliance, the emissions reductions that it will require, the administrative and technical procedures for implementing the program, rules for accounting and monitoring emissions, and procedures for enforcement.

G. What Is Included in the Guidelines?

1. In the guidelines, we provide procedures States must use in implementing the regional haze BART requirements on a source-by-source basis, as provided in 40 CFR 51.308(e)(1). We address general topics related to development of a trading program or other alternative allowed by 40 CFR 51.308(e)(2).

2. The BART analysis process, and the contents of these guidelines, are as follows:

(a) *Identification of all BART-eligible sources.* Section II of these guidelines outlines a step-by-step process for identifying BART-eligible sources.

(b) *Identification of sources subject to BART.* As noted above, sources "subject to BART" are those BART-eligible sources which "emit a pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any Class I area." We discuss considerations for identifying sources subject to BART in section III of the guidance.

(c) *The BART determination process.* For each source subject to BART, the next step is to conduct an analysis of emissions control alternatives. This step requires the identification of available, technically feasible, retrofit technologies, and for each technology identified, analysis of the cost of compliance, and the energy and non-air quality environmental impacts, taking into account the remaining useful life and existing control technology present at the source. This step also requires taking into account the degree of visibility improvement that would be achieved in each affected Class I area as a result of the emissions reductions achievable from sources subject to BART. The visibility impacts analysis must take into account the degree of improvement in visibility from the emissions reductions from the "best technologies" identified. For each source, a "best system of continuous emission reduction" will be selected based upon these analyses. Procedures for the BART determination step are described in section IV of these guidelines.

(d) *Emissions limits.* States must establish enforceable limits, including a deadline for compliance, for each source subject to BART. Considerations related to these limits are discussed in section VI of these guidelines.

(e) *Considerations in establishing a trading program alternative.* General guidance on how to develop an emissions trading program alternative is contained in section VII of these guidelines.

H. Who Is the Target Audience for the Guidelines?

1. The guidelines are written primarily for the benefit of State, local and Tribal agencies, and describe the requirements for including the BART determinations and emission limitations in their SIPs or Tribal implementation plans (TIPs). Throughout the guidelines, which are written in a question and answer format, we ask questions "How do I * * *?" and answer with phrases "you should * * *, you must * * *." The "you" means a State, local or Tribal agency conducting the analysis.[2] We recognize, however, that agencies may prefer to require source owners to assume part of the analytical burden, and that there will be differences in how the supporting information is collected and documented. We also recognize that much of the data collection, analysis, and rule development may be performed by Regional Planning Organizations, for adoption within each SIP or TIP.

2. The preamble to the 1999 regional haze rule discussed at length the issue of Tribal implementation. As explained there, requirements related to visibility are among the programs for which Tribes may be determined eligible and receive authorization to implement under the "Tribal Authority Rule" ("TAR") (40 CFR 49.1 through 49.11). Tribes are not subject to implementation plan deadlines and may use a modular approach to CAA implementation. We believe there are very few BART-eligible sources located on Tribal lands. Where such sources exist, the affected Tribe may apply for delegation of implementation authority for this rule, following the process set forth in the TAR.

[2] In order to account for the possibility that BART-eligible sources could go unrecognized, we recommend that you adopt requirements placing a responsibility on source owners to self-identify if they meet the criteria for BART-eligible sources.

I. Do EPA Regulations Require the Use of These Guidelines?

Section 169A(b) requires us to issue these guidelines for States to follow in establishing BART emission limitations for fossil-fuel fired generating power plants having a capacity in excess of 750 megawatts. This document is intended to fulfill that requirement. These guidelines also establish procedures that States must follow in establishing BART emission limitations for all other BART sources. Under 40 CFR 308(e)(1)(ii)(B), we are requiring States to follow these guidelines in all BART determinations. We believe this approach will promote equitable application of the BART requirement to source owners with similar sources in different States.

II. How To Identify BART-Eligible Sources

This section provides guidelines on how to identify BART-eligible sources. A BART-eligible source is an existing stationary source in any of 26 listed categories which meets criteria for startup dates and potential emissions.

A. What Are the Steps in Identifying BART-Eligible Sources?

Figure 1 shows the steps for identifying whether the source is a "BART-eligible source":

Step 1: Identify the emission units in the BART categories,
Step 2: Identify the start-up dates of those emission units, and
Step 3: Compare the potential emissions to the 250 ton/yr cutoff.

Figure 1. How to determine whether a source is BART-eligible:

Step 1: Identify emission units in the BART categories.

Does the plant contain emissions units in one or more of the 26 source categories?

→ No → Stop
→ Yes → Proceed to Step 2

Step 2: Identify the start-up dates of these emission units.

Do any of these emissions units meet the following two tests?

In existence on August 7, 1977 and, began operation after August 7, 1962.

→ No → Stop
→ Yes → Proceed to Step 3

Step 3: Compare the potential emissions from these emission units to the 250 ton/yr cutoff.

Identify the "stationary source" that includes the emission units you identified in Step 2.

Add the current potential emissions from all the emission units identified in Steps 1 and 2 that are included within the "stationary source" boundary.

Are the potential emissions from these units 250 tons per year or more for any visibility-impairing pollutant?

→	No	→	Stop
→	Yes	→	These emissions units comprise the "BART-eligible source.".

1. Step 1: Identify Emission Units in the BART Categories

1. The BART requirement only applies to sources in specific categories listed in the CAA. The BART requirement does not apply to sources in other source categories, regardless of their emissions. The listed categories are:

(1) Fossil-fuel fired steam electric plants of more than 250 million British thermal units (BTU) per hour heat input,
(2) Coal cleaning plants (thermal dryers),
(3) Kraft pulp mills,
(4) Portland cement plants,
(5) Primary zinc smelters,
(6) Iron and steel mill plants,
(7) Primary aluminum ore reduction plants,
(8) Primary copper smelters,
(9) Municipal incinerators capable of charging more than 250 tons of refuse per day,
(10) Hydrofluoric, sulfuric, and nitric acid plants,
(11) Petroleum refineries,
(12) Lime plants,
(13) Phosphate rock processing plants,
(14) Coke oven batteries,
(15) Sulfur recovery plants,
(16) Carbon black plants (furnace process),
(17) Primary lead smelters,
(18) Fuel conversion plants,
(19) Sintering plants,
(20) Secondary metal production facilities,
(21) Chemical process plants,
(22) Fossil-fuel boilers of more than 250 million BTUs per hour heat input,
(23) Petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels,
(24) Taconite ore processing facilities,
(25) Glass fiber processing plants, and
(26) Charcoal production facilities.

2. Some plants may have emission units from more than one category, and some emitting equipment may fit into more than one category. Examples of this situation are sulfur recovery plants at petroleum refineries, coke oven batteries and sintering plants at steel mills, and chemical process plants at refineries. For Step 1, you identify *all* of the emissions units at the plant that fit into one or more of the listed categories. You do not identify emission units in other categories.

Example: A mine is collocated with an electric steam generating plant and a coal cleaning plant. You would identify emission units associated with the electric steam generating plant and the coal cleaning plant, because they are listed categories, but not the mine, because coal mining is not a listed category.

3. The category titles are generally clear in describing the types of equipment to be listed. Most of the category titles are very broad descriptions that encompass all emission units associated with a plant site (for example, "petroleum refining" and "kraft pulp mills"). In addition, this same list of categories appears in the PSD regulations, for example in 40 CFR 52.21. States and source owners need not revisit any interpretations of the list made previously for purposes of the PSD program. We provide the following clarifications for a few of the category titles:

(1) *"Steam electric plants of more than 250 million BTU/hr heat input."* Because the category refers to "plants," boiler capacities must be aggregated to determine whether the 250 million BTU/hr threshold is reached. This definition also includes those plants that cogenerate steam and electricity. Also, consistent with other EPA rules, the definition only includes those plants that generate electricity for sale.

Example: A stationary source includes a steam electric plant with three 100 million BTU/hr boilers. Because the aggregate capacity exceeds 250 million BTU/hr for the "plant," these boilers would be identified in Step 2.

"Steam electric plants" includes combined cycle turbines because of their incorporation of heat recovery steam generators. Simple cycle turbines are not "steam electric plants" because they typically do not make steam.

(2) *"Fossil-fuel boilers of more than 250 million BTU/hr heat input."* We interpret this category title to cover only those boilers that are individually greater than 250 million BTU/hr. However, an individual boiler smaller than 250 million BTU/hr *should* be subject to BART if it is part of a process description at a plant that is in a different BART category—for example, a boiler at a chemical process plant.

Also, you should consider a multi-fuel boiler to be a fossil-fuel boiler if it burns at least 50 percent fossil fuels. You may take federally enforceable operational limits into account in determining whether a multi-fuel boiler's fossil fuel capacity exceeds 250 million Btu/hr.

(3) *"Petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels."* The 300,000 barrel cutoff refers to total facility-wide tank capacity for tanks that were put in place within the 1962–1977 time period, and includes gasoline and other petroleum-derived liquids.

(4) *"Phosphate rock processing plants."* This category descriptor is broad, and includes all types of phosphate rock processing facilities, including elemental phosphorous plants as well as fertilizer production plants.

(5) *Charcoal production facilities."* We interpret this category to include charcoal briquet manufacturing and activated carbon production.

(6) *"Chemical process plants"* and pharmaceutical manufacturing. Consistent with past policy, we interpret the category "chemical process plants" to include those facilities within 2-digit SIC 28. Accordingly, we interpret the term "chemical process plants" to include pharmaceutical manufacturing facilities.

(7) *"Secondary metal production."* We interpret this category to include nonferrous metal facilities included within SIC code 3341, and secondary ferrous metal facilities that we also consider to be included within the category "iron and steel mill plants."

2. Step 2: Identify the Start-up Dates of the Emission Units

1. Emissions units listed under Step 1 are BART-eligible only if they were "in existence" on August 7, 1977 but were not "in operation" before August 7, 1962.

What Does "in Existence on August 7, 1977" Mean?

2. The regional haze rule defines "in existence" to mean that: "the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (1) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (2) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed in a reasonable time." See 40 CFR 51.301.

Thus, the term "in existence" means the same thing as the term "commence construction" as that term is used in the PSD regulations. See 40 CFR 51.165(a)(1)(xvi) and 40 CFR 52.21(b)(9). Thus, an emissions unit could be "in existence" according to this test even if it did not begin operating until several years later.

Example: The owner or operator obtained necessary permits in early 1977 and entered into binding construction agreements in June 1977. Actual on-site construction began in late 1978, and construction was completed in mid-1979. The source began operating in September 1979. The emissions unit *was* "in existence" as of August 7, 1977.

Emissions units of this size for which construction commenced AFTER August 7, 1977 (*i.e.*, were not "in existence" on August 7, 1977) were subject to major new source review (NSR) under the PSD program. Thus, the August 7, 1977 "in existence" test is essentially the same thing as the identification of emissions units that were grandfathered from the NSR review requirements of the 1977 CAA amendments.

3. Sources are not BART-eligible if the only change at the plant during the relevant time period was the addition of pollution controls. For example, if the only change at a copper smelter during the 1962 through 1977 time period was the addition of acid plants for the reduction of SO_2 emissions, these emission controls would not by themselves trigger a BART review.

What Does "in Operation Before August 7, 1962" Mean?

1. An emissions unit that meets the August 7, 1977 "in existence" test is not BART-eligible if it was in operation before August 7, 1962. "In operation" is defined as "engaged in activity related to the primary design function of the source." This means that a source must have begun actual operations by August 7, 1962 to satisfy this test.

Example: The owner or operator entered into binding agreements in 1960. Actual on-site construction began in 1961, and construction was complete in mid-1962. The source began operating in September 1962. The emissions unit *was not* "in operation" before August 7, 1962 and is therefore subject to BART.

What Is a "Reconstructed Source?'

2. Under a number of CAA programs, an existing source which is completely or substantially rebuilt is treated as a new source. Such "reconstructed" sources are treated as new sources as of the time of the reconstruction. Consistent with this overall approach to reconstructions, the definition of BART-eligible facility (reflected in detail in the definition of "existing stationary facility") includes consideration of sources that were in operation before August 7, 1962, but were reconstructed during the August 7, 1962 to August 7, 1977 time period.

3. Under the regulation, a reconstruction has taken place if "the fixed capital cost of the new component exceeds 50 percent of the fixed capital cost of a comparable entirely new source." The rule also states that "Any final decision as to whether reconstruction has occurred must be made in accordance with the provisions of §§ 60.15 (f)(1) through (3) of this title." [40 CFR 51.301]. "§§ 60.15(f)(1) through (3)" refers to the general provisions for New Source Performance Standards (NSPS). Thus, the same policies and procedures for identifying reconstructed "affected facilities" under the NSPS program must also be used to identify reconstructed "stationary sources" for purposes of the BART requirement.

4. You should identify reconstructions on an emissions unit basis, rather than on a plantwide basis. That is, you need to identify only the reconstructed emission units meeting the 50 percent cost criterion. You should include reconstructed emission units in the list of emission units you identified in Step 1. You need consider as possible reconstructions only those emissions units with the potential to emit more than 250 tons per year of any visibility-impairing pollutant.

5. The "in operation" and "in existence" tests apply to reconstructed sources. If an emissions unit was reconstructed and began actual operation before August 7, 1962, it is not BART-eligible. Similarly, any emissions unit for which a reconstruction "commenced" after August 7, 1977, is not BART-eligible.

How Are Modifications Treated Under the BART Provision?

1. The NSPS program and the major source NSR program both contain the concept of modifications. In general, the term "modification" refers to any physical change or change in the method of operation of an emissions unit that leads to an increase in emissions.

2. The BART provision in the regional haze rule contains no explicit treatment of modifications. Accordingly, guidelines are needed on how modified emissions units, previously subject to best available control technology (BACT), lowest achievable emission rate (LAER) and/or NSPS, are treated under the rule. The BART requirements in the CAA do not appear to provide any exemption for sources which were modified since 1977. Therefore we believe that the best interpretation of the CAA visibility provisions is that a subsequent modification does not change a unit's construction date for the purpose of BART applicability. Accordingly, an emissions unit which began operation within the 1962–1977 time window, but was modified after August 7, 1977, is BART-eligible. However, if an emissions unit began operation before 1962, it is not BART-eligible if it is modified at a later date, so long as the modification is not also a "reconstruction." We note, however, that if such a modification was a major modification subject to the BACT, LAER, or NSPS levels of control, the review process will take into account the level of control that is already in place and may find that the level of controls are already consistent with BART.

3. Step 3: Compare the Potential Emissions to the 250 Ton/Yr Cutoff

The result of Steps 1 and 2 will be a list of emissions units at a given plant site, including reconstructed emissions units, that are within one or more of the BART categories and that were placed into operation within the 1962–1977 time window. The third step is to determine whether the total emissions represent a current potential to emit that is greater than 250 tons per year of any single visibility impairing pollutant. In most cases, you will add the potential emissions from all emission units on the list resulting from Steps 1 and 2. In a few cases, you may need to determine whether the plant contains more than one "stationary source" as the regional haze rule defines that term, and as we explain further below.

What Pollutants Should I Address?

Visibility-impairing pollutants include the following:

(1) Sulfur dioxide (SO2),

(2) Nitrogen oxides (NO^2),

(3) Particulate matter. (You may use PM_{10} as the indicator for particulate matter. We do not recommend use of total suspended particulates (TSP). Emissions of PM_{10} include the components of $PM_{2.5}$ as a subset. There is no need to have separate 250 ton thresholds for PM_{10} and $PM_{2.5}$, because 250 tons of PM_{10} represents at most 250 tons of $PM_{2.5}$, and at most 250 tons of any individual particulate species such as elemental carbon, crustal material, etc.), and

(4) Volatile organic compounds (VOC).

Can States Establish De Minimis Levels of Emissions for Pollutants at BART-Eligible Sources?

In order to simplify BART determinations, States may choose to identify de minimis levels of pollutants at BART-eligible sources. De minimis values should be identified with the purpose of excluding only those

emissions so minimial that they are unlikely to contribute to regional haze. Any de minimis values that States consider must not be higher than the PSD applicability levels: 40 tons/yr for SO_2, NO_X and VOC, and 15 tons/yr for PM_{10}.

What Does the Term "Potential" Emissions Mean?

The regional haze rule defines potential to emit as follows:

"Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

This definition is identical to that in the PSD program [40 CFR 51.166 and 51.18]. This means that a source which actually emits less than 250 tons per year of a visibility-impairing pollutant is BART-eligible if its emissions would exceed 250 tons per year when operating at its maximum physical and operational design (and considering all federally enforceable permit limits).

Example: A source, while operating at one-fourth of its capacity, emits 75 tons per year of SO_2. If it were operating at 100 percent of its maximum capacity, the source would emit 300 tons per year. Because under the above definition such a source would have "potential" emissions that exceed 250 tons per year, the source (if in a listed category and built during the 1962–1977 time window) would be BART-eligible.

How Do I Identify Whether a Plant Has More Than One "Stationary Source?"

1. The regional haze rule, in 40 CFR 51.301, defines a stationary source as a "building, structure, facility or installation which emits or may emit any air pollutant."[3] The rule further defines "building, structure or facility" as:

All of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities must be considered as part of the same industrial grouping if they belong to the same Major Group (*i.e.*, which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972 as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

2. In applying this definition, it is necessary to determine which facilities are located on "contiguous or adjacent properties." Within this contiguous and adjacent area, it is also necessary to group those emission units that are under "common control." We note that these plant boundary issues and "common control" issues are very similar to those already addressed in implementation of the title V operating permits program and in NSR.

3. For emission units within the "contiguous or adjacent" boundary and under common control, you must group emission units that are within the same industrial grouping (that is, associated with the same 2-digit Standard Industrial Classification (SIC) code).[4] For most plants on the BART source category list, there will only be one 2-digit SIC that applies to the entire plant. For example, all emission units associated with kraft pulp mills are within SIC code 26, and chemical process plants will generally include emission units that are all within SIC code 28. The "2-digit SIC test" applies in the same way as the test is applied in the major source NSR programs.[5]

4. For purposes of the regional haze rule, you must group emissions from all emission units put in place within the 1962–1977 time period that are within the 2-digit SIC code, even if those emission units are in different categories on the BART category list.

Examples: A chemical plant which started operations within the 1962 to 1977 time period manufactures hydrochloric acid (within the category title "Hydrochloric, sulfuric, and nitric acid plants") and various organic chemicals (within the category title "chemical process plants"), and has onsite an industrial boiler greater than 250 million BTU/hour. All of the emission units are within SIC 28 and, therefore, all the emission units are considered in determining BART eligibility of the plant. You sum the emissions over all of these emission units to see whether there are more than 250 tons per year of potential emissions.

A steel mill which started operations within the 1962 to 1977 time period includes a sintering plant, a coke oven battery, and various other emission units. All of the emission units are within SIC 33. You sum the emissions over all of these emission units to see whether there are more than 250 tons per year of potential emissions.

4. Final Step: Identify the Emissions Units and Pollutants That Constitute the BART-Eligible Source

If the emissions from the list of emissions units at a stationary source exceed a potential to emit of 250 tons per year for any visibility-impairing pollutant, then that collection of emissions units is a BART-eligible source. A BART analysis is required for each visibility-impairing pollutant emitted at each BART-eligible source.

Example: A stationary source comprises the following two emissions units, with the following potential emissions:

Emissions unit A—200 tons/yr SO_2; 150 tons/yr NO_X; 25 tons/yr PM.

Emissions unit B—100 tons/yr SO_2; 75 tons/yr NO_X; 10 tons/yr PM.

For this example, potential emissions of SO_2 are 300 tons/yr, which exceeds the 250 tons/yr threshold. Accordingly, the entire "stationary source", that is, emissions units A and B, are subject to a BART review for SO_2, NO_X, and PM, even though the potential emissions of PM and NO_X at each emissions unit are less than 250 tons/yr each.

Example: The total potential emissions, obtained by adding the potential emissions of all emission units in a listed category at a plant site, are as follows: 200 tons/yr SO_2, 150 tons/yr NO_X, 25 tons/yr PM.

Even though total emissions exceed 250 tons/yr, no individual regulated pollutant exceeds 250 tons/yr and this source is not BART-eligible.

III. How To Identify Sources "Subject to BART"

Once you have identified and compiled your list of BART-eligible sources, you need to determine which of those sources may cause or contribute to any visibility impairment in a Class I area (*i.e.*, which of those sources should be subject to BART). First, you may choose to consider that all of the BART-eligible sources in your State are subject to BART (*i.e.*, none are exempt). Alternatively, you may submit to EPA a demonstration, based on overall visibility impacts, that the sum of all emissions from BART-eligible sources

[3] Note: Most of these terms and definitions are the same for regional haze and the 1980 visibility regulations. For the regional haze rule we use the term "BART-eligible source" rather than "existing stationary facility" to clarify that only a limited subset of existing stationary sources are subject to BART.

[4] We recognize that we are in a transition period from the use of the SIC system to a new system called the North American Industry Classification System (NAICS). For purposes of identifying BART-eligible sources, you may use either 2-digit SICS or the equivalent in the NAICS system.

[5] Note: The concept of support facility used for the NSR program applies here as well. Support facilities, that is facilities that convey, store or otherwise assist in the production of the principal product, must be grouped with primary facilities even when the facilities fall within separate SIC codes. For purposes of BART reviews, however, such support facilities (a) must be within one of the 26 listed source categories and (b) must have been in existence as of August 7, 1977, and (c) must not have been in operation as of August 7, 1962.

in your State do not cause or contribute to any visibility impairment in a Class I area (*i.e.*, none of your BART-eligible sources are subject to BART; all are exempt).

However, if you cannot or choose not to demonstrate to EPA that the sum total of emissions from BART-eligible sources in your State do not cause or contribute to any visibility impairment in Class I areas, and if you also choose not to consider that all BART-eligible sources should automatically be subject to BART, you may use the third exemption option, individual source modeling. The individual source exemption process is presented below.

1. Individual Source Exemption Process (CALPUFF Modeling)

You may elect to do the modeling or to require the source to do the modeling. If the source is making the visibility impact determination, you should review and approve or disapprove of the source's analysis before making the exemption determination. For each BART-eligible source:

a. Submit a Modeling protocol to EPA. If you are having your sources do the modeling, they should prepare a modeling protocol that is acceptable to you and the EPA. If modeling is to be conducted for receptors greater than 200 km from the emission unit, a modeling protocol is required. Some critical items to include are meteorological and terrain data, as well as source-specific information (stack height, temperature, exit velocity, elevation, and allowable emission rate of applicable pollutants), and receptor data from appropriate Class I areas. Distances from the actual BART-eligible emission unit that is modeled to each Class I area should be measured from the nearest point in the Class I area. All receptors in the Class I area should be analyzed. The State should bear in mind that, for sources 50 km from a Class I area, some receptors within that Class I area may be less than 50 km from the source while other receptors within that same Class I area may be greater than 50 km from the same source; this situation may result in two different modeling approaches for the same Class I area and source, depending upon the State's chosen method for modeling sources less than 50 km.

b. Once the modeling methodology is approved, for each Class I area:

i. Run CALPUFF for receptors in the Class I area that are greater than or equal to 50 km from the source. For CALPUFF setup (meteorological data and parameter settings), we recommend following EPA's Interagency Workgroup on Air Quality Modeling (IWAQM) Phase 2 Summary Report and Recommendations for Modeling Long Range Transport Impacts.

(a) Tabulate Results —Calculate 24-hr values for each receptor as the change in deciviews compared against natural visibility conditions.

(b) Make the exemption determination—If the change in the maximum 24-hour value at any receptor is greater than 0.5 deciviews, the source is subject to BART.

ii. For sources not subject to BART under i. above and where the distance from the BART-eligible unit modeled to the nearest receptor at any Class I area is less than 50 km:

(1) You will need to determine whether or not to exempt the source. Use your discretion for determining visibility impacts giving consideration to CALPUFF and to other EPA-approved methods.

Note that each of the modeling options may be supplemented with source apportionment data or source apportionment modeling that is acceptable to the State and the EPA regional office.

IV. The BART Determination: Analysis of BART Options

This section describes the process for the engineering analysis of control options for sources subject to BART.

A. What Factors Must I Address in the Engineering Analysis?

The visibility regulations define BART as follows:

Best Available Retrofit Technology (BART) means an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by * * * [a BART -eligible source]. The emission limitation must be established, on a case-by-case basis, taking into consideration the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use or in existence at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

The BART analysis requirement in 40 CFR 51.308(e)(1)(ii)(A) has two parts: an engineering analysis and a visibility impacts analysis. This section of the guidelines addresses the requirements for the engineering analysis. Your engineering analysis identifies the best system of continuous emission reduction taking into account:

(1) The available retrofit control options,
(2) Any pollution control equipment in use at the source (which affects the availability of options and their impacts),
(3) The costs of compliance with control options,
(4) The remaining useful life of the facility (which as we will discuss below, is an integral part of the cost analysis), and
(5) The energy and non-air quality environmental impacts of control options.

We discuss the requirement for a visibility impacts analysis below in section V.

(4) How Does a BART Engineering Analysis Compare to a BACT Review Under the PSD Program?

The process for a BART analysis is very similar to the BACT review as described in the New Source Review Workshop Manual (Draft, October 1990). Consistent with the Workshop Manual, the BART engineering analysis requires that all available control technologies be ranked in descending order of control effectiveness (*i.e.* percent control). You must examine the most stringent alternative first. That alternative is selected as the "best" unless you demonstrate and document that the alternative cannot be justified based upon the consideration of the five statutory factors discussed below. If you eliminate the most stringent technology in this fashion, you then consider the next most stringent alternative, and so on.

Although very similar in process, BART reviews differ in several respects from the BACT review described in the NSR Draft Manual. First, because all BART reviews apply to existing sources, the available controls and the impacts of those controls may differ from source to source. Second, the CAA requires you to take slightly different factors into account in determining BART and BACT. In a BACT analysis, the permitting authority must consider the "energy, environmental and economic impacts and other costs" associated with a control technology in making its determination. In a BART analysis, on the other hand, the State must take into account the "cost of compliance, the remaining useful life of the source, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, and the degree of improvement in visibility from the use of such technology" in making its BART determination. Because of the differences in terminology, the BACT review process tends to encompass a broader range of factors. For example,

the term "environmental impacts" in the BACT definition is more broad than the term "nonair quality environmental impacts" used in the BART definition. Accordingly, there is no requirement in the BART engineering analysis to evaluate adverse air quality impacts of control alternatives such as the relative impacts on hazardous air pollutants, although you may wish to do so. Finally, for the BART analysis, there is no minimum level of control required, while any BACT emission limitation must be at least as stringent as any NSPS that applies to the source.

(5) Which Pollutants Must I Address in the Engineering Review?

Once you determine that a source is subject to BART, then a BART review is required for each visibility-impairing pollutant emitted. In a BART review, for each affected emission unit, you must establish BART for each pollutant that can impair visibility. Consequently, the BART determination must address air pollution control measures for each emissions unit or pollutant emitting activity subject to review.

Example: Plantwide emissions from emission units within the listed categories that began operation within the "time window" for BART[6] are 300 tons/yr of NO_X, 200 tons/yr of SO_2, and 150 tons/yr of primary particulate. Emissions unit A emits 200 tons/yr of NO_X, 100 tons/yr of SO_2, and 100 tons/yr of primary particulate. Other emission units, units B through H, which began operating in 1966, contribute lesser amounts of each pollutant. For this example, a BART review is required for NO_X, SO_2, and primary particulate, and control options must be analyzed for units B through H as well as unit A.

D. How Does a BACT Review Relate to Maximum Achievable Control Technology (MACT) Standards Under CAA Section 112?

For VOC and PM sources subject to MACT standards, States may streamline the analysis by including a discussion of the MACT controls and whether any major new technologies have been developed subsequent to the MACT standards. We believe that there are many VOC and PM sources that are well controlled because they are regulated by the MACT standards, which EPA developed under CAA section 112. For a few MACT standards, this may also be true for SO_2. Any source subject to MACT standards must meet a level that is as stringent as the best-controlled 12 percent of sources in the industry. Examples of these hazardous air pollutant sources which effectively control VOC and PM emissions include (among others) secondary lead facilities, organic chemical plants subject to the hazardous organic NESHAP (HON), pharmaceutical production facilities, and equipment leaks and wastewater operations at petroleum refineries. We believe that, in many cases, it will be unlikely that States will identify emission controls more stringent than the MACT standards without identifying control options that would cost many thousands of dollars per ton. Unless there are new technologies subsequent to the MACT standards which would lead to cost-effective increases in the level of control, you may rely on the MACT standards for purposes of BART. We believe that the same rationale also holds true for emissions standards developed for municipal waste incinerators under CAA section 111(d).

Where you are relying on MACT standards to achieve a BART level of control, you must provide the public with a discussion of how you have reached the conclusion that it is appropriate to rely on MACT standards, and a discussion of whether any new technologies are available subsequent to the date the MACT standards were published.

E. What Are the Five Basic Steps of a Case-by-Case BART Engineering Analysis?

The five steps are:

STEP 1—Identify All[7] Available Retrofit Control Technologies,
STEP 2— Eliminate Technically Infeasible Options,
STEP 3— Rank Remaining Control Technologies By Control Effectiveness,
STEP 4— Evaluate Impacts and Document the Results, and
STEP 5—Evaluate Visibility Impacts.

1. STEP 1: How do I Identify all Available Retrofit Emission Control Techniques?

1. Available retrofit control options are those air pollution control technologies with a practical potential for application to the emissions unit and the regulated pollutant under evaluation. Air pollution control technologies can include a wide variety of available methods, systems, and techniques for control of the affected pollutant. Available air pollution control technologies can include technologies employed outside of the United States that have been successfully demonstrated in practice on full scale operations, particularly those that have been demonstrated as retrofits to existing sources. Technologies required as BACT or LAER are available for BART purposes and must be included as control alternatives. The control alternatives should include not only existing controls for the source category in question, but also take into account technology transfer of controls that have been applied to similar source categories and gas streams. Technologies which have not yet been applied to (or permitted for) full scale operations need not be considered as available; we do not expect the source owner to purchase or construct a process or control device that has not already been demonstrated in practice.

2. Where an NSPS exists for a source category (which is the case for most of the categories affected by BART), you should include a level of control equivalent to the NSPS as one of the control options.[8] The NSPS standards are codified in 40 CFR part 60. We note that there are situations where NSPS standards do not require the most stringent level of available control for all sources within a category. For example, post-combustion NO_X controls (the most stringent controls for stationary gas turbines) are not required under subpart GG of the NSPS for Stationary Gas Turbines. However, such controls must still be considered available technologies for the BART selection process.

3. Potentially applicable retrofit control alternatives can be categorized in three ways.

- Pollution prevention: use of inherently lower-emitting processes/practices, including the use of materials and production processes and work practices that prevent emissions and

[6] That is, emission units that were in existence on August 7, 1977 and which began actual operation on or after August 7, 1962.

[7] In identifying "all" options, you must identify the most stringent option and a reasonable set of options for analysis that reflects a comprehensive list of available technologies. It is not necessary to list all permutations of available control levels that exist for a given technology—the list is complete if it includes the maximum level of control each technology is capable of achieving.

[8] In EPA's 1980 BART guidelines for reasonably attributable visibility impairment, we concluded that NSPS standards generally, at that time, represented the best level sources could install as BART, and we required no further demonstration if an NSPS level was selected. In the 20 year period since this guidance was developed, there have been advances in SO_2 control technologies as well as technologies for the control of other pollutants, confirmed by a number of recent retrofits at Western power plants. Accordingly, EPA no longer concludes that the NSPS level of controls automatically represents "the best these sources can install." While it is possible that a detailed analysis of the BART factors could result in the selection of an NSPS level of control, we believe that you should only reach this conclusion based upon an analysis of the full range of control options.

result in lower "production-specific" emissions,

• Use of, (and where already in place, improvement in the performance of) add-on controls, such as scrubbers, fabric filters, thermal oxidizers and other devices that control and reduce emissions after they are produced, and

• Combinations of inherently lower-emitting processes and add-on controls. Example: for a gas-fired turbine, a combination of combustion controls (an inherently lower-emitting process) and post-combustion controls such as selective catalytic reduction (add-on) may be available to reduce NO_X emissions.

4. For the engineering analysis, you should consider potentially applicable control techniques from all three categories. You should consider lower-polluting processes based on demonstrations from facilities manufacturing identical or similar products using identical or similar raw materials or fuels. Add-on controls, on the other hand, should be considered based on the physical and chemical characteristics of the pollutant-bearing emission stream. Thus, candidate add-on controls may have been applied to a broad range of emission unit types that are similar, insofar as emissions characteristics, to the emissions unit undergoing BART review.

5. In the course of the BART engineering analysis, one or more of the available control options may be eliminated from consideration because they are demonstrated to be technically infeasible or to have unacceptable energy, cost, or non-air quality environmental impacts on a case-by-case (or site-specific) basis. However, at the outset, you should initially identify all control options with potential application to the emissions unit under review.

6. We do not consider BART as a requirement to redesign the source when considering available control alternatives. For example, where the source subject to BART is a coal-fired electric generator, we do not require the BART analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting on a per unit basis.

7. In some cases, retrofit design changes may be available for making a given production process or emissions unit inherently less polluting.[9] (Example: use of low NO_X burners). In such cases, the ability of design considerations to make the process inherently less polluting must be considered as a control alternative for the source.

8. Combinations of inherently lower-polluting processes/practices (or a process made to be inherently less polluting) and add-on controls could possibly yield more effective means of emissions control than either approach alone. Therefore, the option to use an inherently lower-polluting process does not, in and of itself, mean that no additional add-on controls need to be included in the BART analysis. These combinations should be identified in Step 1 for evaluation in subsequent steps. (Example: use of low NO_X burner and add-on SCR for NO_X control).

9. For emission units subject to a BART engineering review, there will often be control measures or devices already in place. For such emission units, it is important to include control options that involve improvements to existing controls, and not to limit the control options only to those measures that involve a complete replacement of control devices.

Example: For a power plant with an existing wet scrubber, the current control efficiency is 66 percent. Part of the reason for the relatively low control efficiency is that 22 percent of the gas stream bypasses the scrubber. An engineering review identifies options for improving the performance of the wet scrubber by redesigning the internal components of the scrubber and by eliminating or reducing the percentage of the gas stream that bypasses the scrubber. Four control options are identified: (1) 78 percent control based upon improved scrubber performance while maintaining the 22 percent bypass, (2) 83 percent control based upon improved scrubber performance while reducing the bypass to 15 percent, (3) 93 percent control based upon improving the scrubber performance while eliminating the bypass entirely, (this option results in a "wet stack" operation in which the gas leaving the stack is saturated with water) and (4) 93 percent as in option 3, with the addition of an indirect reheat system to reheat the stack gas above the saturation temperature. You must consider each of these four options in a BART analysis for this source.

10. You are expected to identify all demonstrated and potentially applicable retrofit control technology alternatives. Examples of general information sources to consider include:

• The EPA's Clean Air Technology Center, which includes the RACT/BACT/LAER Clearinghouse (RBLC);

• State and Local Best Available Control Technology Guidelines—many agencies have online information—for example South Coast Air Quality Management District, Bay Area Air Quality Management District, and Texas Natural Resources Conservation Commission;

• Control technology vendors;

• Federal/State/Local NSR permits and associated inspection/performance test reports;

• Environmental consultants;

• Technical journals, reports and newsletters, air pollution control seminars; and

• The EPA's NSR bulletin board—*http://www.epa.gov/ttn/nsr;*

• Department of Energy's Clean Coal Program—technical reports;

• The NO_X Control Technology "Cost Tool"—Clean Air Markets Division Web page—*http://www.epa.gov/airmarkets/arp/nox/controltech.html;*

• Performance of selective catalytic reduction on coal-fired steam generating units—final report. OAR/ARD, June 1997 (also available at *http://www.epa.gov/airmarkets/arp/nox/controltech.html);*

• Cost estimates for selected applications of NO_X control technologies on stationary combustion boilers. OAR/ARD June 1997. (Docket for NO_X SIP Call, A–96–56, item II–A–03);

• Investigation of performance and cost of NO_X controls as applied to group 2 boilers. OAR/ARD, August 1996. (Docket for Phase II NO_X rule, A–95–28, item IV–A–4);

• Controlling SO_2 Emissions: A Review of Technologies. EPA–600/R–00–093, USEPA/ORD/NRMRL, October 2000; and

• The OAQPS Control Cost Manual.

You should compile appropriate information from all available information sources, and you should ensure that the resulting list of control alternatives is complete and comprehensive.

2. STEP 2: How Do I Determine Whether the Options Identified in Step 1 Are Technically Feasible?

In Step 2, you evaluate the technical feasibility of the control options you identified in Step 1. You should clearly document a demonstration of technical infeasibility and should show, based on physical, chemical, and engineering principles, that technical difficulties would preclude the successful use of the control option on the emissions unit under review. You may then eliminate such technically infeasible control options from further consideration in the BART analysis.

In General, What Do We Mean by Technical Feasibility?

Control technologies are technically feasible if either (1) they have been installed and operated successfully for

[9] Because BART applies to existing sources, we recognize that there will probably be far fewer opportunities to consider inherently lower-emitting processes than may be available for NSR.

the type of source under review, or (2) the technology could be applied to the source under review. Two key concepts are important in determining whether a technology could be applied: "availability" and "applicability." As explained in more detail below, a technology is considered "available" if the source owner may obtain it through commercial channels, or it is otherwise available within the common sense meaning of the term. An available technology is "applicable" if it can reasonably be installed and operated on the source type under consideration. A technology that is available and applicable is technically feasible.

What Do We Mean by "Available" Technology?

1. The typical stages for bringing a control technology concept to reality as a commercial product are:

- Concept stage;
- research and patenting;
- bench scale or laboratory testing;
- pilot scale testing;
- licensing and commercial demonstration; and
- commercial sales.

2. A control technique is considered available, within the context presented above, if it has reached the licensing and commercial sales stage of development. Similarly, we do not expect a source owner to conduct extended trials to learn how to apply a technology on a totally new and dissimilar source type. Consequently, you would not consider technologies in the pilot scale testing stages of development as "available" for purposes of BART review.

3. Commercial availability by itself, however, is not necessarily a sufficient basis for concluding a technology to be applicable and therefore technically feasible. Technical feasibility, as determined in Step 2, also means a control option may reasonably be deployed on or "applicable" to the source type under consideration.

Because a new technology may become available at various points in time during the BART analysis process, we believe that guidelines are needed on when a technology must be considered. For example, a technology may become available during the public comment period on the State's rule development process. Likewise, it is possible that new technologies may become available after the close of the State's public comment period and before submittal of the SIP to EPA, or during EPA's review process on the SIP submittal. In order to provide certainty in the process, we propose that all technologies be considered if available before the close of the State's public comment period. You need not consider technologies that become available after this date. As part of your analysis, you should consider any technologies brought to your attention in public comments. If you disagree with public comments asserting that the technology is available, you should provide an explanation for the public record as to the basis for your conclusion.

What Do We Mean by "Applicable" Technology?

You need to exercise technical judgment in determining whether a control alternative is applicable to the source type under consideration. In general, a commercially available control option will be presumed applicable if it has been or is soon to be deployed (*e.g.*, is specified in a permit) on the same or a similar source type. Absent a showing of this type, you evaluate technical feasibility by examining the physical and chemical characteristics of the pollutant-bearing gas stream, and comparing them to the gas stream characteristics of the source types to which the technology had been applied previously. Deployment of the control technology on a new or existing source with similar gas stream characteristics is generally a sufficient basis for concluding the technology is technically feasible barring a demonstration to the contrary as described below. What type of demonstration is required if I conclude that an option is not technically feasible?

1. Where you assert that a control option identified in Step 1 is technically infeasible, you should make a factual demonstration that the option is commercially unavailable, or that unusual circumstances preclude its application to a particular emission unit. Generally, such a demonstration involves an evaluation of the characteristics of the pollutant-bearing gas stream and the capabilities of the technology. Alternatively, a demonstration of technical infeasibility may involve a showing that there are unresolvable technical difficulties with applying the control to the source (*e.g.*, size of the unit, location of the proposed site, or operating problems related to specific circumstances of the source). Where the resolution of technical difficulties is a matter of cost, you should consider the technology to be technically feasible. The cost of a control alternative is considered later in the process.

2. The determination of technical feasibility is sometimes influenced by recent air quality permits. In some cases, an air quality permit may require a certain level of control, but the level of control in a permit is not expected to be achieved in practice (*e.g.*, a source has received a permit but the project was canceled, or every operating source at that permitted level has been physically unable to achieve compliance with the limit). Where this is the case, you should provide supporting documentation showing why such limits are not technically feasible, and, therefore, why the level of control (but not necessarily the technology) may be eliminated from further consideration. However, if there is a permit requiring the application of a certain technology or emission limit to be achieved for such technology (especially as a retrofit for an existing emission unit), this usually is sufficient justification for you to assume the technical feasibility of that technology or emission limit.

3. Physical modifications needed to resolve technical obstacles do not, in and of themselves, provide a justification for eliminating the control technique on the basis of technical infeasibility. However, you may consider the cost of such modifications in estimating costs. This, in turn, may form the basis for eliminating a control technology (see later discussion).

4. Vendor guarantees may provide an indication of commercial availability and the technical feasibility of a control technique and could contribute to a determination of technical feasibility or technical infeasibility, depending on circumstances. However, we do not consider a vendor guarantee alone to be sufficient justification that a control option will work. Conversely, lack of a vendor guarantee by itself does not present sufficient justification that a control option or an emissions limit is technically infeasible. Generally, you should make decisions about technical feasibility based on chemical, and engineering analyses (as discussed above), in conjunction with information about vendor guarantees.

5. A possible outcome of the BART procedures discussed in these guidelines is the evaluation of multiple control technology alternatives which result in essentially equivalent emissions. It is not our intent to encourage evaluation of unnecessarily large numbers of control alternatives for every emissions unit. Consequently, you should use judgment in deciding on those alternatives for which you will conduct the detailed impacts analysis (Step 4 below). For example, if two or more control techniques result in control levels that are essentially

identical, considering the uncertainties of emissions factors and other parameters pertinent to estimating performance, you may evaluate only the less costly of these options. You should narrow the scope of the BART analysis in this way, only if there is a negligible difference in emissions and energy and non-air quality environmental impacts between control alternatives.

3. STEP 3: How Do I Develop a Ranking of the Technically Feasible Alternatives?

Step 3 involves ranking all the technically feasible control alternatives identified in Step 2. For the pollutant and emissions unit under review, you rank the control alternatives from the most to the least effective in terms of emission reduction potential.

Two key issues that must be addressed in this process include:

(1) Making sure that you express the degree of control using a metric that ensures an "apples to apples" comparison of emissions performance levels among options, and

(2) Giving appropriate treatment and consideration of control techniques that can operate over a wide range of emission performance levels.

What Are the Appropriate Metrics for Comparison?

This issue is especially important when you compare inherently lower-polluting processes to one another or to add-on controls. In such cases, it is generally most effective to express emissions performance as an average steady state emissions level per unit of product produced or processed.

Examples of common metrics:

- Pounds of SO_2 emissions per million Btu heat input, and
- pounds of NO_X emissions per ton of cement produced.

How Do I Evaluate Control Techniques With a Wide Range of Emission Performance Levels?

1. Many control techniques, including both add-on controls and inherently lower polluting processes, can perform at a wide range of levels. Scrubbers and high and low efficiency electrostatic precipitators (ESPs) are two of the many examples of such control techniques that can perform at a wide range of levels. It is not our intent to require analysis of each possible level of efficiency for a control technique, as such an analysis would result in a large number of options. It is important, however, that in analyzing the technology you take into account the most stringent emission control level that the technology is capable of achieving. You should use the most recent regulatory decisions and performance data (*e.g.*, manufacturer's data, engineering estimates and the experience of other sources) to identify an emissions performance level or levels to evaluate.

2. In assessing the capability of the control alternative, latitude exists to consider any special circumstances pertinent to the specific source under review, or regarding the prior application of the control alternative. However, you must document the basis for choosing the alternate level (or range) of control in the BART analysis. Without a showing of differences between the source and other sources that have achieved more stringent emissions limits, you should conclude that the level being achieved by those other sources is representative of the achievable level for the source being analyzed.

3. You may encounter cases where you may wish to evaluate other levels of control in addition to the most stringent level for a given device. While you must consider the most stringent level as one of the control options, you may consider less stringent levels of control as additional options. This would be useful, particularly in cases where the selection of additional options would have widely varying costs and other impacts.

4. Finally, we note that for retrofitting existing sources in addressing BART, you should consider ways to improve the performance of existing control devices, particularly when a control device is not achieving the level of control that other similar sources are achieving in practice with the same device.

How Do I Rank the Control Options?

After determining the emissions performance levels (using appropriate metrics of comparison) for each control technology option identified in Step 2, you establish a list that identifies the most stringent control technology option. Each other control option is then placed after this alternative in a ranking according to its respective emissions performance level, ranked from lowest emissions to highest emissions (most effective to least stringent effective emissions control alternative). You should do this for each pollutant and for each emissions unit (or grouping of similar units) subject to a BART analysis.

4. STEP 4: For a BART Engineering Analysis, What Impacts Must I Calculate and Report? What Methods Does EPA Recommend for the Impacts Analysis?

After you identify and rank the available and technically feasible control technology options, you must then conduct three types of impacts analyses when you make a BART determination:

Impact analysis part 1: costs of compliance, (taking into account the remaining useful life of the facility)

Impact analysis part 2: energy impacts, and

Impact analysis part 3: non-air quality environmental impacts.

In this section, we describe how to conduct each of these three analyses. You are responsible for presenting an evaluation of each impact along with appropriate supporting information. You should discuss and, where possible, quantify both beneficial and adverse impacts. In general, the analysis should focus on the direct impact of the control alternative.

a. Impact Analysis Part 1: How Do I Estimate the Costs of Control?

1. To conduct a cost analysis, you: (1) Identify the emissions units being controlled, (2) identify design parameters for emission controls, and (3) develop cost estimates based upon those design parameters.

2. It is important to identify clearly the emission units being controlled, that is, to specify a well-defined area or process segment within the plant. In some cases, multiple emission units can be controlled jointly. However, in other cases, it may be appropriate in the cost analysis to consider whether multiple units will be required to install separate and/or different control devices. The engineering analysis should provide a clear summary list of equipment and the associated control costs. Inadequate documentation of the equipment whose emissions are being controlled is a potential cause for confusion in comparison of costs of the same controls applied to similar sources.

3. You then specify the control system design parameters. Potential sources of these design parameters include equipment vendors, background information documents used to support NSPS development, control technique guidelines documents, cost manuals developed by EPA, control data in trade publications, and engineering and performance test data. The following are a few examples of design parameters for two example control measures:

Control device	Examples of design parameters
Wet Scrubbers	Type of sorbent used (lime, limestone, etc.) Gas pressure drop Liquid/gas ratio
Selective Catalytic Reduction.	Ammonia to NO_x molar ratio Pressure drop Catalyst life

4. The value selected for the design parameter should ensure that the control option will achieve the level of emission control being evaluated. You should include in your analysis, documentation of your assumptions regarding design parameters. Examples of supporting references would include the Office of Air Quality Planning and Standards (OAQPS) *Control Cost Manual* (see below) and background information documents used for NSPS and hazardous pollutant emission standards. If the design parameters you specified differ from typical designs, you should document the difference by supplying performance test data for the control technology in question applied to the same source or a similar source.

5. Once the control technology alternatives and achievable emissions performance levels have been identified, you then develop estimates of capital and annual costs. The basis for equipment cost estimates also should be documented, either with data supplied by an equipment vendor (*i.e.*, budget estimates or bids) or by a referenced source (such as the *OAQPS Control Cost Manual*, Fifth Edition, February 1996, EPA 453/B–96–001).[10] In order to maintain and improve consistency, cost estimates should be based on the EPA/OAQPS *Control Cost Manual*, where possible.[11] The *Control Cost Manual* addresses most control technologies in sufficient detail for a BART analysis. While the types of site-specific analyses contained in the *Control Cost Manual* are less precise than those based upon a detailed engineering design, normally the estimates provide results that are plus or minus 30 percent, which is generally sufficient for the BART review. The cost analysis should take into account site-specific conditions that are out of the ordinary (*e.g.*, use of a more expensive fuel or additional waste disposal costs) that may affect the cost of a particular BART technology option.

b. How Do I Take Into Account a Project's "Remaining Useful Life" In Calculating Control Costs?

1. You treat the requirement to consider the source's "remaining useful life" of the source for BART determinations as one element of the overall cost analysis. The "remaining useful life" of a source, if it represents a relatively short time period, may affect the annualized costs of retrofit controls. For example, the methods for calculating annualized costs in EPA's *Control Cost Manual* require the use of a specified time period for amortization that varies based upon the type of control. If the remaining useful life will clearly exceed this time period, the remaining useful life has essentially no effect on control costs and on the BART determination process. Where the remaining useful life is less than the time period for amortizing costs, you should use this shorter time period in your cost calculations.

2. For purposes of these guidelines, the remaining useful life is the difference between:

(1) January 1 of the year you are conducting the BART analysis (but not later than January 1, 2007)[12]; and

(2) the date the facility permanently stops operations. Where this affects the BART determination, this date must be assured by a federally-enforceable restriction preventing further operation. A projected closure date, without such a federally-enforceable restriction, is not sufficient.

3. We recognize that there may be situations where a source operator intends to shut down a source by a given date, but wishes to retain the flexibility to continue operating beyond that date in the event, for example, that market conditions change. Where this is the case, your BART analysis may account for this, but it must maintain consistency with the statutory requirement to install BART within 5 years. Where the source chooses not to accept a federally enforceable condition requiring the source to shut down by a given date, it is necessary to determine whether a reduced time period for the remaining useful life changes the level of controls that would have been required as BART. If the reduced time period does change the level of BART controls, you may identify, and include as part of the BART emission limitation, the more stringent level of control that would be required as BART if there were no assumption that reduced the remaining useful life. You may incorporate into the BART emission limit this more stringent level, which would serve as a contingency should the source continue operating more than 5 years after the date EPA approves the relevant SIP. The source would not be allowed to operate after the 5-year mark without such controls. If a source does operate after the 5-year mark without BART in place, the source is considered to be in violation of the BART emissions limit for each day of operation.

c. What Do We Mean by Cost Effectiveness?

Cost effectiveness, in general, is a criterion used to assess the potential for achieving an objective in the most economical way. For purposes of air pollutant analysis, "effectiveness" is measured in terms of tons of pollutant emissions removed, and "cost" is measured in terms of annualized control costs. We recommend two types of cost-effectiveness calculations—average cost effectiveness, and incremental cost effectiveness.

In the cost analysis, you should take care to not focus on incomplete results or partial calculations. For example, large capital costs for a control option alone would not preclude selection of a control measure if large emissions reductions are projected. In such a case, low or reasonable cost effectiveness numbers may validate the option as an appropriate BART alternative irrespective of the large capital costs. Similarly, projects with relatively low capital costs may not be cost effective if there are few emissions reduced.

d. How Do I Calculate Average Cost Effectiveness?

Average cost effectiveness means the total annualized costs of control divided by annual emissions reductions (the difference between baseline annual emissions and the estimate of emissions after controls), using the following formula:

Average cost effectiveness (dollars per ton removed) = *Control option annualized cost*[13] Baseline annual

[10] The *Control Cost Manual* is updated periodically. While this citation refers to the latest version at the time this guidance was written, you should use the version that is current as of when you conduct your impact analysis. This document is available at the following Web site: *http://www.epa.gov/ttn/catc/dir1/chpt2acr.pdf*

[11] You should include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the *Control Cost Manual*.

[12] The reason for the year 2007 is that the year 2007 is the latest year for which a BART analysis will be conducted in order to be included in a regional haze SIP.

[13] Whenever you calculate or report annual costs, you should indicate the year for which the costs are estimated. For example, if you use the year 2000 as the basis for cost comparisons, you would report that an annualized cost of $20 million would be: $20 million (year 2000 dollars).

emissions—Annual emissions with Control option

Because you calculate costs in (annualized) dollars per year ($/yr) and because you calculate emissions rates in tons per year (tons/yr), the result is an average cost-effectiveness number in (annualized) dollars per ton ($/ton) of pollutant removed.

e. How Do I Calculate Baseline Emissions?

1. The baseline emissions rate should represent a realistic depiction of anticipated annual emissions for the source. In general, for the existing sources subject to BART, you will estimate the anticipated annual emissions based upon actual emissions from a baseline period.

2. When you project that future operating parameters (*e.g.*, limited hours of operation or capacity utilization, type of fuel, raw materials or product mix or type) will differ from past practice, and if this projection has a deciding effect in the BART determination, then you must make these parameters or assumptions into enforceable limitations. In the absence of enforceable limitations, you calculate baseline emissions based upon continuation of past practice.

3. For example, the baseline emissions calculation for an emergency standby generator may consider the fact that the source owner would not operate more than past practice of 2 weeks a year. On the other hand, baseline emissions associated with a base-loaded turbine should be based on its past practice which would indicate a large number of hours of operation. This produces a significantly higher level of baseline emissions than in the case of the emergency/standby unit and results in more cost-effective controls. As a consequence of the dissimilar baseline emissions, BART for the two cases could be very different.

f. How Do I Calculate Incremental Cost Effectiveness?

1. In addition to the average cost effectiveness of a control option, you should also calculate incremental cost effectiveness. You should consider the incremental cost effectiveness in combination with the total cost effectiveness in order to justify elimination of a control option. The incremental cost effectiveness calculation compares the costs and emissions performance level of a control option to those of the next most stringent option, as shown in the following formula:

Incremental Cost Effectiveness (dollars per incremental ton removed) = (Total annualized costs of control option)—(Total annualized costs of next control option) ÷ (Next control option annual emissions)—(Control option annual emissions)

Example 1: Assume that Option F on Figure 2 has total annualized costs of $1 million to reduce 2000 tons of a pollutant, and that Option D on Figure 2 has total annualized costs of $500,000 to reduce 1000 tons of the same pollutant. The incremental cost effectiveness of Option F relative to Option D is ($1 million—$500,000) divided by (2000 tons—1000 tons), or $500,000 divided by 1000 tons, which is $500/ton.

Example 2: Assume that two control options exist: Option 1 and Option 2. Option 1 achieves a 1,000 ton/yr reduction at an annual cost of $1,900,000. This represents an average cost of ($1,900,000/1,000 tons) = $1,900/ton. Option 2 achieves a 980 tons/yr reduction at an annual cost of $1,500,000. This represents an average cost of ($1,500,000/980 tons) = $1,531/ton. The incremental cost effectiveness of Option 1 relative to Option 2 is ($1,900,000—$1,500,000) divided by (1,000 tons—980 tons). The adoption of Option 1 instead of Option 2 results in an incremental emission reduction of 20 tons per year at an additional cost of $400,000 per year. The incremental cost of Option 1, then, is $20,000 per ton—11 times the average cost of $1,900 per ton. While $1,900 per ton may still be deemed reasonable, it is useful to consider both the average and incremental cost in making an overall cost-effectiveness finding. Of course, there may be other differences between these options, such as, energy or water use, or non-air environmental effects, which also should be considered in selecting a BART technology.

2. You should exercise care in deriving incremental costs of candidate control options. Incremental cost-effectiveness comparisons should focus on annualized cost and emission reduction differences between "dominant" alternatives. To identify dominant alternatives, you generate a graphical plot of total annualized costs for total emissions reductions for all control alternatives identified in the BART analysis, and by identifying a "least-cost envelope" as shown in Figure 2. (A "least-cost envelope" represents the set of options that should be dominant in the choice of a specific option.)

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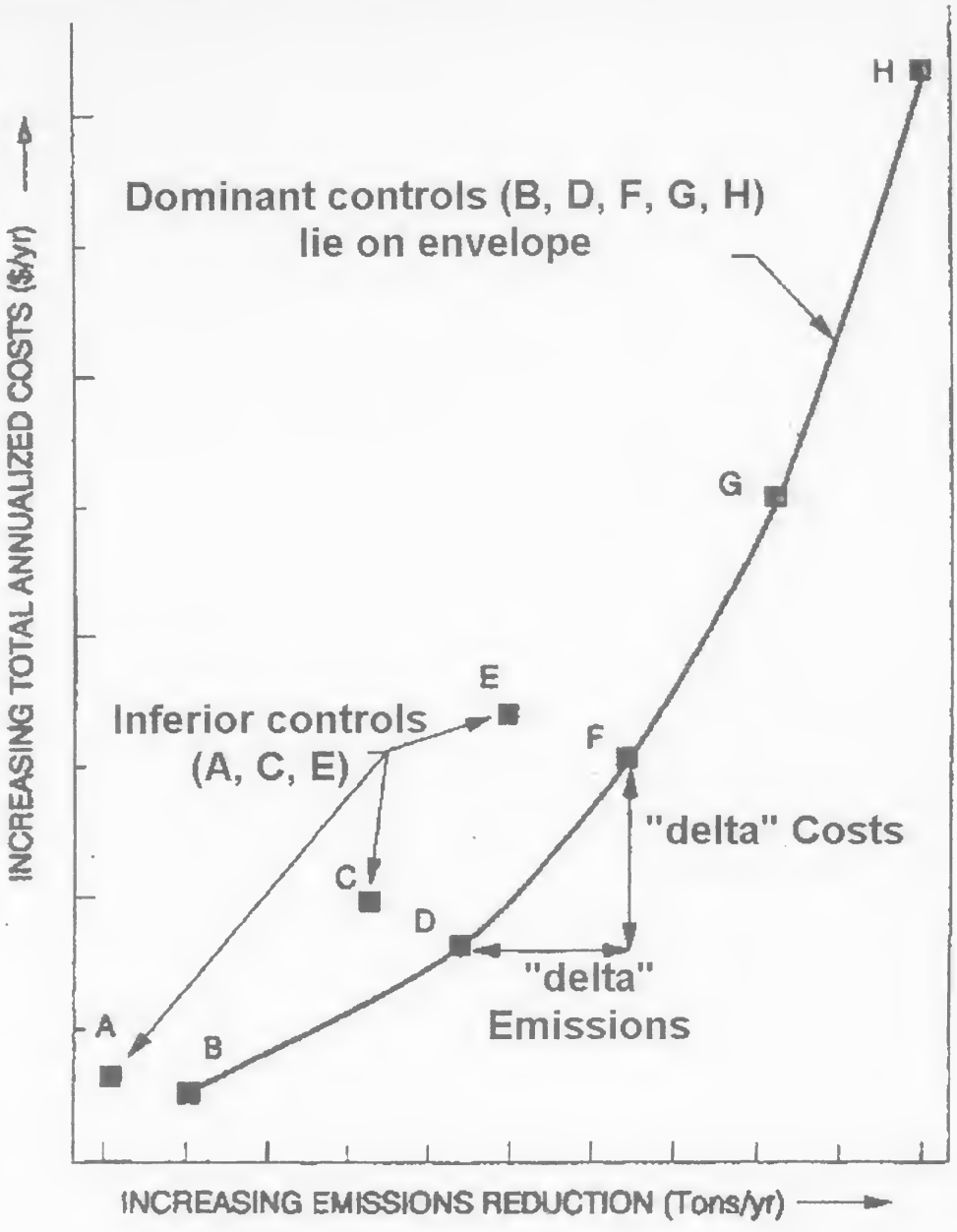

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Figure 2. Least-Cost Envelope

Example: Eight technically feasible control options for analysis are listed in the BART ranking. These are represented as A through H in Figure 2. The dominant set of control options, B, D, F, G, and H, represent the least-cost envelope, as we depict by the cost curve connecting them. Points A, C and E are inferior options, and you should not use them in calculating incremental cost effectiveness. Points A, C and E represent inferior controls because B will buy more emissions reductions for less money than A; and similarly, D and F will buy more reductions for less money than C and E, respectively.

3. In calculating incremental costs, you:

(1) Rank the control options in ascending order of annualized total costs,

(2) Develop a graph of the most reasonable smooth curve of the control options, as shown in Figure 2. This is to show the "least-cost envelope" discussed above; and

(3) Calculate the incremental cost effectiveness for each dominant option, which is the difference in total annual costs between that option and the next most stringent option, divided by the difference in emissions reductions between those two options. For example, using Figure 2, you would calculate incremental cost effectiveness

for the difference between options B and D, options D and F, options F and G, and options G and H.

4. A comparison of incremental costs can also be useful in evaluating the viability of a specific control option over a range of efficiencies. For example, depending on the capital and operational cost of a control device, total and incremental cost may vary significantly (either increasing or decreasing) over the operational range of a control device. Also, the greater the number of possible control options that exist, the more weight should be given to the incremental costs vs. average costs.

5. In addition, when you evaluate the average or incremental cost effectiveness of a control alternative, you should make reasonable and supportable assumptions regarding control efficiencies. An unrealistically low assessment of the emission reduction potential of a certain technology could result in inflated cost-effectiveness figures.

g. What Other Information Should I Provide in the Cost Impacts Analysis?

You should provide documentation of any unusual circumstances that exist for the source that would lead to cost-effectiveness estimates that would exceed that for recent retrofits. This is especially important in cases where recent retrofits have cost-effectiveness values that are within what has been considered a reasonable range, but your analysis concludes that costs for the source being analyzed are not considered reasonable. (A reasonable range would be a range that is consistent with the range of cost effectiveness values used in other similar permit decisions over a period of time.)

Example: In an arid region, large amounts of water are needed for a scrubbing system. Acquiring water from a distant location could greatly increase the cost effectiveness of wet scrubbing as a control option.

h. Impact Analysis Part 2: How Should I Analyze and Report Energy Impacts?

1. You should examine the energy requirements of the control technology and determine whether the use of that technology results in any significant or unusual energy penalties or benefits. A source owner may, for example, benefit from the combustion of a concentrated gas stream rich in volatile organic compounds; on the other hand, more often extra fuel or electricity is required to power a control device or incinerate a dilute gas stream. If such benefits or penalties exist, they should be quantified and included in the cost analysis. Because energy penalties or benefits can usually be quantified in terms of additional cost or income to the source, the energy impacts analysis can, in most cases, simply be factored into the cost impacts analysis. However, certain types of control technologies have inherent energy penalties associated with their use. While you should quantify these penalties, so long as they are within the normal range for the technology in question, you should not consider such penalties to be an adequate justification for eliminating that technology from consideration.

2. Your energy impact analysis should consider only direct energy consumption and not indirect energy impacts. For example, you could estimate the direct energy impacts of the control alternative in units of energy consumption at the source (*e.g.*, BTU, kWh, barrels of oil, tons of coal). The energy requirements of the control options should be shown in terms of total (and in certain cases, also incremental) energy costs per ton of pollutant removed. You can then convert these units into dollar costs and, where appropriate, factor these costs into the control cost analysis.

3. You generally do not consider indirect energy impacts (such as energy to produce raw materials for construction of control equipment). However, if you determine, either independently or based on a showing by the source owner, that the indirect energy impact is unusual or significant and that the impact can be well quantified, you may consider the indirect impact.

4. The energy impact analysis may also address concerns over the use of locally scarce fuels. The designation of a scarce fuel may vary from region to region. However, in general, a scarce fuel is one which is in short supply locally and can be better used for alternative purposes, or one which may not be reasonably available to the source either at the present time or in the near future.

5. Finally, the energy impacts analysis may consider whether there are relative differences between alternatives regarding the use of locally or regionally available coal, and whether a given alternative would result in significant economic disruption or unemployment. For example, where two options are equally cost effective and achieve equivalent or similar emissions reductions, one option may be preferred if the other alternative results in significant disruption or unemployment.

i. Impact Analysis Part 3: How Do I Analyze "Non-Air Quality Environmental Impacts?'

1. In the non-air quality related environmental impacts portion of the BART analysis, you address environmental impacts other than air quality due to emissions of the pollutant in question. Such environmental impacts include solid or hazardous waste generation and discharges of polluted water from a control device.

2. You should identify any significant or unusual environmental impacts associated with a control alternative that have the potential to affect the selection or elimination of a control alternative. Some control technologies may have potentially significant secondary environmental impacts. Scrubber effluent, for example, may affect water quality and land use. Alternatively, water availability may affect the feasibility and costs of wet scrubbers. Other examples of secondary environmental impacts could include hazardous waste discharges, such as spent catalysts or contaminated carbon. Generally, these types of environmental concerns become important when sensitive site-specific receptors exist or when the incremental emissions reductions potential of the more stringent control is only marginally greater than the next most-effective option. However, the fact that a control device creates liquid and solid waste that must be disposed of does not necessarily argue against selection of that technology as BART, particularly if the control device has been applied to similar facilities elsewhere and the solid or liquid waste is similar to those other applications. On the other hand, where you or the source owner can show that unusual circumstances at the proposed facility create greater problems than experienced elsewhere, this may provide a basis for the elimination of that control alternative as BART.

3. The procedure for conducting an analysis of non-air quality environmental impacts should be made based on a consideration of site-specific circumstances. It is not necessary to perform this analysis of environmental impacts for the entire list of technologies you ranked in Step 3, if you propose to adopt the most stringent alternative. In general, the analysis need only address those control alternatives with any significant or unusual environmental impacts that have the potential to affect the selection of a control alternative, or elimination of a more stringent control alternative. Thus, any important relative environmental impacts (both positive and negative) of

alternatives can be compared with each other.

4. In general, the analysis of impacts starts with the identification and quantification of the solid, liquid, and gaseous discharges from the control device or devices under review. Initially, you should perform a qualitative or semi-quantitative screening to narrow the analysis to discharges with potential for causing adverse environmental effects. Next, you should assess the mass and composition of any such discharges and quantify them to the extent possible, based on readily-available information. You should also assemble pertinent information about the public or environmental consequences of releasing these materials.

j. What Are Examples of Non-Air Quality Environmental Impacts?

The following are examples of how to conduct non-air quality environmental impacts:

(1) Water Impact

You should identify the relative quantities of water used and water pollutants produced and discharged as a result of the use of each alternative emission control system relative to the most stringent alternative. Where possible, you should assess the effect on ground water and such local surface water quality parameters as ph, turbidity, dissolved oxygen, salinity, toxic chemical levels, temperature, and any other important considerations. The analysis should consider whether applicable water quality standards will be met and the availability and effectiveness of various techniques to reduce potential adverse effects.

(2) Solid Waste Disposal Impact

You should compare the quality and quantity of solid waste (*e.g.*, sludges, solids) that must be stored and disposed of or recycled as a result of the application of each alternative emission control system with the quality and quantity of wastes created with the most stringent emission control system. You should consider the composition and various other characteristics of the solid waste (such as permeability, water retention, rewatering of dried material, compression strength, leachability of dissolved ions, bulk density, ability to support vegetation growth and hazardous characteristics) which are significant with regard to potential surface water pollution or transport into and contamination of subsurface waters or aquifers.

(3) Irreversible or Irretrievable Commitment of Resources

You may consider the extent to which the alternative emission control systems may involve a trade-off between short-term environmental gains at the expense of long-term environmental losses and the extent to which the alternative systems may result in irreversible or irretrievable commitment of resources (for example, use of scarce water resources).

(4) Other Adverse Environmental Impacts

You may consider significant differences in noise levels, radiant heat, or dissipated static electrical energy. Other examples of non-air quality environmental impacts would include hazardous waste discharges such as spent catalysts or contaminated carbon. Generally, these types of environmental concerns become important when the plant is located in an area that is particularly sensitive to environmental degradation and when the incremental emissions reductions potential of the most stringent control option is only marginally greater than the next most-effective option, but the environmental impact is of greater concern.

(5) Benefits to the Environment

It is important to consider relative differences between options regarding their beneficial impacts to non-air quality-related environmental media. For example, you may consider whether a given control option results in less deposition of pollutants, in particular nitrogen compounds, to nearby sensitive water bodies (lakes, rivers, coastal waters). You may also consider effects which may be unique to high elevation ecosystems. In some eastern Class I areas with elevations above 1000 meters, there may be direct deposition of acid and nitrogen compounds on vegetation and soil from cloud impacts. Growth rates and competition between alien and native species might be affected by pollution loadings as well. As part of the consultation requirement between States and the Federal Land Managers in 40 CFR 51.308(i)(2), we expect the Federal Land Managers to provide information on non-air quality indicators to be considered in determining BART and other implementation strategies. The States should also consider such information available from other sources, such as public comments.

5. Step 5: How Should I Determine Visibility Impacts in the BART Determination?

The following is the approach to determine visibility impacts (the degree of visibility improvement for each source subject to BART) in the BART determination. You may elect to conduct the modeling or require the source to conduct the modeling. If modeling is to be conducted for receptors greater than 200 km from the emission unit, a modeling protocol is required. If the source is conducting the modeling, you should review and approve or disapprove of the source's analysis. Note that distances from the actual BART-eligible emission unit that is modeled to each Class I area should be measured from the nearest point in the Class I area. All receptors in the Class I area should be analyzed. The State should bear in mind that, for sources 50 km from a Class I area, some receptors within that Class I area may be less than 50 km from the source while other receptors within that same Class I area may be greater than 50 km from the same source; this situation may result in two different modeling approaches for the same Class I area and source, depending upon the State's chosen method for modeling sources less than 50 km.

1. For receptors in the Class I area that are greater than or equal to 50 km from the emission unit:

(1) Run CALPUFF, at pre-control allowable emission rates and post-control allowable emission rates.

For CALPUFF setup (meteorological data and parameter settings), we recommend following EPA's Interagency Workgroup on Air Quality Modeling (IWAQM) Phase 2 Summary Report and Recommendations for Modeling Long Range Transport Impacts. Choose an emission control level representing the most stringent control option available for the post-control scenario.

(2) Tabulate Results;

(i) Calculate 24-hr values for each receptor as the change in deciviews compared against natural visibility conditions (conditions that are estimated to exist in a given Class I area in the absence of human-caused impairment). Tabulate pre-control and post-control results.

(b) Make the net visibility improvement determination:

(i) Assess the visibility improvement based on the change in visibility impact of the average 20% worst modeled days between the pre-control and post-control emission rates. For example, if average impact from the 20% worst days

for a source's pre-control emission rates for a particular receptor is a change of 1.0 deciviews, and its post-control impact is 0.4 deciviews, the net visibility improvement is 0.6 deciviews (60%). All receptors in the Class I area should be analyzed.

2. For sources that have not determined their degree of visibility improvement under 1. above and where all receptors at a Class I area are less than 50 km from the BART-eligible unit:

(1) Estimate visibility impacts for pre-control and post-control emissions. Give consideration to CALPUFF or other EPA-approved methods or local scale models for determining visibility impacts for pre-controlled and post-controlled emissions.

(2) Estimate the degree of visibility improvement expected.

Note that each of the modeling options may be supplemented with source apportionment data or source apportionment modeling that is acceptable to the State and the EPA regional office.

F. How Do I Select the "Best" Alternative, Using the Results of Steps 1 Through 5?

1. Summary of the Impacts Analysis

From the alternatives you ranked in Step 3, you should develop a chart (or charts) displaying for each of the ranked alternatives:

(1) Expected emission rate (tons per year, pounds per hour);

(2) Emissions performance level (*e.g.*, percent pollutant removed, emissions per unit product, lb/MMbtu, ppm);

(3) Expected emissions reductions (tons per year);

(4) Costs of compliance—total annualized costs ($), cost effectiveness ($/ton), and incremental cost effectiveness ($/ton);

(5) Energy impacts (indicate any significant energy benefits or disadvantages);

(6) Non-air quality environmental impacts (includes any significant or unusual other media impacts, *e.g.*, water or solid waste), both positive and negative; and

(7) Modeled visibility impacts.

2. Selecting a "Best" Alternative

1. As discussed above, we are seeking comment on two alternative approaches for evaluating control options for BART. The first involves a sequential process for conducting the impacts analysis that begins with a complete evaluation of the most stringent control option. Under this approach, you determine that the most stringent alternative in the ranking does not impose unreasonable costs of compliance, taking into account both average and incremental costs, then the analysis begins with a presumption that this level is selected. You then proceed to considering whether energy and non-air quality environmental impacts would justify selection of an alternative control option. If there are no outstanding issues regarding energy and non-air quality environmental impacts, the analysis is ended and the most stringent alternative is identified as the "best system of continuous emission reduction."

2. If you determine that the most stringent alternative is unacceptable due to such impacts, you need to document the rationale for this finding for the public record. Then, the next most-effective alternative in the listing becomes the new control candidate and is similarly evaluated. This process continues until you identify a technology which does not pose unacceptable costs of compliance, energy and/or non-air quality environmental impacts.

3. We also request comment on an alternative decision-making approach that would not begin with an evaluation of the most stringent control option. For example, you could choose to begin the BART determination process by evaluating the least stringent, technically feasible control option or by evaluating an intermediate control option drawn from the range of technically feasible control alternatives. Under this approach, you would then consider the additional emissions reductions, costs, and other effects (if any) of successively more stringent control options. Under such an approach, you would still be required to (1) display and rank all of the options in order of control effectiveness and to identify the average and incremental costs of each option; (2) consider the energy and non-air quality environmental impacts of each option; and (3) provide a justification for adopting the technology that you select as the "best" level of control, including an explanation as to why you rejected other more stringent control technologies.

4. In the case where you are conducting a BART determination for two regulated pollutants on the same source, if the result is two different BART technologies that do not work well together, you could then substitute a different technology or combination of technologies, provided that they achieve at least the same emissions reductions for each pollutant.

3. In Selecting a "Best" Alternative, Should I Consider the Affordability of Controls?

1. Even if the control technology is cost effective, there may be cases where the installation of controls would affect the viability of continued plant operations.

2. As a general matter, for plants that are essentially uncontrolled at present, and emit at much greater levels per unit of production than other plants in the category, we are unlikely to accept as BART any analysis that preserves a source's uncontrolled status. While this result may predict the shutdown of some facilities, we believe that the flexibility provided in the regional haze rule for an alternative reduction approach, such as an emissions trading program, will minimize the likelihood of forced shutdowns.

3. Nonetheless, we recognize there may be unusual circumstances that justify taking into consideration the conditions of the plant and the economic effects of requiring the use of a given control technology. These effects would include effects on product prices, the market share, and profitability of the source. We do not intend, for example, that the most stringent alternative must always be selected, if that level would cause a plant to shut down, while a slightly lesser degree of control would not have this effect. Where there are such unusual circumstances that are judged to have a severe effect on plant operations, you may take into consideration the conditions of the plant and the economic effects of requiring the use of a control technology. Where these effects are judged to have a severe impact on plant operations you may consider them in the selection process, so long as you provide an economic analysis that demonstrates, in sufficient detail for a meaningful public review, the specific economic effects, parameters, and reasoning. (We recognize that this review process must preserve the confidentiality of sensitive business information). Any analysis should consider whether other competing plants in the same industry may also be required to install BART controls.

4. Sulfur Dioxide Limits for Utility Boilers

You must require 750 MW power plants to meet specific control levels of either 95% control, or controls in the range of .1 to .15 lbs/MMBtu, for each EGU greater than 250 MW, unless you determine that an alternative control level is clearly justified based on a careful consideration of the statutory

factors. Thus, for example, if the source convincingly demonstrates unique circumstances affecting its ability to cost-effectively reduce its emissions, you should take that into account in determining whether the presumptive levels of control are appropriate for that facility. For an EGU greater than 250 MW in size, but located at a power plant smaller than 750 MW in size, you should similarly find that such controls are cost-effective as a general matter when taking into consideration the costs of compliance in your BART analysis. You should consider these control levels as the minimum that may be required. While these levels may represent current control capabilities, we expect that scrubber technology will continue to improve and control costs continue to decline. You should be sure to consider the level of control that is currently best achievable at the time that you are conducting your BART analysis.

5. Nitrogen Oxide Limits for Utility Boilers

You should establish specific numerical limits for NO_X control for each BART determination. For sources currently using selective catalytic reduction (SCR) or selective non-catalytic reduction (SNCR) for part of the year, you should presume that use of those same controls year-round is highly cost-effective.

For all other utility boilers, you should also presume that a NO_X emission limit of 0.2 lbs/MMBtu is cost-effective. Most utility boilers can achieve a degree of removal of 0.2 lbs/MMBtu with relatively inexpensive controls such as low NO_X burners and combustion control. For those sources who cannot achieve this control level without SCR, you may find SCR to be appropriate if you finds visibility impacts that are of high enough concern to warrant the additional capital cost.

V. Enforceable Limits/Compliance Date

To complete the BART process, you must establish enforceable emission limits and require compliance within a given period of time. In particular, you must establish an enforceable emission limit for each subject emission unit at the source and for each pollutant subject to review that is emitted from the source. In addition, you must require compliance with the BART emission limitations no later than 5 years after EPA approves your regional haze SIP. If technological or economic limitations in the application of a measurement methodology to a particular emission unit would make an emissions limit infeasible, you may prescribe a design, equipment, work practice, operation standard, or combination of these types of standards. You should ensure that any BART requirements are written in a way that clearly specifies the individual emission unit(s) subject to BART review. Because the BART requirements are "applicable" requirements of the CAA, they must be included as title V permit conditions according to the procedures established in 40 CFR part 70 or 40 CFR part 71.

Section 302(k) of the CAA requires emissions limits such as BART to be met on a continuous basis. Although this provision does not necessarily require the use of continuous emissions monitoring (CEMs), it is important that sources employ techniques that ensure compliance on a continuous basis. Monitoring requirements generally applicable to sources, including those that are subject to BART, are governed by other regulations. See, *e.g.*, 40 CFR part 64 (compliance assurance monitoring); 40 CFR 70.6(a)(3) (periodic monitoring); 40 CFR 70.6(c)(1) (sufficiency monitoring). Note also that while we do not believe that CEMs would necessarily be required for all BART sources, the vast majority of electric generating units already employ CEM technology for other programs, such as the acid rain program. In addition, emissions limits must be enforceable as a practical matter (contain appropriate averaging times, compliance verification procedures and recordkeeping requirements). In light of the above, the permit must:

- Be sufficient to show compliance or noncompliance (*i.e.*, through monitoring times of operation, fuel input, or other indices of operating conditions and practices); and
- Specify a reasonable averaging time consistent with established reference methods, contain reference methods for determining compliance, and provide for adequate reporting and recordkeeping so that air quality agency personnel can determine the compliance status of the source.

VI. Emission Trading Program Overview

40 CFR 51.308(e)(2) allows States the option of implementing an emissions trading program or other alternative measure instead of requiring BART. This option provides the opportunity for achieving better environmental results at a lower cost than under a source-by-source BART requirement. A trading program must include participation by BART sources, but may also include sources that are not subject to BART. The program would allow for implementation during the first implementation period of the regional haze rule (that is, by the year 2018) instead of the 5-year compliance period noted above. In this section of the guidance, we provide an overview of the steps in developing a trading program [14] consistent with 40 CFR 51.308(e)(2).

A. What Are the General Steps in Developing an Emission Trading Program?

1. The basic steps are to:

(1) Develop emission budgets;

(2) Allocate emission allowances to individual sources; and

(3) Develop a system for tracking individual source emissions and allowances. (For example, procedures for transactions, monitoring, compliance and other means of ensuring program accountability).

2. A good example of an emissions trading program is the acid rain program under title IV of the CAA. The acid rain program is a national program—it establishes a national emissions cap, allocates allowances to individual sources, and allows trading of allowances between all covered sources in the United States. The Ozone Transport Commission's NO_X Memorandum of Understanding, and the NO_X SIP call both provide for regional trading programs. The recently proposed Interstate Air Quality Rule (69 FR 4566, January 30, 2004) would establish statewide emissions budgets and allows for trading programs to achieve the budgets. Other trading programs generally have applied only to sources within a single State. In the proposed Interstate Air Quality rule (IAQR) (69 FR 4566, January 30, 2004), we requested comment on whether compliance with the IAQR by affected EGUs in affected States would satisfy, for those sources, the BART requirements of the CAA, provided that a State imposes the full amount of SO2 and NO_X emissions reductions on EGUs that the IAQR deemed highly cost effective. We are in the process of evaluating those comments. Based on our current evaluation, we believe the IAQR, as proposed, is clearly better than BART for those affected EGUs in the affected States which we propose to cover under the IAQR. We thus expect that the final IAQR would satisfy the BART requirements for affected EGUs that are covered pursuant to the final IAQR.

3. In creating a trading program as an alternative to source-specific BART, a

[14] We focus in this section on emission cap and trade programs which we believe will be the most common type of economic incentive program developed as an alternative to BART.

State may wish to work with other States through a regional planning organization to develop a regional, multi-state program. Such a program would provide greater opportunities for emission trading. Coordination through the Regional Planning Organization (RPO) would ensure compatibility of the core elements of the trading program—budgets, allocations, tracking, etc.—between the SIPs and TIPs of participating States and Tribes. The WRAP has adopted such a regional market trading program as a backstop to its overall emission reduction program for SO_2. Although regional trading programs require more interstate coordination, we have expertise that we can offer to States wishing to pursue such a program.

B. What Are Emission Budgets and Allowances?

An emissions budget is a limit, for a given source population, on the total emissions amount [15] that may be emitted by those sources over a State or region. An emission budget is also referred to as an "emission cap."

In general, the emission budget is subdivided into source-specific amounts that we refer to as "allowances." Generally, each allowance equals one ton of emissions. Sources must hold allowances for all emissions of the pollutant covered by the program that they emit. Once you allocate the allowances, source owners have flexibility in determining how they will meet their emissions limit. Source owners have the options of:

(1) Emitting at the level of allowances they are allocated (for example, by controlling emissions or curtailing operations),

(2) Emitting at amounts less than the allowance level, thus freeing up allowances that may be used by other sources owned by the same owner, or sold to another source owner, or

(3) Emitting at amounts greater than the allowance level, and purchasing allowances from other sources or using excess allowances from another plant under the same ownership.

C. What Criteria Must Be Met in Developing an Emission Trading Program as an Alternative to BART?

Under the regional haze rule, an emission trading program must achieve "greater reasonable progress" (that is, greater visibility improvement) than would be achieved through the installation and operation of source-specific BART. The "greater reasonable progress" demonstration involves the following steps, which are discussed in more detail below:

(1) Identify the sources that are subject to BART,

(2) Calculate the emissions reductions that would be achieved if BART were installed and operated on sources subject to BART,

(3) Demonstrate whether your emission budget achieves emission levels that are equivalent to or less than the emissions levels that would result if BART were installed and operated,

(4) Analyze whether implementing a trading program in lieu of BART would likely lead to differences in the geographic distribution of emissions within a region, and

(5) Demonstrate that the emission levels will achieve greater progress in visibility than would be achieved if BART were installed and operated on sources subject to BART.

1. How Do I Identify Sources Subject to BART?

For a trading program, you would identify sources subject to BART in the same way as we described in sections II and III of these guidelines.

2. How Do I Calculate the Emissions Reductions That Would Be Achieved if BART Were Installed and Operated on These Sources?

1. For a trading program under 51.308(e)(2), you may identify these emissions reductions by:

(1) Conducting a case-by-case analysis for each of the sources, using the procedures described above in these guidelines in sections II through V;

(2) Conducting an analysis for each source category that takes into account the available technologies, the costs of compliance, the energy impacts, the non-air quality environmental impacts, the pollution control equipment in use, and the remaining useful life, on a category-wide basis; or

(3) Conducting an analysis that combines considerations on both source-specific and category-wide information.

2. For a category-wide analysis of available control options, you develop cost estimates and estimates of energy and non-air quality environmental impacts that you judge representative of the sources subject to BART for a source category as a whole, rather than analyze each source that is subject to BART. The basic steps of a category-wide analysis are the same as for a source-specific analysis. You identify technically feasible control options and rank them according to control stringency. Next, you calculate the costs and cost effectiveness for each control option, beginning with the most stringent option. Likely, the category-wide estimate will represent a range of cost and cost-effectiveness values rather than a single number. Next, you evaluate the expected energy and non-air quality impacts (both positive and negative impacts) to determine whether these impacts preclude selection of a given alternative.

3. We note that States and RPOs have the flexibility to adopt an approach to the category-wide analysis of BART that would involve the evaluation of different levels of BART control options (*e.g.*, all measures less than $1000/ton vs. all measures less than $2000/ton vs. all measures less than $3000/ton) through an iterative process of assessing relative changes in cumulative visibility impairment. For example, States or regional planning organizations could use $1000 or $2000/ton as an initial cutoff for selecting reasonable control options. The States or regional planning organizations could then compare the across-the-board regional emissions and visibility changes resulting from the implementation of the initial control option and that resulting from the implementation of control options with a $3000/ton cutoff (or $1500/ton, etc). This approach would allow States and other stakeholders to understand the visibility differences among BART control options achieving less cost-effective or more cost-effective levels of overall control.

3. For a Cap and Trade Program, How Do I Demonstrate That My Emission Budget Results in Emission Levels That Are Equivalent To or Less Than the Emissions Levels That Would Result if BART Were Installed and Operated?

Emissions budgets must address two criteria. First, you must develop an emissions budget for a future year [16] which ensures reductions in actual emissions that achieve greater reasonable visibility progress than BART. This will generally necessitate development of a "baseline forecast" of emissions for the population of sources included within the budget. A baseline forecast is a prediction of the future emissions for that source population in absence of either BART or the alternative trading program. Second, you must take into consideration the

[15] An emission budget generally represents a total emission amount for a single pollutant such as SO_2. As noted in the preamble to the regional haze rule (64 FR 35743, July 1, 1999) we believe that unresolved technical difficulties preclude inter-pollutant trading at this time.

[16] As required by 40 CFR 51.308(e)(2)(iii), emissions reductions must take place during the period of the first long-term strategy for regional haze. This means the reductions must take place no later than the year 2018.

timing of the emission budget relative to the timetable for BART. If the implementation timetable for the emission trading program is a significantly longer period than the 5-year time period for BART implementation, you should establish budgets for interim years that ensure steady and continuing progress in emissions reductions.

In evaluating whether the program milestone for the year 2018 provides for a BART-equivalent or better emission inventory total, you conduct the following steps:

(1) Identify the source population included within the budget, which must include all BART sources and may include other sources,

(2) For sources included within the budget, develop a base year [17] emissions inventory for stationary sources included within the budget, using the most current available emission inventory,

(3) Develop a future emissions inventory for the milestone year (in most cases, the year 2018), that is, an inventory of projected emissions for the milestone year in the absence of BART or a trading program,

(4) Calculate the reductions from the forecasted emissions if BART were installed on all sources subject to BART,

(5) Subtract this amount from the forecasted total, and

(6) Compare the budget you have selected and confirm that it does not exceed this level of emissions.

Example: For a given region for which a budget is being developed for SO_2, the most recent inventory is for the year 2002. The budget you propose for the trading program is 1.2 million tons. The projected emissions inventory total for the year 2018, using the year 2002 inventory and growth projections, is 4 million tons per year. Application of BART controls on the population of sources subject to BART would achieve 2.5 million tons per year of reductions. Subtracting this amount from the project inventory yields a value of 1.5 million tons. Because your selected budget of 1.2 million tons is less than this value, it achieves a better than a BART-equivalent emission total.

4. How Do I Ensure That Trading Budgets Achieve "Greater Reasonable Progress?"

In some cases, you may be able to demonstrate that a trading program that achieves greater emissions progress may also achieve greater visibility progress without necessarily conducting a detailed dispersion modeling analysis. This could be done, for example, if you can demonstrate, using economic models, that the likely distribution of emissions when the trading program is implemented would not be significantly different than the distribution of emissions if BART was in place. If distribution of emissions is not substantially different than under BART, and greater emissions reductions are achieved, then the trading program would presumptively achieve "greater reasonable progress."

If the distribution of emissions is different under the two approaches, then the possibility exists that the trading program, even though it achieves greater emissions reductions, may not achieve better visibility improvement. Where this is the case, then you must conduct dispersion modeling to determine the visibility impact of the trading alternative. The dispersion modeling should determine differences in visibility between BART and the trading program for each impacted Class I area, for the worst and best 20 percent of days. The modeling should identify:

—The estimated difference in visibility conditions under the two approaches for each Class I area,

—The average difference in visibility over all Class I areas impacted by the region's emissions. [For example, if six Class I areas are in the region impacted, you would take the average of the improvement in deciviews over those six areas].

The modeling study would demonstrate "greater reasonable progress" if both of the following two criteria are met:

—Visibility does not decline in any Class I area, and

—Overall improvement in visibility, determined by comparing the average differences over all affected Class I areas.

Example: Assume that ten Class I areas are affected. You would take the average deciview improvement from BART for each of the ten Class I areas—one value for each Class I area—and average them together. If the ten values are 2.5, 3.9, 4.1, 1.7, 3.3, 4.5, 3.1, 3.6, 3.8 and 4.5, then the average deciview improvement from BART for the ten Class I areas is 3.5 deciviews. Therefore, the average of the ten deciview values for the trading program must be 3.5 deciviews or more.

5. How Do I Allocate Emissions to Sources?

Emission allocations must be consistent with the overall budget that you provide to us. We believe it is not appropriate for us to require a particular process and criteria for individual source allocations, and thus we will not dictate how to allocate allowances. When developing an allocation methodology, the State or regional planning organization should consult with any Indian Tribes located within the trading area, regardless of whether BART-eligible sources are currently on Tribal lands. We will provide information on allocation processes to State, Tribal, and local agencies, and to RPOs.

6. What Provisions Must I Include in Developing a System for Tracking Individual Source Emissions and Allowances?

1. In general, we expect regional haze trading programs to contain the same degree of rigor as trading programs for criteria pollutants. In terms of ensuring the overall integrity and enforceability of a trading program, we expect that you will generally follow the guidance already being developed for other economic incentive programs (EIPs) in establishing a trading program for regional haze. In addition, we expect that any future trading programs developed by States and/or regional planning organizations will be developed in consultation with a broad range of stakeholders.

2. There are two EPA-administered emission trading programs that we believe provide good examples of the features of a well-run trading program. These two programs provide considerable information that would be useful to the development of regional haze trading programs as an alternative to BART.

3. The first example is our acid rain program under title IV of the CAA. Phase I of the acid rain reduction program began in 1995. Under phase I, reductions in the overall SO_2 emissions were required from large coal-burning boilers in 110 power plants in 21 midwest, Appalachian, southeastern and northeastern States. Phase II of the acid rain program began in 2000, and required further reductions in the SO_2 emissions from coal-burning power plants. Phase II also extended the program to cover other lesser-emitting sources. Allowance trading is the centerpiece of EPA's acid rain program for SO_2. You will find information on this program in:

(1) Title IV of the CAA Amendments (1990),

(2) 40 CFR part 73 at 58 FR 3687 (January 1993),

(3) EPA's acid rain Web site, at *www.epa.gov/acidrain/trading.html.*

[17] See 2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, PM2.5 and Regional Haze Programs. memorandum of November 18, 2002, from Lydia Wegman and Peter Tsirigotis. This document is available at the following Web site: *http://www.epa.gov/ttn/oarpg/t1/memoranda/2002bye_gm.pdf.*

4. The second example is the rule for reducing regional transport of ground-level ozone (NO_X SIP Call). The NO_X SIP Call requires a number of eastern, midwestern, and southeastern States and the District of Columbia to submit SIPs that address the regional transport of ground-level ozone through reductions in NO_X. States may meet the requirements of the rule by participating in an EPA-administered trading program. To participate in the program, the States must submit rules sufficiently similar to a model trading rule promulgated by the Agency (40 CFR part 96). More information on this program is available in:

(1) The preamble and rule in the **Federal Register** at 63 FR 57356 (October 1998),

(2) The NO_X compliance guide, available at *www.epa.gov/acidrain/modlrule/main.html#126,*

(3) Fact sheets for the rule, available at *www.epa.gov/ttn/rto/sip/related.html#prop,*

(4) Additional information available on EPA's Web site, at *www.epa.gov/acidrain/modlrule/main.html.*

5. A third program that provides a good example of trading programs is the Ozone Transport Commission (OTC) NO_X budget program. The OTC NO_X budget program was created to reduce summertime NO_X emissions in the northeast United States. The program caps NO_X emissions for the affected States at less than half of the 1990 baseline emission level of 490,000 tons, and uses trading to achieve cost-effective compliance. For more information on the trading provisions of the program, see:

(1) Memorandum of Understanding (MOU), available at *www.sso.org/otc/att2.HTM,*

(2) Fact sheets available at *www.sso.org/otc/Publications/327facts.htm,*

(3) Additional information, available at *www.epa.gov/acidrain/otc/otcmain.html.*

6. We are including in the docket for this rulemaking a detailed presentation that has been used by EPA's Clean Air Markets Division to explain the provisions of NO_X trading programs with State and local officials. This presentation provides considerable information on EPA's views on sound trading programs.

7. We recognize that it is desirable to minimize administrative burdens for sources that may be subject to the provisions of several different emission trading programs. We believe that it is desirable for any emission trading program for BART to use existing tracking systems to the extent possible. We believe that any trading program established by States for BART should be fully consistent with the recently proposed NO_X/SO_X Transport rule. Should the transport rule not be in effect for the same time period or in the same States as any BART trading program, we recommend that States and/or regional planning organizations should conduct additional technical analyses to determine whether the time periods for tracking of allowances under other existing programs (*i.e.*, annual allowances for SO_2 for the acid rain program, and allowances for the ozone season for NO_X) are appropriate for purposes of demonstrating greater reasonable regional progress vis a vis BART. Further, we recommend that you conduct any such analysis in conjunction with the timelines for development of SIPs for regional haze.

7. How Would a Regional Haze Trading Program Interface With the Requirements for "Reasonably Attributable" BART Under § 51.302 of the Regional Haze Rule?

1. If a State elects to impose case-by-case BART emission limitations according to 40 CFR 51.308(e)(1) of the regional haze rule, then there should be no difficulties arising from the implementation of requirement for "reasonably attributable" BART under 40 CFR 51.302. However, if a State chooses an alternative measure, such as an emissions trading program, in lieu of requiring BART emissions limitation on specific sources, then the requirement for BART is not satisfied until alternative measures reduce emissions sufficient to make "more reasonable progress than BART." Thus, in that period between implementation of an emissions trading program and the satisfaction of the overall BART requirement, an individual source could be required to install BART for reasonably attributable impairment under 40 CFR 51.302. Because such an overlay of the requirements under 40 CFR 51.302 on a trading program under 40 CFR 51.308 might affect the economic and other considerations that were used in developing the emissions trading program, the regional haze rule allows for a "geographic enhancement" under 40 CFR 51.308. This provision addresses the interface between a regional trading program and the requirement under 40 CFR 51.302 regarding BART for reasonably attributable visibility impairment. (See 40 CFR 51.308(e)(2)(v)).

2. We recognize the desirability of addressing any such issues at the outset of developing an emissions trading program to address regional haze. We note that the WRAP, the planning organization for the nine western States considering a trading program under 40 CFR 51.309 (which contains a similar geographic enhancement provision), has adopted policies which target use of the 51.302 provisions by the Federal Land Managers (FLMs). In this case, for the nine WRAP States, the FLMs have agreed that they will certify reasonable attributable impairment only under certain specific conditions. Under this approach, the FLMs would certify under 40 CFR 51.302 only if the regional trading program is not decreasing sulfate concentrations in a Class I area within the region. Moreover, the FLMs will certify impairment under 40 CFR 51.302 only where: (1) BART-eligible sources are located "near" that class I area and (2) those sources have not implemented BART controls. In addition, the WRAP is investigating other procedures for States to follow in responding to a certification of "reasonably attributable" impairment if an emissions trading approach is adopted to address the BART requirement based on the sources' impact on regional haze.

3. The specific pollutants and the magnitude of impacts under the regional haze rule and at specific Class I areas may vary in different regions of the country. We expect that each State through its associated regional planning organization will evaluate the need for geographic enhancement procedures within any adopted regional emissions trading program.

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Federal Register

Wednesday,
May 5, 2004

Part III

Department of Agriculture

Rural Development

Notice of Funds Availability (NOFA) Inviting Applications for the Renewable Energy Systems and Energy Efficiency Improvements Grant Program; Notice

DEPARTMENT OF AGRICULTURE

Rural Development

Notice of Funds Availability (NOFA) Inviting Applications for the Renewable Energy Systems and Energy Efficiency Improvements Grant Program

AGENCY: Rural Development, USDA.

ACTION: Notice.

SUMMARY: Rural Development announces the availability of up to $22.8 million in competitive grant funds for fiscal year (FY) 2004 to purchase renewable energy systems and make energy improvements for agricultural producers and rural small businesses. In order to be eligible for grant funds, the agricultural producer or rural small business must demonstrate financial need. The grant request must not exceed 25 percent of the eligible project costs.

DATES: Applications must be completed and submitted to the appropriate United States Department of Agriculture (USDA) State Rural Development Office postmarked no later than 75 calendar days after the date of the published notice. Applications postmarked after that date will be returned to the applicant with no action.

ADDRESSES: Submit proposals to the USDA State Rural Development Office where your project is located or, in the case of a rural small business, where you are headquartered. A list of the Energy Coordinators and State Rural Development Office addresses and telephone numbers follow. For further information about this solicitation, please contact the applicable State Office.

USDA State Rural Development Offices

Alabama

Chris Harmon, USDA Rural Development, Sterling Center, Suite 601, 4121 Carmichael Road, Montgomery, AL 36106–3683, (334) 279–3615.

Alaska

Dean Stewart, USDA Rural Development, 800 West Evergreen, Suite 201, Palmer, AK 99645–6539, (907) 761–7722.

Arizona

Gary Mack, USDA Rural Development, 3003 North Central Avenue, Suite 900, Phoenix, AZ 85012–2906, (602) 280–8717.

Arkansas

Shirley Tucker, USDA Rural Development, 700 West Capitol Avenue, Room 3416, Little Rock, AR 72201–3225, (501) 301–3280.

California

Charles Clendenin, USDA Rural Development, 430 G Street, Agency 4169, Davis, CA 95616–4169, (530) 792–5825.

Colorado

Linda Sundine, USDA Rural Development, 628 West 5th Street, Cortez, CO 81321, (720) 544–2929.

Delaware-Maryland

James Waters, USDA Rural Development, 4607 South Dupont Hwy., P.O. Box 400, Camden, DE 19934–0400, (302) 697–4324.

Florida/Virgin Islands

Joe Mueller, USDA Rural Development, 4440 NW. 25th Place, P.O. Box 147010, Gainesville, FL 32614–7010, (352) 338–3482.

Georgia

J. Craig Scroggs, USDA Rural Development, 333 Phillips Drive, McDonough, GA 30253, (678) 583–0866.

Hawaii

Tim O'Connell, USDA Rural Development, Federal Building, Room 311, 154 Waianuenue Avenue, Hilo, HI 96720, (808) 933–8313.

Idaho

Dale Lish, USDA Rural Development, 725 Jensen Grove Drive, Suite 1, Blackfoot, ID 83221, (208) 785–5840, Ext. 118.

Illinois

Cathy McNeal, USDA Rural Development, 2118 West Park Court, Suite A, Champaign, IL 61821, (217) 403–6210.

Indiana

Jerry Hay, USDA Rural Development, North Vernon Area Office, 2600 Highway 7 North, North Vernon, IN 47265, (812) 346–3411, Ext. 4.

Iowa

Jeff Kuntz, USDA Rural Development, Federal Building, Room 873, 210 Walnut Street, Des Moines, IA 50309, (641) 932–3031.

Kansas

Larry Carnahan, USDA Rural Development, P.O. Box 437, 115 West 4th Street, Altamont, KS 67330, (620) 784–5431.

Kentucky

Dewayne Easter, USDA Rural Development, 771 Corporate Drive, Suite 200, Lexington, KY 40503, (859) 224–7435.

Louisiana

Kevin Boone, USDA Rural Development, 3727 Government Street, Alexandria, LA 71302, (318) 473–7960.

Maine

Valarie Flanders, USDA Rural Development, 967 Illinois Avenue, Suite 4, P.O. Box 405, Bangor, ME 04402–0405, (207) 990–9168.

Massachusetts/Rhode Island/ Connecticut

Sharon Colburn, USDA Rural Development, 451 West Street, Suite 2, Amherst, MA 01002–2999, (413) 253–4303.

Michigan

Lee Bambusch, USDA Rural Development, 3001 Coolidge Road, Suite 200, East Lansing, MI 48823, (517) 324–5257.

Minnesota

David Gaffaney, USDA Rural Development, 375 Jackson Street, Suite 410, St. Paul, MN 55101–1853, (651) 602–7814.

Mississippi

Charlie Joiner, USDA Rural Development, Federal Building, Suite 831, 100 West Capitol Street, Jackson, MS 39269, (601) 965–5457.

Missouri

D. Clark Thomas, USDA Rural Development, 601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, (573) 876–0995.

Montana

John Guthmiller, USDA Rural Development, 900 Technology Blvd., Unit 1, Suite B, P.O. Box 850, Bozeman, MT 59771, (406) 585–2540.

Nebraska

Cliff Kumm, USDA Rural Development, 201 North, 25 Street, Beatrice, NE 68310, (402) 223–3125.

Nevada

Dan Johnson, USDA Rural Development, 555 West Silver Street, Suite 101, Elko, NV 89801, (775) 738–8468, Ext. 112.

New Hampshire

See Vermont.

New Jersey

Michael Kelsey, USDA Rural Development, 5th Floor North, Suite 500, 8000 Midlantic Drive, Mt. Laurel, NJ 08054, (856) 787–7700, Ext. 7751.

New Mexico

Eric Vigil, USDA Rural Development, 6200 Jefferson Street, NE., Room 255, Albuquerque, NM 87109, (505) 761–4952.

New York

Scott Collins, USDA Rural Development, The Galleries of Syracuse, Suite 357, 441 South Salina Street, Syracuse, NY 13202–2541, (315) 477–6409.

North Carolina

H. Rossie Bullock, USDA Rural Development, P.O. Box 7426, Lumberton, NC 28359–7426, (910) 739–3349.

North Dakota

Dale Van Eckhout, USDA Rural Development, Federal Building, Room 208, 220 East Rosser Avenue, P.O. Box 1737, Bismarck, ND 58502–1737, (701) 530–2065.

Ohio

James Cogan, USDA Rural Development, Federal Building, Room 507, 200 North High Street, Columbus, OH 43215–2418, (614) 255–2420.

Oklahoma

Jody Harris, USDA Rural Development, 100 USDA, Suite 108, Stillwater, OK 74074–2654, (405) 742–1036.

Oregon

Don Hollis, USDA Rural Development, 1229 SE. Third Street, Suite A, Pendleton, OR 97801–4198, (541) 278–8049, Ext. 129.

Pennsylvania

Vincent Murphy, USDA Rural Development, One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, (717) 237–2181.

Puerto Rico

Virgilio Velez, USDA Rural Development, IBM Building, 654 Munoz Rivera Avenue, Suite 601, Hato Rey, PR 00918–6106, (787) 766–5091, ext. 251.

South Carolina

R. Gregg White, USDA Rural Development, Strom Thurmond Federal Building, 1835 Assembly Street, Room 1007, Columbia, SC 29201, (803) 765–5881.

South Dakota

Gary Korzan, USDA Rural Development, Federal Building, Room 210, 200 4th Street, SW., Huron, SD 57350, (605) 352–1142.

Tennessee

Dan Beasley, USDA Rural Development, 3322 West End Avenue, Suite 300, Nashville, TN 37203–1084, (615) 783–1341.

Texas

Pat Liles, USDA Rural Development, Federal Building, Suite 102, 101 South Main Street, Temple, TX 76501, (254) 742–9780.

Utah

Richard Carrig, USDA Rural Development, Wallace F. Bennett Federal Building, 125 South State Street, Room 4311, Salt Lake City, UT 84138, (801) 524–4328.

Vermont/New Hampshire

Lyn Millhiser, USDA Rural Development, City Center, 3rd Floor, 89 Main Street, Montpelier, VT 05602, (802) 828–6069.

Virginia

Laurette Tucker, USDA Rural Development, Culpeper Building, Suite 238, 1606 Santa Rosa Road, Richmond, VA 23229, (804) 287–1594.

Washington

Chris Cassidy, USDA Rural Development, 1606 Perry Street, Suite E, Yakima, WA 98902–5769, (509) 454–5743, Ext. 5.

West Virginia

Cheryl Wolfe, USDA Rural Development, 75 High Street, Room 320, Morgantown, WV 26505–7500, (304) 284–4882.

Wisconsin

Mark Brodziski, USDA Rural Development, 4949 Kirschling Court, Stevens Point, WI 54481, (715) 345–7615, Ext. 131.

Wyoming

Jerry Tamlin, USDA Rural Development, 100 East B, Federal Building, Room 1005, P.O. Box 820, Casper, WY 82602, (307) 261–6319.

SUPPLEMENTARY INFORMATION:

Background

This solicitation is issued pursuant to enactment of the Farm Security and Rural Investment Act of 2002 (2002 Act), which established the Renewable Energy Systems and Energy Efficiency Improvements Program under Title IX, Section 9006. The 2002 Act requires the Secretary of Agriculture to create a program to make direct loans, loan guarantees, and grants to agricultural producers and rural small businesses to purchase renewable energy systems and make energy efficiency improvements. The program is designed to help agricultural producers and rural small businesses reduce energy costs and consumption and help meet the nation's critical energy needs. The 2002 Act also mandates the maximum percentage Rural Development will provide in funding for these types of projects. The Rural Development grant will not exceed 25 percent of the eligible project costs and will be made only to those who demonstrate financial need. Due to the time constraints for implementing this program, Rural Development is issuing only the grant program for FY 2004 at this time.

Definitions Applicable to This NOFA

Agency. Rural Development or successor Agency assigned by the Secretary of Agriculture to administer the program.

Agricultural producer. An individual or entity directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations.

Annual receipts. The total income or gross income (sole proprietorship) plus cost of goods sold.

Biogas. Biomass converted to gaseous fuels.

Biomass. Any organic material that is available on a renewable or recurring basis including agricultural crops; trees grown for energy production; wood waste and wood residues; plants, including aquatic plants and grasses; fibers; animal waste and other waste materials; and fats, oils, and greases, including recycled fats, oils, and greases. It does not include paper that is commonly recycled or unsegregated solid waste.

Capacity. The load that a power generation unit or other electrical apparatus or heating unit is rated by the manufacturer to be able to meet or supply.

Commercially available. Systems that have a proven operating history and an established design, installation, equipment, and service industry.

Demonstrated financial need. The demonstration by an applicant that the applicant is unable to finance the project from its own resources or other funding sources without grant assistance.

Eligible project cost. The total project costs that are eligible to be paid with grant funds.

Energy audit. A written report by an independent, qualified entity or

individual that documents current energy usage, recommended improvements and their costs, energy savings from these improvements, dollars saved per year, and the weighted-average payback period in years.

Energy efficiency improvement. Improvements to a facility or process that reduce energy consumption.

Financial feasibility. The ability of the business to achieve the projected income and cash flow. The concept includes assessments of the cost-accounting system, the availability of short-term credit for seasonal business, and the adequacy of raw materials and supplies, where necessary.

Grant close-out. When all required work is completed, administrative actions relating to the completion of work and expenditures of funds have been accomplished, and the Agency accepts final expenditure information.

In-kind contributions. Applicant or third-party real or personal property or services benefiting the Federally assisted project or program that are contributed by the applicant or a third party. The identifiable value of goods and services must directly benefit the project.

Interconnection agreement. The terms and conditions governing the interconnection and parallel operation of the grantee's or borrower's electric generation equipment and the utility's electric power system. Other services required by the applicant from the utility are covered under separate arrangements.

Matching funds. The funds needed to pay for the portion of the eligible project costs not funded by the Agency through a grant under this program.

Other waste materials. Inorganic or organic materials that are used as inputs for energy production or are by-products of the energy production process.

Power purchase arrangement. The terms and conditions governing the sale and transportation of electricity produced by the grantee or borrower to another party. Other services required by the applicant from the utility are covered under separate arrangements.

Pre-commercial technology. Technologies that have emerged through the research and development process and have technical and economic potential for application in commercial energy markets but are not yet commercially available.

Renewable energy. Energy derived from a wind, solar, biomass, or geothermal source; or hydrogen derived from biomass or water using wind, solar, or geothermal energy sources.

Renewable energy system. A process that produces energy from a renewable energy source.

Rural. Any area other than a city or town that has a population of greater than 50,000 inhabitants and the urbanized area contiguous and adjacent to such a city or town.

Small business. A private entity including a sole proprietorship, partnership, corporation, and a cooperative (including a cooperative qualified under section 501(c)(12) of the Internal Revenue Code) but excluding any private entity formed solely for a charitable purpose, and which private entity is considered a small business concern in accordance with the Small Business Administration's (SBA) Small Business Size Standards by North American Industry Classification System (NAICS) Industry found in 13 CFR part 121; provided the entity has 500 or fewer employees and $20 million or less in total annual receipts including all parent, affiliate, or subsidiary entities at other locations.

State. Any of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

Total project cost. The sum of all costs associated with a completed, operational project.

Grant Amounts

The amount of funds available for this program in FY 2004 is up to $22.8 million. Rural Development grant funds may be used to pay up to 25 percent of the eligible project costs. Half of the funds will be available for renewable energy systems and the other half for energy efficiency improvement projects. USDA may reallocate funds between the renewable energy systems and the energy efficiency improvement funds. Applications for renewable energy systems must be for a minimum grant request of $2,500, but no more than $500,000. Applications for energy efficiency improvements must be for a minimum grant request of $2,500, but no more than $500,000. The actual number of grants funded will depend on the quality of proposals received and the amount of funding requested. These limits are consistent with energy efficiency improvement projects and alternative energy systems, which the Department has determined are appropriate for agricultural producers and rural small businesses. Grant limitations were based on historical data supplied from Department of Energy, Environmental Protection Agency and Rural Utilities Service on renewable energy systems and from an energy efficiency state program for energy efficiency improvements.

Applicant Eligibility

To receive a grant under this subpart, an applicant must meet each of the criteria, as applicable, as set forth in paragraphs (a) through (f).

(a) The applicant or borrower must be an agricultural producer or rural small business.

(b) Individuals must be citizens of the United States (U.S.) or reside in the U.S. after being legally admitted for permanent residence.

(c) Entities must be at least 51 percent owned, directly or indirectly, by individuals who are either citizens of the U.S. or reside in the U.S. after being legally admitted for permanent residence.

(d) If the applicant or borrower, or an owner has an outstanding judgment obtained by the United States in a Federal Court (other than in the United States Tax Court), is delinquent in the payment of Federal income taxes, or is delinquent on a Federal debt, the applicant or borrower is not eligible to receive a grant, until the judgment is paid in full or otherwise satisfied or the delinquency is resolved.

(e) In the case of an applicant or borrower that is applying as a rural small business, the business headquarters must be in a rural area and the project to be funded also must be in a rural area.

(f) The applicant must have demonstrated financial need.

Adverse actions made on applications are appealable pursuant to 7 CFR part 11.

Project Eligibility

For a project to be eligible to receive a grant under this subpart, the proposed project must meet each of the criteria, as applicable, in paragraphs (a) through (f).

(a) The project must be for the purchase of a renewable energy system or to make energy efficiency improvements.

(b) The project must be for a pre-commercial or commercially available and replicable technology, not for research and development.

(c) The project must be technically feasible.

(d) The project must be located in a rural area.

(e) The applicant must be the owner of the system and control the operation and maintenance of the proposed project. A qualified third-party operator may be used to manage the operation

and/or for maintenance of the proposed project.

(f) All projects must be based on satisfactory sources of revenues in an amount sufficient to provide for the operation and maintenance of the system or project.

(g) Proposed projects which may necessitate an Environmental Impact Statement (EIS) may not be selected.

(h) The total input from a nonrenewable energy source for necessary and incidental requirements of the energy system will be determined by the technical reviewers.

Grant Funding

(a) The amount of grant funds that will be made available to an eligible project under this subpart will not exceed 25 percent of eligible project costs.

(1) The only eligible project costs are those costs associated with the items identified in paragraphs (a)(1)(i) through (ix). The items must be an integral and necessary part of the total project:

(i) Post-application purchase and installation of equipment, except agricultural tillage equipment and vehicles;

(ii) Post-application construction or project improvements, except residential;

(iii) Energy audits or assessments;

(iv) Permit fees;

(v) Professional service fees, except for application preparation;

(vi) Feasibility studies;

(vii) Business plans;

(viii) Retrofitting; and

(ix) Construction of a new facility only when the facility is used for the same purpose, is approximately the same size, and based on the energy audit will provide more energy savings than improving an existing facility. Only costs identified in the energy audit for energy efficiency projects are allowed.

(2) The applicant must provide at least 75 percent of eligible project costs to complete the project. Applicant in-kind and other Federal grant awards cannot be used to meet the 75 percent match requirements. However, the Agency will allow third-party, in-kind contributions to be used in meeting the matching requirement. Third-party, in-kind contributions will be limited to 10 percent of the 75 percent match requirement of the grantee. The Agency will advise if the third-party, in-kind contributions are acceptable in accordance with 7 CFR part 3015.

(b) The maximum amount of grant assistance to one individual or entity will not exceed $750,000.

(c) Applications for renewable energy systems must be for a minimum grant request of $2,500, but no more than $500,000.

(d) Applications for energy efficiency improvements must be for a minimum grant request of $2,500, but no more than $250,000.

Application and Documentation

(a) *Application.* Separate applications must be submitted for renewable energy system and energy efficiency improvement projects. For each type of project, only one application with required copies may be submitted.

(1) *Table of Contents.* The first item in each application will be a detailed Table of Contents in the order presented below. Include page numbers for each component of the proposal. Begin pagination immediately following the Table of Contents.

(2) *Project Summary.* A summary of the project proposal, not to exceed one page, must include the following: Title of the project, a detailed description of the project including its purpose and need, goals and tasks to be accomplished, names of the individuals responsible for conducting and completing the tasks, and the expected timeframes for completing all tasks, including an operational date. The applicant must also clearly state whether the application is for the purchase of a renewable energy system or to make energy efficiency improvements.

(3) *Eligibility.* Each applicant must describe how it meets the eligibility requirements.

(4) *Agricultural producer/small business information.* All applications must contain the following information on the agricultural producer or small business seeking funds under this program:

(i) Business/farm/ranch operation.

(A) A description of the ownership, including a list of individuals and/or entities with ownership interest, names of any corporate parents, affiliates, and subsidiaries, as well as a description of the relationship, including products, between these entities.

(B) A description of the operation.

(ii) Management. The resume of key managers focusing on relevant business experience. If a third-party operator is used to monitor and manage the project, provide a discussion on the benefits and burdens of such monitoring and management as well as the qualifications of the third party.

(iii) Financial information.

(A) Explanation of demonstrated financial need.

(B) For rural small businesses, a current balance sheet and income statement prepared in accordance with generally accepted accounting principles (GAAP) and dated within 90 days of the application. Agricultural producers must present financial information in the format that is generally required by commercial agriculture lenders. Financial information is required on the total operations of the agricultural producer/small business and its parent, subsidiary, or affiliates at other locations.

(C) Rural small businesses must provide sufficient information to determine total annual receipts of the business and any parent, subsidiary, or affiliates at other locations. Voluntarily providing tax returns is one means of satisfying this requirement. Information provided must be sufficient for the Agency to make a determination of total income and cost of goods sold by the business.

(D) If available, historical financial statements prepared in accordance with GAAP for the past 3 years, including income statements and balance sheets. If agricultural producers are unable to present this information in accordance with GAAP, they may instead present financial information for the past 3 years in the format that is generally required by commercial agriculture lenders.

(E) Pro forma balance sheet at startup of the agricultural producer's/small business' business that reflects the use of the loan proceeds or grant award; and 3 additional years, indicating the necessary start-up capital, operating capital, and short-term credit; and projected cash flow and income statements for 3 years supported by a list of assumptions showing the basis for the projections.

(F) For agricultural producers, identify the gross market value of your agricultural products for the calendar year preceding the year in which you submit your application.

(iv) Production information for renewable energy system projects.

(A) Provide a statement as to whether the technology to be employed by the facility is commercially or pre-commercially available and replicable. Provide information to support this position.

(B) Describe the availability of materials, labor, and equipment for the facility.

(v) Business market information for renewable energy system projects.

(A) Demand. Identify the demand (past, present, and future) for the product and/or service and who will buy the product and/or service.

(B) Supply. Identify the supply (past, present, and future) of the product and/or service and your competitors.

(C) Market niche. Given the trends in demand and supply, describe how the business will be able to sell enough of its product/service to be profitable.

(vi) A Dun and Bradstreet Universal Numbering System (DUNS) number.

(b) *Forms, certifications, and agreements.* Each application submitted must contain, as applicable, the items identified in paragraphs (b)(1) through (15) of this section.

(1) Form SF–424, "Application for Federal Assistance."

(2) Form SF–424C, "Budget Information—Construction Programs." Each cost classification category listed on the form must be filled out if it applies to your project. Any cost category item not listed on the form that applies to your project can be put under the miscellaneous category. Attach a separate sheet if you are using the miscellaneous category and list each miscellaneous cost by not allowable and allowable costs in the same format as on SF 424C. All project costs must be categorized as either allowable or not allowable.

(3) Form SF–424D, "Assurances—Construction Programs."

(4) AD–1049, "Certification Regarding Drug-Free Workplace Requirements."

(5) AD–1048, "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tiered Covered Transactions."

(6) A copy of a bank statement or a copy of the confirmed funding commitment from the funding source. Matching funds must be included on SF 424 and SF 424C.

(7) Exhibit A–1, (Certification for Contracts, Grants and Loans) of RD Instruction 1940–Q required by section 319 of Public Law 101–121 if the grant exceeds $100,000 or Exhibit A–2, Statement of Guarantees of RD Instruction 1940–Q required by section 319 of Public Law 101–121 if the guaranteed loan exceeds $150,000.

(8) If the applicant has made or agreed to make payment using funds other than Federal appropriated funds to influence or attempt to influence a decision in connection with the application, Form SF–LLL, "Disclosure of Lobbying Activities," must be completed.

(9) AD–1047, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions."

(10) Form RD 400–1, "Equal Opportunity Agreement."

(11) Form RD 400–4, "Assurance Agreement."

(12) If the project involves interconnection to an electric utility, a copy of a letter of intent to purchase power, a power purchase agreement, a copy of a letter of intent for an interconnection agreement, or an interconnection agreement will be required from your utility company or other purchaser for renewable energy systems.

(13) If applicable, intergovernmental consultation comments in accordance with Executive Order 12372.

(14) Applicants and borrowers must provide a certification indicating whether or not there is a known relationship or association with an Agency employee.

(15) *Environmental review.* All applicants must complete Form RD 1940–20, "Request for Environmental Information." All applicants will be responsible for providing all information necessary for the Agency to do a National Environmental Policy Act (NEPA) review and analysis in accordance with 7 CFR part 1940, subpart G. Any additional environmental information required will be conveyed to the applicant after a preliminary review of the grant application by the State Rural Development Office. Any applicable analyses and studies required as part of completing the NEPA analysis (*i.e.*, Archaeological studies, Biological Assessments, *etc.*) will be the responsibility of the Applicant. The Applicant should strive to achieve positive community support, select good sites, and mitigate environmental impacts resulting from their proposals. If an environmental review cannot be completed in sufficient time for grant funds to be obligated by September 30, 2004, grant funds will not be awarded.

(c) *Feasibility study for renewable energy systems.* Each application for a renewable energy system project, except for requests of $50,000 or less, must include a project-specific feasibility study prepared by a qualified independent consultant. The feasibility study must include an analysis of the market, financial, economic, technical, and management feasibility of the proposed project. The feasibility study must also include an opinion and a recommendation by the independent consultant.

(d) *Technical requirements reports.* The technical report must demonstrate that the project design, procurement, installation, startup, operation and maintenance of the renewable energy system or energy efficiency improvement will operate or perform as specified over its design life in a reliable and a cost effective manner. The technical report must also identify all necessary project agreements, demonstrate that those agreements will be in place, and that necessary project equipment and services are available over the design life.

All technical information provided must follow the format specified in paragraphs (d)(1) through (10). Supporting information may be submitted in other formats. Preliminary design drawings and process flow charts should be included as exhibits. A discussion of each topic identified in paragraphs (d)(1) through (10) is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. The applicant must submit the original technical requirements report plus one copy to the State Rural Development Office. For small solar and small wind projects, the narrative portion of technical requirements portion of the proposals, excluding supporting documentation and drawings, should be less than ten pages. Projects costing more than $50,000 require the services of a professional engineer (PE). Depending on the level of engineering required for the specific project or if necessary to ensure public safety, the services of a PE may be required for smaller projects.

(1) *Biomass, bioenergy.* The technical requirements specified in paragraphs (d)(1)(i) through (x) apply to renewable energy projects that produce fuel, thermal energy, or electric power from a biomass source, including wood, agricultural residue excluding animal wastes, or other energy crops considered biomass or bioenergy projects. The major components of bioenergy systems will vary significantly depending on the type of feedstock, product, type of process, and size of the process but in general includes components around which the balance of the system is designed.

(i) *Qualifications of project team.* The biomass project team will vary according to the complexity and scale of the project. For engineered systems, the project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor or system installer, and a system operator and maintainer. One individual or entity may serve more than one role.

The project team must have demonstrated expertise in similar biomass systems development, engineering, installation, and maintenance. The applicant must

provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The application must:

(A) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design build method, often referred to as turn key, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(B) Discuss the biomass system equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(C) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing biomass energy systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(D) Describe the system operator's qualifications and experience for servicing, operating, and maintaining biomass renewable energy equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(1)(ii)(A) through (G).

(A) Biomass systems must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify licenses where required and the schedule for obtaining those licenses.

(C) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(D) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(E) Identify available component warranties for the specific project location and size.

(F) Systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program, describe the applicable local net metering program.

(G) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, *etc.*)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the type, quantity, quality, and seasonality of the biomass resource including harvest and storage, where applicable. Where applicable, also indicate shipping or receiving method and required infrastructure for shipping. For proposed projects with an established resource, provide a summary of the resource.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive including site selection, system and component selection, and system monitoring equipment. Systems must be constructed by a qualified entity.

(A) The application must include a concise but complete description of the biomass project including location of the project, resource characteristics, system specifications, electric power system interconnection, and monitoring equipment. Identify possible vendors and models of major system components. Describe the expected electric power, fuel production, or thermal energy production of the proposed system as rated and as expected in actual field conditions. For systems with a capacity more than 20 tons per day of biomass, address performance on a monthly and annual basis. For small projects such as a commercial biomass furnace or pelletizer of up to 5 tons daily capacity, proven, commercially available devices need not be addressed in detail. Describe the uses of or the market for electricity, heat, or fuel produced by the system. Discuss the impact of reduced or interrupted biomass availability on the system process.

(B) The application must include a description of the siting criteria used in selecting the project site and the reason for elimination of other site alternatives considered and address issues such as site access, foundations, backup equipment when applicable, and environmental issues with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, and other construction and installation issues applicable to this type of technology. Identify any unique construction and installation issues.

(C) Sites must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and

maintenance costs. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Biomass systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Provide information regarding available system and component warranties and availability of spare parts;

(B) For systems having a biomass input capacity exceeding 10 tons of biomass per day;

(1) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedule for the mechanical, piping, and electrical systems and system monitoring and control requirements. Provide information that supports expected design life of the system and timing of major component replacement or rebuilds; and

(2) Discuss the costs and labor associated with operations and maintenance of system and plans for in or outsourcing. Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator; and

(C) Provide and discuss the risk management plan for handling large, unanticipated failures or major components. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for in-sourcing or out-sourcing.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(2) *Anaerobic digester projects.* The technical requirements specified in paragraphs (d)(2)(i) through (x) apply to renewable energy projects, called anaerobic digester projects, that use animal waste and other organic substrates to produce thermal or electrical energy via anaerobic digestion. The major components of an anaerobic digester system include the digester, the gas handling and transmission systems, and the gas use system.

(i) *Qualifications of project team.* The anaerobic digester project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor, and a system operator or maintainer. One individual or entity may serve more than one role.

The project team must have demonstrated commercial-scale expertise in anaerobic digester systems development, engineering, installation, and maintenance as related to the organic materials and operating mode of the system. The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design build method, often referred to as turn key, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(B) Discuss the anaerobic digester system equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(C) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing anaerobic digester systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating consistent with the substrate material and with references if available; and

(D) For regional or centralized digester plants, describe the system operator's qualifications and experience for servicing, operating, and maintaining similar projects. Farm scale systems may not require operator experience as the developer is typically required to provide operational training during system startup and shakedown. Provide a list of the same or similar projects designed, installed, or supplied and currently operating consistent with the substrate material and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(2)(ii)(A) through (G).

(A) Anaerobic digester systems must be installed in accordance with applicable local, State, and national codes and regulations. Anaerobic digesters must also be designed and constructed in accordance with USDA anaerobic digester standards. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify licenses where required and the schedule for obtaining those licenses.

(C) For regional or centralized digester plants, identify feedstock access agreements required for the project and the schedule for securing those agreements and the term of those agreements.

(D) Identify any permits or agreements required for transport and ultimate waste disposal and the schedule for securing those agreements and permits.

(E) Identify available component warranties for the specific project location and size.

(F) Systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and

obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program, describe the applicable local net metering program.

(G) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, *etc.*)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the substrates used as digester inputs including animal wastes, food processing wastes, or other organic wastes in terms of type, quantity, seasonality, and frequency of collection. Describe any special handling of feedstock that may be necessary. Describe the process for determining the feedstock resource. Provide either tabular values or laboratory analysis of representative samples that include biodegradability studies to produce gas production estimates for the project on daily, monthly, and seasonal basis.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive including site selection, digester component selection, gas handling component selection, and gas use component selection. Systems must be constructed by a qualified entity.

(A) The application must include a concise but complete description of the anaerobic digester project including location of the project, farm description, feedstock characteristics, a step-by-step flowchart of unit operations, electric power system interconnection equipment, and any required monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production, heat balances, material balances as part of the unit operations flowchart.

(B) The application must include a description of the siting criteria used in selecting the project site and the reason for elimination of other site alternatives considered and address issues such as site access, foundations, backup equipment when applicable, and environmental issues with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, and other construction and installation issues applicable to this type of technology. Identify any unique construction and installation issues.

(C) Sites must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including feedstock assessment, system and site design, permits and agreements, equipment procurement, system installation from excavation through startup and shakedown, and operator training.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including project management, feedstock assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, training and operations, and maintenance costs of both the digester and the gas use systems. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Anaerobic digester systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Ensure that systems must have at least a 3-year warranty for equipment and a 10-year warranty on design. Provide information regarding system warranties and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed project, including maintenance for the digester, the gas handling equipment, and the gas use systems. Describe any maintenance requirements for system monitoring and control equipment;

(C) Provide information that supports expected design life of the system and the timing of major component replacement or rebuilds;

(D) Provide and discuss the risk management plan for handling large, unanticipated failures of major components. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for insourcing or outsourcing; and

(E) Describe opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(3) *Geothermal, electric generation.* The technical requirements specified in paragraphs (d)(3)(i) through (x) apply to geothermal projects that produce electric power from the thermal potential of a geothermal source. The major components of an electric generating geothermal system include the production well, the separator or heat exchanger, the turbine, the generator, condenser, and the balance of

station elements including the, field piping, roads, fencing and grading, plant buildings, transformers and other electrical infrastructure such as interconnection equipment.

(i) *Qualifications of project team.* The electric generating geothermal plant project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor, and a system operator and maintainer. One individual or entity may serve more than one role.

The project team must have demonstrated expertise in geothermal electric generation systems development, engineering, installation, and maintenance. The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design build method, often referred to as turn key, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(B) Discuss the geothermal plant equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(C) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing geothermal electric generation systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(D) Describe system operator's qualifications and experience for servicing, operating, and maintaining electric generating geothermal projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(3)(ii)(A) through (F).

(A) Electric generating geothermal systems must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify any permits or agreements required for well construction and for disposal or re-injection of cooled geothermal waters and the schedule for securing those agreements and permits.

(C) Identify land use or access to the resource agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(D) Identify available component warranties for the specific project location and size.

(E) Systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and obtaining those agreements.

(F) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, etc.)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the quality of the geothermal resource including temperature, flow, and sustainability and what conversion system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive including site selection, system and component selection, conversion system component and selection, design of the local collection grid, interconnection equipment selection, and system monitoring equipment. Systems must be constructed by a qualified entity.

(A) The application must include a concise but complete description of the geothermal project including location of the project, resource characteristics, thermal system specifications, electric power system interconnection equipment and project monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production on a monthly and annual basis.

(B) The application must include a description of the siting criteria used in selecting the project site and the reason for elimination of other site alternatives considered and address issues such as site access, foundations, backup equipment when applicable, proximity to the electrical grid, environmental issues with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, and other construction, and installation issues applicable to this type of technology. Identify any unique construction and installation issues.

(C) Sites must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including project management, resource

assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues including electricity sales, production tax credits, revenues from green tags, and any other production incentive programs throughout the life of the project. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Geothermal systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup or shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Ensure that systems must have at least a 3-year warranty for equipment. Provide information regarding turbine warranties and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed project, including maintenance for the mechanical and electrical systems and system monitoring and control requirements;

(C) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(D) Provide and discuss the risk management plan for handling large, unanticipated failures of major components such as the turbine. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for insourcing or outsourcing; and

(E) Describe opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(4) *Geothermal, direct use.* The technical requirements specified in paragraphs (d)(4)(i) through (x) apply to geothermal projects that directly use thermal energy from a geothermal source. The major components of a direct use geothermal system include the production well, the heat exchanger, pumps, and the balance of station elements including the, field piping, re-injection wells or other disposal equipment as required, and final point-of-use heat exchangers and control systems.

(i) *Qualifications of project team.* The geothermal project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor, and a system operator and maintainer. One individual or entity may serve more than one role.

The project team must have demonstrated expertise in geothermal heating systems development, engineering, installation, and maintenance. The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the proposed project delivery method. Such method include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design build method, often referred to as turn key, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(B) Discuss the geothermal system equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(C) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing direct use geothermal systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(D) Describe system operator's qualifications and experience for servicing, operating, and maintaining direct use generating geothermal projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(4)(ii)(A) through (F).

(A) Direct use geothermal systems must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify licenses where required and the schedule for obtaining those licenses.

(C) Identify land use or access to the resource agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(D) Identify any permits or agreements required for well construction and for disposal or re-injection of cooled geothermal waters and the schedule for securing those permits and agreements.

(E) Identify available component warranties for the specific project location and size.

(F) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, *etc.*)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability

of the renewable resource required for the system to operate as designed. Indicate the quality of the geothermal resource including temperature, flow, and sustainability and what direct use system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive including site selection, system and component selection, thermal system component selection, and system monitoring equipment. Systems must be constructed by a qualified entity.

(A) The application must include a concise but complete description of the geothermal project including location of the project, resource characteristics, thermal system specifications, and monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production on a monthly and annual basis.

(B) The application must include a description of the siting criteria used in selecting the project site and the reason for elimination of other site alternatives considered and address issues such as, site access, foundations, thermal backup equipment, and environmental issues with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, and other construction, and installation issues applicable to this type of technology. Identify any unique construction and installation issues.

(C) Sites must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Geothermal systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Ensure that systems must have at least a 3-year warranty for equipment. Provide information regarding system warranties and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed project, including maintenance for the mechanical and electrical systems and system monitoring and control requirements;

(C) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(D) Provide and discuss the risk management plan for handling large, unanticipated failures of major components. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for insourcing or outsourcing; and

(E) Describe opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(5) *Hydrogen.* The technical requirements specified in paragraphs (d)(5)(i) through (x) apply to renewable energy projects that produce hydrogen and renewable energy projects that use mechanical or electric power or thermal energy from a renewable resource using hydrogen as an energy transport medium. The major components of hydrogen systems include reformers, electrolyzers, hydrogen compression and storage components, and fuel cells.

(i) *Qualifications of project team.* The hydrogen project team will vary according to the complexity and scale of the project. For engineered systems, the project team should consist of a system designer, a project manager, an equipment supplier, a project engineer, a construction contractor or system installer, and a system operator and maintainer. One individual or entity may serve more than one role.

The project team must have demonstrated expertise in similar hydrogen systems development, engineering, installation, and maintenance. The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design build method, often referred to as turn key, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(B) Discuss the hydrogen system equipment manufacturers of major components for the hydrogen system being considered in terms of the length of time in the business and the number of units installed at the capacity and scale being considered;

(C) Discuss the project manager, equipment supplier, system designer, project engineer, and construction contractor qualifications for engineering, designing, and installing hydrogen systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(D) Describe the system operator's qualifications and experience for servicing, operating, and maintaining hydrogen system equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(5)(ii)(A) through (G).

(A) Hydrogen systems must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and building code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify licenses where required and the schedule for obtaining those licenses.

(C) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(D) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(E) Identify available component warranties for the specific project location and size.

(F) Systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program, provide a description of the applicable local net metering program.

(G) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, etc.)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the type, quantity, quality, and seasonality of the biomass resource. For solar, wind, or geothermal sources of energy used to generate hydrogen, indicate the local renewable resource where the hydrogen system is to be installed. Local resource maps may be used as an acceptable preliminary source of renewable resource data. For proposed projects with an established renewable resource, provide a summary of the resource.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive including site selection, system and component selection, and system monitoring equipment. Systems must be constructed by a qualified entity.

(A) The application must include a concise but complete description of the hydrogen project including location of the project, resource characteristics, system specifications, electric power system interconnection equipment, and monitoring equipment. Identify possible vendors and models of major system components. Describe the expected electric power, fuel production, or thermal energy production of the proposed system. Address performance on a monthly and annual basis. Describe the uses of or the market for electricity, heat, or fuel produced by the system. Discuss the impact of reduced or interrupted resource availability on the system process.

(B) The application must include a description of the siting criteria used in selecting the project site and the reason for elimination of other site alternatives considered and address issues such as site access, foundations, backup equipment when applicable, and any environmental issues and safety concerns with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, and other construction and installation issues applicable to this type of technology. Identify any unique construction and installation issues.

(C) Sites must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including project management, resource assessment, project design and engineering, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed analysis and description of annual project revenues and expenses. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is

available and can be procured and delivered within the proposed project development schedule. Hydrogen systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues, such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, and receiving, and on-site storage or inventory. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Provide information regarding system warranties and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed project, including maintenance of the reformer, electrolyzer, or fuel cell as appropriate, and other mechanical, piping, and electrical systems and system monitoring and control requirements;

(C) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(D) Provide and discuss the risk management plan for handling large, unanticipated failures of major components. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for in or outsourcing; and

(E) Describe opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(6) *Solar, small.* The technical requirements specified in paragraphs (d)(6)(i) through (x) of this section apply to small solar electric projects and small solar thermal projects. Small solar electric projects are those for which the rated power of the system is 10kW or smaller. The major components of a small solar electric system are the solar panels, the support structure, the foundation, the power conditioning equipment, the interconnection equipment, surface or submersible water pumps, energy storage equipment and supporting documentation including operations and maintenance manuals. Small solar electric projects are either stand-alone (off grid) or interconnected to the grid at less than 600 volts (on grid). Small solar thermal projects are those for which the rated storage volume of the system is 240 gallons, or smaller. The major components of a small solar thermal system are the solar collector(s), the support structure, the foundation, the circulation pump(s) and piping, heat exchanger (if required), energy storage equipment and support.

(i) *Qualifications of project team.* The small solar project team should consist of a system designer, a project manager or general contractor, an equipment supplier of major components, a system installer, a system maintainer, and, in some cases, the owner of the application or load served by the system. One individual or entity may serve more than one role.

The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the qualifications of the suppliers of major components being considered;

(B) Describe the knowledge, skills, and abilities needed to service, operate, and maintain the system for the proposed application; and

(C) Discuss the project manager, system designer, and system installer qualifications for engineering, designing, and installing small solar systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar systems designed or installed by the design and installation team and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(6)(ii)(A) through (D).

(A) Small solar systems must be installed in accordance with local, State, and national building and electrical codes and regulations. Identify zoning, building and electrical code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify available component warranties for the specific project location and size.

(C) Small solar electric systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program, describe the applicable local net metering program.

(D) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, etc.)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Describe the local solar resource where the solar system is to be installed. Acceptable sources of solar resource data include state solar maps and nearby weather station data. Incorporate information from state solar resource maps when possible. Indicate the source of the solar data and assumptions made when applying nearby solar data to the site.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. For small solar electric systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, power conditioning design and selection, surface or submersible water pumps and energy storage requirements as

applicable, and selection of cabling, disconnects and interconnection equipment. For small solar thermal systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, pump and piping design and selection, and energy storage design and selection.

(A) The application must include a concise but complete description of the small solar system including location of the project and proposed equipment specifications. Identify possible vendors and models of major system components. Provide the expected system energy production based on available solar resource data on a monthly (when possible) and annual basis and how the energy produced by the system will be used.

(B) The application must include a description of the siting criteria used in selecting the project site and the reason for elimination of other site alternatives considered and address issues such as solar access, site access, foundations, backup equipment when applicable, orientation, proximity to the load or the electrical grid, unique safety concerns, and environmental issues with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, and other construction, and installation issues, and whether special circumstances exist applicable to this type of technology.

(C) Sites and application load must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including design, permitting, equipment, site preparation, system installation, system startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed description of historic or expected energy use and expected energy offsets or sales on monthly and annual bases.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Small solar systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Ensure that systems must have at least a 5-year warranty for equipment. Provide information regarding system warranty and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedules for the mechanical and electrical and software systems;

(C) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance; and

(D) Provide information regarding expected system design life and timing of major component replacement or rebuilds. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for in or outsourcing.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(7) *Solar, large.* The technical requirements specified in paragraphs (d)(7)(i) through (x) apply to large solar electric projects and large solar thermal projects. Large solar electric systems are those for which the rated power of the system is larger than 10kW. The major components of a large solar electric system are the solar panels, the support structure, the foundation, the power conditioning equipment, the interconnection equipment, surface or submersible water pumps and energy storage equipment and supporting documentation including operations and maintenance manuals. Large solar electric systems are either stand-alone (off grid) or interconnected to the grid (on grid.) Large solar thermal systems are those for which the rated storage volume of the system is greater than 240 gallons. The major components of a small solar thermal system are the solar collector(s), the support structure, the foundation, the circulation pump(s) and piping, heat exchanger (if required), energy storage equipment and supporting documentation including operations and maintenance manuals.

(i) *Qualifications of project team.* The large solar project team should consist of an equipment supplier of major components, a project manager, general contractor, a system engineer, a system installer, and system maintainer. One individual or entity may serve more than one role.

The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design build method, often referred to as turn key, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(B) Discuss the qualifications of the suppliers of major components being considered;

(C) Discuss the project manager, general contractor, system engineer, and

system installer qualifications for engineering, designing, and installing large solar systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar systems designed or installed by the design, engineering, and installation team and currently operating and with references if available; and

(D) Describe the system operator's qualifications and experience for servicing, operating, and maintaining the system for the proposed application. Provide a list of the same or similar systems designed or installed by the design, engineering, and installation team and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(7)(ii)(A) through (D).

(A) Large solar systems must be installed in accordance with local, State, and national building and electrical codes and regulations. Identify zoning, building and electrical code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify available component warranties for the specific project location and size.

(C) Large solar electric systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program, describe the applicable local net metering program.

(D) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, *etc.*)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Describe the local solar resource where the solar system is to be installed. Acceptable sources of solar resource data include state solar maps and nearby weather station data. Incorporate information from state solar resource maps when possible. Indicate the source of the solar data and assumptions made when applying nearby solar data to the site.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards.

(A) For large solar electric systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, power conditioning design and selection, surface or submersible water pumps and energy storage requirements as applicable, and selection of cabling, disconnects and interconnection equipment. A complete set of engineering drawings, stamped by a professional engineer must be provided.

(B) For large solar thermal systems, the engineering must be comprehensive, including solar collector design and selection, support structure design and selection, pump and piping design and selection, and energy storage design and selection. Provide a complete set of engineering drawings, stamped by a professional engineer.

(C) For either type of system, provide a concise but complete description of the large solar system including location of the project and proposed equipment and system specifications. Identify possible vendors and models of major system components. Provide the expected system energy production based on available solar resource data on a monthly (when possible) and annual basis and how the energy produced by the system will be used.

(D) For either type of system, provide a description of the project site and address issues such as, solar access, orientation, proximity to the load or the electrical grid, environmental concerns, unique safety concerns, construction, and installation issues and whether special circumstances exist.

(E) Sites must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including design and engineering, permitting, equipment, site preparation, system installation, system startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed description of historic or expected energy use and expected energy offsets or sales on a monthly and annual basis.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Large solar systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment, including cranes and other devices, needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Ensure that systems must have at least a 5-year warranty for equipment.

Provide information regarding system warranty and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedules for the mechanical and electrical and software systems;

(C) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance; and

(D) Provide information regarding expected system design life and timing of major component replacement or rebuilds. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for insourcing or outsourcing.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(8) *Wind, small.* The technical requirements specified in paragraphs (d)(8)(i) through (x) apply to wind energy systems for which the rated power of the wind turbine is 100kW or smaller and with a generator hub height of 120 ft or less. Such systems are considered small wind systems. The major components of a small wind system are the wind turbine, the tower, the foundation, the inverter, the interconnection equipment and energy storage when applicable. A small wind system is either stand-alone or connected to the local electrical system at less than 600 volts.

(i) *Qualifications of project team.* The small wind project team should consist of a system designer, a project manager or general contractor, an equipment supplier of major components, a system installer, a system maintainer, and, in some cases, the owner of the application or load served by the system. One individual or entity may serve more than one role.

The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the small wind turbine manufacturers and other equipment suppliers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(B) Describe the knowledge, skills, and abilities needed to service, operate, and maintain the system for the proposed application; and

(C) Discuss the project manager, system designer, and system installer qualifications for engineering, designing, and installing small wind systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar systems designed, installed, or supplied and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(8)(ii)(A) through (D).

(A) Small wind systems must be installed in accordance with applicable local, State, and national building and electrical codes and regulations. Identify zoning, building and electrical code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify available component warranties for the specific project location and size.

(C) Small wind systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and obtaining those agreements. This is required even if the system is installed on the customer side of the utility meter. For systems planning to utilize a local net metering program, describe the applicable local net metering program.

(D) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, *etc.*)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the local wind resource where the small wind turbine is to be installed. Acceptable sources of wind resource data include state wind maps and nearby weather station data. Incorporate information from state wind resource maps when possible. Indicate the source of the wind data and the conditions of the wind monitoring when collected at the site or assumptions made when applying nearby wind data to the site.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Small wind systems must be engineered by either the wind turbine manufacturer or other qualified party. Systems must be offered as a complete, integrated system with matched components. The engineering must be comprehensive including turbine design and selection, tower design and selection, specification of guy wire anchors and tower foundation, inverter/controller design and selection, energy storage requirements as applicable, and selection of cabling, disconnects and interconnection equipment as well as the engineering data needed to match the wind system output to the application load, if applicable.

(A) The application must include a concise but complete description of the small wind system including location of the project, proposed turbine specifications, tower height and type of tower, type of energy storage and location of storage if applicable, proposed inverter manufacturer and model, electric power system interconnection equipment, and application load and load interconnection equipment as applicable. Identify possible vendors and models of major system components. Provide the expected system energy production based on available wind resource data on monthly (when possible) and annual basis and how the energy produced by the system will be used.

(B) The application must include a description of the siting criteria used in selecting the project site and address issues such as site access, foundations, backup equipment when applicable, access to the wind resource, proximity to the electrical gird or application load, and environmental issues with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, avian impacts, and other construction and installation issues and whether special circumstances such as proximity to airports exist when applicable to this type of technology. Provide a 360-degree panoramic photograph of the proposed

site including indication of prevailing winds when possible.

(C) Sites and application loads must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed project to demonstrate the financial performance of the project. Provide a detailed analysis and description of project costs including design, permitting, equipment, site preparation, system installation, system startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed description of historic or expected energy use and expected energy offsets or sales on a monthly and annual basis.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Small wind systems may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment, including cranes and other devices, needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Ensure that systems must have at least a 5-year warranty for equipment and a commitment from the supplier to have spare parts available. Provide information regarding system warranty and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed system, including maintenance schedules for the mechanical and electrical and software systems;

(C) Provide historical or engineering information that supports expected design life of the system and timing of major component replacement or rebuilds. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for in or outsourcing; and

(D) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(9) *Wind, large.* The technical requirements specified in paragraphs (d)(9)(i) through (x) apply to wind energy systems for which the rated power of the individual wind turbine(s) is larger than 100kW. Such systems are considered large wind systems. The major components of a large wind system are the wind turbine rotor, the gearbox, the generator, the tower, the power electronics, the local collection grid, and the interconnection equipment.

(i) *Qualifications of project team.* The large wind project team should consist of a project manager, a meteorologist, an equipment supplier, a project engineer, a primary or general contractor, construction contractor, and a system operator and maintainer and in some cases the owner of the application or load served by the system. One individual or entity may serve more than one role.

The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the applicant's risk, and a design build method, often referred to as turn key, where the applicant establishes the specifications for the project and secures the services of a developer who will design and build the project at the developers risk;

(B) Discuss the large wind turbine manufacturers and other equipment suppliers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(C) Discuss the project manager, equipment supplier, project engineer, and construction contractor qualifications for engineering, designing, and installing large wind systems including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available;

(D) Discuss the qualifications of the meteorologist, including references; and

(E) Describe system operator's qualifications and experience for servicing, operating, and maintaining the system for the proposed application. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(9)(ii)(A) through (E).

(A) Large wind systems must be installed in accordance with local, State, and national building and electrical codes and regulations. Identify zoning, building and electrical code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(B) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(C) Identify available component warranties for the specific project location and size.

(D) Large wind systems interconnected to the electric power system will need arrangements to interconnect with the utility. Identify utility system interconnection requirements, power purchase arrangements, or licenses where required and the schedule for meeting those requirements and obtaining those agreements.

(E) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, *etc.*)

(iii) *Resource assessment.* The applicant must provide adequate and appropriate evidence of the availability of the renewable resource required for the system to operate as designed. Indicate the local wind resource where the wind turbine is to be installed. Wind resource maps may be used as an acceptable preliminary source of wind resource data. Projects greater than 500kW must obtain wind data from the proposed project site. For such projects, describe the proposed measurement setup for the collection of the wind resource data. For proposed projects with an established wind resource, provide a summary of the wind resource and the specifications of the measurement setup. Large wind systems larger than 500kW in size will typically require at least one year of on-site monitoring. If less than one year of data is used, the qualified meteorological consultant must provide a detailed analysis of correlation between the site data and a near-by long-term measurement site.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the system will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Large wind systems must be engineered by a qualified entity. Systems must be engineered as a complete, integrated system with matched components. The engineering must be comprehensive including site selection, turbine selection, tower selection, tower foundation, design of the local collection grid, interconnection equipment selection, and system monitoring equipment. For stand alone, non-grid applications, engineering information must be provided that demonstrates appropriate matching of wind turbine and load.

(A) The application must include a concise but complete description of the large wind project including location of the project, proposed turbine specifications, tower height and type of tower, the collection grid, interconnection equipment, and monitoring equipment. Identify possible vendors and models of major system components. Provide the expected system energy production based on available wind resource data on monthly and annual bases. For wind projects larger than 500kW in size, provide the expected system energy production over the life of the project including a discussion on inter-annual variation using a comparison of the on-site monitoring data with long-term meteorological data from a nearby monitored site.

(B) The application must include a description of the siting criteria used in selecting the project site and address issues such as site access, foundations, backup equipment when applicable, proximity to the electrical grid or application load, and environmental issues with emphasis on land use, air quality, water quality, noise pollution, soil degradation, wildlife, habitat fragmentation, aesthetics, odor, noise, avian impacts, and other construction, and installation issues and whether special circumstances such as proximity to airports exist.

(C) Sites must be controlled by the agricultural producer or small business for the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including resource assessment, system and site design, permits and agreements, equipment procurement, and system installation from excavation through startup and shakedown.

(vi) *Financial feasibility.* The applicant must provide a study that describes costs and revenues of the proposed renewable energy system(s) to demonstrate the financial performance of the renewable energy system(s). Provide a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, system installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs. Provide a detailed description of applicable investment incentives, productivity incentives, loans, and grants. Provide a detailed analysis and description of annual project revenues including electricity sales, production tax credits, revenues from green tags, and any other production incentive programs throughout the life of the project. Provide a description of planned contingency fees or reserve funds to be used for unexpected large component replacement or repairs and for low productivity periods.

(vii) *Equipment procurement.* The applicant must demonstrate that equipment required by the system is available and can be procured and delivered within the proposed project development schedule. Large wind turbines may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(viii) *Equipment installation.* The applicant must fully describe the management of and plan for site development and system installation, provide details regarding the scheduling of major installation equipment, including cranes or other devices, needed for project construction, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole.

(ix) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the system necessary for the system to operate as designed over the design life. The applicant must:

(A) Ensure that systems must have at least a 3-year warranty for equipment. Provide information regarding turbine warranties and availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed project, including maintenance schedules for the mechanical and electrical systems and system monitoring and control requirements;

(C) Provide information that supports expected design life of the system and

timing of major component replacement or rebuilds;

(D) Provide and discuss the risk management plan for handling large, unanticipated failures of major components such as the turbine gearbox or rotor. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for insourcing or outsourcing;

(E) Describe opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator; and

(F) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance.

(x) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

(10) *Energy efficiency improvements.* The technical requirements specified in paragraphs (d)(10)(i) through (ix) apply to projects that involve improvements to a facility, building or process resulting in reduced energy consumption or reduced amount of energy required per unit of production are regarded as energy efficiency projects. Projects in excess of $50,000 require a full energy audit. The system engineering for such projects must be performed by a qualified entity certified Professional Engineer.

(i) *Qualifications of project team.* The energy efficiency project team is expected to consist of an energy auditor, a project manager, an equipment supplier of major components, a project engineer, and a construction contractor or system installer. One individual or entity may serve more than one role.

The applicant must provide authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services. The applicant must also provide authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the system to operate over its design life. The applicant must:

(A) Discuss the qualifications of the various project team members including any relevant certifications by recognized organizations or bodies;

(B) Describe qualifications or experience of the team as related to installation, service, operation and maintenance of the project;

(C) Provide a list of the same or similarly engineered projects designed, installed, or supplied by the team or by team members and currently operating. Provide references if available; and

(D) Discuss the manufacturers of major energy efficiency equipment being considered including length of time in business.

(ii) *Agreements and permits.* The applicant must identify all necessary agreements and permits required for the energy efficiency improvement(s) and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (d)(10)(ii)(A) through (C).

(A) Energy efficiency improvements must be installed in accordance with local, State, and national building and electrical codes and regulations. Identify building code, electrical code, and zoning issues and required permits, and the schedule for meeting those requirements and securing those permits.

(B) Identify available component warranties for the specific project location and size.

(C) Describe all potential environmental impacts resulting from siting issues, construction and operation of the proposed project. Identify other site or design alternatives that were considered in your planning process. Identify all environmental compliance issues such as required permits (*i.e.*, wetland fill, endangered species, etc.)

(iii) *Energy assessment.* The applicant must provide adequate and appropriate evidence of energy savings expected when the system is operated as designed.

(A) The application must include information on baseline energy usage (preferably including energy bills for at least one year), expected energy savings based on manufacturers specifications or other estimates, estimated dollars saved per year, and payback period in years (total investment cost equal to cumulative total dollars of energy savings). Calculation of energy savings should follow accepted methodology and practices. System interactions should be considered and discussed.

(B) For energy efficiency improvement projects in excess of $50,000, an energy audit is required. An energy audit is a written report by an independent, qualified entity that documents current energy usage, recommended potential improvements and their costs, energy savings from these improvements, dollars saved per year, and simple payback period in years (total costs divided by annual dollars of energy savings). The methodology of the energy audit must meet professional and industry standards. The energy audit must cover the following:

(*1*) *Situation report.* Provide a narrative description of the facility or process, its energy system(s) and usage, and activity profile. Also include price per unit of energy (electricity, natural gas, propane, fuel oil, renewable energy, *etc.*) paid by the customer on the date of the audit. Any energy conversion should be based on use rather than source.

(*2*) *Potential improvements.* List specific information on all potential energy-saving opportunities and their costs.

(*3*) *Technical analysis.* Give consideration to the interactions among the potential improvements and other energy systems:

(*i*) Estimate the annual energy and energy costs savings expected from each improvement identified in the potential project.

(*ii*) Calculate all direct and attendant indirect costs of each improvement.

(*iii*) Rank potential improvements measures by cost-effectiveness.

(*4*) *Potential improvement description.* Provide a narrative summary of the potential improvement and its ability to provide needed benefits, including a discussion of non-energy benefits such as project reliability and durability.

(*i*) Provide preliminary specifications for critical components.

(*ii*) Provide preliminary drawings of project layout, including any related structural changes.

(*iii*) Document baseline data compared to projected consumption, together with any explanatory notes. When appropriate, show before-and-after data in terms of consumption per unit of production, time or area. Include at least 1 year's bills for those energy sources/fuel types affected by this project. Also submit utility rate schedules, if appropriate.

(*iv*) Identify significant changes in future related operations and maintenance costs.

(*v*) Describe explicitly how outcomes will be measured.

(iv) *Design and engineering.* The applicant must provide authoritative evidence that the energy efficiency improvement(s) will be designed and engineered so as to meet its intended purpose and need, will ensure public safety, mitigate any adverse environmental impacts, and will comply with applicable laws, regulations, agreements, permits, codes, and standards.

(A) Energy efficiency improvement projects in excess of $50,000 must be engineered by a qualified entity. Systems must be engineered as a

complete, integrated system with matched components.

(B) For all energy efficiency improvement projects, identify and itemize major energy efficiency improvements including associated project costs. Specifically delineate which costs of the project are directly associated with energy efficiency improvements. Describe the components, materials or systems to be installed and how they improve the energy efficiency of the process or facility being modified. Discuss passive improvements that reduce energy loads, such as improving the thermal efficiency of a storage facility, and active improvements that directly reduce energy consumption, such as replacing existing energy consuming equipment with high efficiency equipment, as separate topics. Discuss any anticipated synergy between active and passive improvements or other energy systems. Include in the discussion any change in on-site effluents, pollutants, or other by-products.

(C) Identify possible suppliers and model of major pieces of equipment.

(v) *Project development schedule.* The applicant must identify each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including energy audit (if applicable), system and site design, permits and agreements, equipment procurement, and system installation from site preparation through startup and shakedown.

(vi) *Equipment procurement.* The applicant must demonstrate that equipment required for the energy efficiency improvement(s) is available and can be procured and delivered within the proposed project development schedule. Energy efficiency improvements may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory. Provide a detailed description of equipment certification. Procurement must be made in accordance with the requirements of 7 CFR part 3015.

(vii) *Equipment installation.* The applicant must fully describe the management of and plan for installation of the energy efficiency improvement(s), identify specific issues associated with installation, provide details regarding the scheduling of major installation equipment needed for project discussion, and provide a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the system as a whole. Include in this discussion any unique concerns, such as the effects of energy efficiency improvements on system power quality.

(viii) *Operations and maintenance.* The applicant must identify the operations and maintenance requirements of the energy efficiency improvement(s) necessary for the energy efficiency improvement(s) to operate as designed over the design life. The applicant must:

(A) Provide information regarding component warranties and the availability of spare parts;

(B) Describe the routine operations and maintenance requirements of the proposed project, including maintenance schedules for the mechanical and electrical systems and system monitoring and control requirements;

(C) Provide information that supports expected design life of the system and timing of major component replacement or rebuilds;

(D) Provide and discuss the risk management plan for handling large, unanticipated failures of major components. Include in the discussion, costs and labor associated with operations and maintenance of system and plans for in or outsourcing; and

(E) For owner maintained portions of the system, describe any unique knowledge, skills, or abilities needed for service operations or maintenance.

(ix) *Decommissioning.* When uninstalling or removing the project, describe the decommissioning process. Describe any issues, any environmental compliance requirements, and costs for removal and disposal of the system.

Evaluation of Grant Applications

(a) *General review.* The Agency will evaluate each application and make a determination whether the applicant is eligible, the proposed grant is for an eligible project, and the proposed grant complies with all applicable statutes and regulations.

(b) *Ineligible or incomplete applications.* If the applicant is ineligible or the application is incomplete, the Agency will inform the applicant in writing of the decision, reasons therefore, and any appeal rights, and no further evaluation of the application will occur.

(c) *Technical feasibility determination.* The Agency's determination of a project's technical feasibility will be based on the information provided by the applicant and on other sources of information, such as recognized industry experts in the applicable technology field, as necessary, to determine technical feasibility of the proposed project.

(d) *Evaluation criteria.* Agency personnel will score and fund each application based on the evaluation criteria specified in paragraph (d)(1) for renewable energy systems and in paragraph (d)(2) for energy efficiency improvements. These criteria must be individually addressed in narrative form on a separate sheet of paper.

(1) *Criteria for applications for renewable energy systems.* Criteria for applications for renewable energy systems are:

(i) *Quantity of energy produced.* Points may only be awarded for either energy replacement or energy generation, but not for both;

(A) *Energy replacement.* If the proposed renewable energy system is intended primarily for self use by the farm, ranch, or rural small business and will provide energy replacement of greater than 75 percent, 20 points will be awarded; greater than 50 percent, but equal to or less than 75 percent, 15 points will be awarded; or greater than 25 percent, but equal to or less than 50 percent, 10 points will be awarded. The energy replacement should be determined by dividing the estimated quantity of energy to be generated by at least the past 12 months' energy profile of the agricultural producer or small business or anticipated energy use. The estimated quantity of energy may be described in Btu's, kilowatts, or similar energy equivalents. Energy profiles can be obtained from the utility company;

(B) *Energy generation.* If the proposed renewable energy system is intended primarily for production of energy for sale, 20 points will be awarded;

(ii) *Environmental benefits.* If the purpose of the proposed renewable energy system is to upgrade an existing facility or construct a new facility required to meet applicable health or sanitary standards, 10 points will be awarded. Documentation must be obtained by the applicant from the appropriate regulatory agency with jurisdiction to establish the standard, to verify that a bona fide standard exists, what that standard is, and that the proposed project is needed and required to meet the standard;

(iii) *Commercial availability.* If the renewable energy system is currently

commercially available and replicable, an additional 10 points will be awarded;

(iv) *Cost effectiveness.* If the proposed renewable energy system will return the cost of the investment in 5 years or less, 25 points will be awarded; up to 10 years, 20 points will be awarded; up to 15 years, 15 points will be awarded; or up to 20 years, 10 points will be awarded. The estimated return on investment is calculated by dividing the total project cost by the estimated projected net annual income and/or energy savings of the renewable energy system;

(v) *Matching funds.* If the agricultural producer or small business has provided eligible matching funds of over 90 percent, 15 points will be awarded; 85–90 percent, 10 points will be awarded; or at least 80 and up to but not including 85 percent, 5 points will be awarded;

(vi) *Management.* If the renewable energy system will be monitored and managed by a qualified third-party operator, such as pursuant to a service contract, maintenance contract, or remote telemetry, an additional 10 points will be awarded; and

(vii) *Small agricultural producer.* If the applicant (for grants or direct loans) or borrower (for guaranteed loans) is an agricultural producer producing agricultural products with a gross market value of less than $1 million in the preceding year, an additional 10 points will be awarded.

(2) *Criteria for applications for energy efficiency improvements.* Criteria for applications for energy efficiency improvements are:

(i) *Energy savings.* If the estimated energy expected to be saved by the installation of the energy efficiency improvements will be 35 percent or greater, 20 points will be awarded; 30 and up to but not including 35 percent, 15 points will be awarded; 25 and up to but not including 30 percent, 10 points will be awarded; or 20 and up to but not including 25 percent, 5 points will be awarded. Energy savings will be determined by the projections in an energy assessment or audit;

(ii) *Cost effectiveness.* If the proposed energy efficiency improvements will return the cost of the investment in 2 years or less, 25 points will be awarded; greater than 2 and up to and including 5 years, 20 points will be awarded; greater than 5 and up to and including 9 years, 15 points will be awarded; or greater than 9 and up to and including 11 years, 10 points will be awarded. The estimated return on investment is calculated by dividing the total project cost by the project net annual energy savings of the energy efficiency improvements;

(iii) *Matching funds.* If the agricultural producer or small business has provided eligible matching funds of over 90 percent, 15 points will be awarded; 85–90 percent, 10 points will be awarded; or 80 and up to but not including 85 percent, 5 points will be awarded; and

(iv) *Small agricultural producer.* If the applicant is an agricultural producer producing agricultural products with a gross market value of less than $1 million in the preceding year, an additional 10 points will be awarded.

Insurance Requirements

Insurance is required to protect the interest of the recipient of funds under this subpart and the Agency. The coverage must be maintained for the life of the grant unless this requirement is waived or modified by the Agency in writing.

(a) Worker compensation insurance is required in accordance with State law.

(b) National flood insurance is required in accordance with 7 CFR part 1806, subpart B.

(c) Business interruption insurance will be required.

Laws That Contain Other Compliance Requirements

The applicant must comply with all applicable laws, regulations, Executive Orders, and other generally applicable requirements, including those contained in 7 CFR part 3015, "Uniform Federal Assistance Regulations," and such other statutory provisions as are specifically contained herein.

(a) *Equal employment opportunity.* For all construction contracts and grants in excess of $10,000, the contractor must comply with Executive Order 11246 as amended by Executive Order 11375, and as supplemented by applicable Department of Labor regulations (41 CFR part 60). The applicant and borrower are responsible for ensuring that the contractor complies with these requirements.

(b) *Americans With Disabilities Act (ADA).* Loans and grants that involve the construction of or addition to facilities that accommodate the public and commercial facilities, as defined by the ADA, must comply with the ADA. The applicant and borrower are responsible for compliance.

(c) *Civil rights compliance.* Recipients of direct loans and grants must comply with the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. This may include collection and maintenance of data on the race, sex, and national origin of the recipient's membership/ownership and employees. These data should be available to conduct compliance reviews in accordance with 7 CFR part 1901, subpart E, section 1901.204. Initial reviews will be conducted after Form RD 400–4, "Assurance Agreement," is signed and all subsequent reviews every 3 years thereafter. The Agency should be contacted to provide further guidance on collection of information and compliance with Civil Rights laws.

(d) *National Environmental Policy Act.* Each applicant must prepare Form RD 1940–20, "Request for Environmental Information." The State Rural Development Office will review the information provided and advise the applicant of the specific and necessary environmental review and analysis to be completed in completing the required NEPA review and analysis pursuant to 7 CFR part 1940, subpart G. A site visit by the Agency will be scheduled, if necessary, to determine the scope of the review. The applicant will be notified of all specific compliance requirements, such as the publication of public notices. All required environmental analysis and compliance will be completed prior to grant obligation. The taking of any actions or incurring any obligations during the time of application or application review and processing that would either limit the range of alternatives to be considered or that would have an adverse effect on the environment, such as the initiation of construction, will result in project ineligibility.

(e) *Executive Order 12898.* When grant and loans (direct or guaranteed) are proposed, Rural Development employees are to conduct a Civil Rights Impact Analysis in regard to environmental justice utilizing Form RD 2006–38. This must be done prior to loan approval, obligation of funds, including issuance of a Letter of Conditions, whichever occurs first.

Construction Planning and Performing Development

The requirements of 7 CFR part 1924, subpart A, apply for construction of renewable energy systems and energy efficiency improvement projects as applicable.

Recipients of grants and direct loans under this subpart are not authorized to construct the facility, project, or improvement in total, or in part, or utilize their own personnel and/or equipment.

Grantee Requirements

(a) Letter of Conditions, which is prepared by the Agency, establishes conditions that must be understood and agreed to by the applicant before any obligation of funds can occur. The applicant must sign Letter of Intent To Meet Conditions and Form 1940–1, "Request for Obligation of Funds," if they accept the conditions of the grant. These forms will be enclosed with the Letter of Conditions. The grant will be obligated when the Agency receives an executed Letter of Intent and Request for Obligation of Funds from the applicant agreeing to all provisions in the Letter of Conditions.

(b) The grantee must sign a Grant Agreement (which is published at the end of the NOFA) and abide by all requirements contained in the Grant Agreement or any other Federal statutes or regulations governing this program. Failure to follow the requirements may result in termination of the grant and adoption of other remedies provided for in the Grant Agreement.

Servicing Grants

Grants will be serviced in accordance with 7 CFR part 1951, subpart E and the Grant Agreement.

Dated: April 27, 2004.

Gilbert G. Gonzalez, Jr.,

Acting Under Secretary.

UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL DEVELOPMENT

FORM APPROVED
OMB No. 0570-0044

RENEWABLE ENERGY/ENERGY EFFICIENCY GRANT AGREEMENT RENEWABLE ENERGY SYSTEMS AND ENERGY EFFICIENCY IMPROVEMENTS GRANT PROGRAM

The purpose of this agreement is to identify the terms and conditions to be fulfilled by the Grantee upon award of a grant under the Renewable Energy Systems and Energy Efficiency Improvements Grant Program of Rural Development, United States Department of Agriculture. ***Provide the requested information, read this agreement in its entirety and sign in the space on the last page. Your signature indicates consent with this agreement.***

1. Case No.	2. Grant No.	
3. Grantee Name:	4. Address of Grantee:	
5. Total Estimated Eligible Project Cost:	6. Amount of Grant:	7. Grant Amount as Percent of Total Estimate Eligible Project Cost:
8. Amount of Funds Available from Other Sources:	9. Location of Project	
This Grant Agreement covers the project described below (use continuation sheets as necessary). You may elect to attach a copy of the project description from the application if the description is still current.		

According to the Paperwork Reduction Act of 1995, 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. The valid OMB control number for this information collection is 0570-0044. The time required to complete this information collection is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This Grant Agreement covers the following described real property (use continuation sheets as necessary).

This Grant Agreement covers the following described equipment (use continuation sheets as necessary):

Item	Useful Life

General Grantee Certifications

This GRANT AGREEMENT is a contract for receipt of grant funds under the Renewable Energy/Energy Efficiency program (Title IX, Section 9006 of Public Law 107–171) between the Grantee and the United States of America acting through Rural Development, Department of Agriculture (Grantor). All references herein to "Project" refer to installation of a renewable energy system or energy efficiency improvement at the location identified in Block 9. Should actual project costs be lower than projected in the agreement (see Block 5), the final amount of grant will be adjusted to remain at the percentage (identified in Block 7) of the final Eligible Project Cost.

(1) Assurance Agreement

Grantee assures the Grantor that Grantee is in compliance with and will comply in the course of the Agreement with all applicable laws, regulations, Executive Orders, and other generally applicable requirements, including those contained in 7 CFR part 3015, "Uniform Federal Assistance Regulations," which are incorporated into this agreement by reference, and such other statutory provisions as are specifically contained herein.

Grantee and Grantor agree to all of the terms and provisions of any policy or regulations promulgated under Title IX, Section 9006 of the Farm Security and Rural Investment Act of 2002 as amended. Any application submitted by the Grantee for this grant, including any attachments or amendments, are incorporated and included as part of this Agreement. Any changes to

these documents or this Agreement must be approved in writing by the Grantor.

The Grantor may terminate the grant in whole, or in part, at any time before the date of completion, whenever it is determined that the Grantee has failed to comply with the conditions of this Agreement.

(2) Use of Grant Funds

Grantee will use grant funds and leveraged funds only for the purposes and activities specified in the application approved by the Grantor including the approved budget. Budget and approved use of funds are as further described in the Grantor Letter of Conditions and amendments or supplements thereto. Any uses not provided for in the approved budget must be approved in writing by the Grantor. The proposed renewable energy system or energy efficiency improvements shall be constructed/installed in accordance with any energy audit recommendations or engineering or other technical reports provided by the Grantee and approved by the Grantor.

(3) Civil Rights Compliance

Grantee will comply with Executive Order 12898, the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. This shall include collection and maintenance of data on the race, sex, and national origin of Grantee's membership/ ownership and employees. This data must be available to the Grantor in its conduct of Civil Rights Compliance Reviews, which will be conducted prior to grant closing and 3 years later, unless the final disbursement of grant funds has occurred prior to that date.

(4) Financial Management Systems

A. Grantee will provide a Financial Management System in accordance with 7 CFR part 3015, including but not limited to:

(1) Records that identify adequately the source and application of funds for grant-supported activities. Those records shall contain information pertaining to grant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income.

(2) Effective control over and accountability for all funds, property, and other assets. Grantees shall adequately safeguard all such assets and ensure that they are used solely for authorized purposes.

(3) Accounting records prepared in accordance with generally accepted accounting principles (GAAP) and supported by source documentation.

(4) Grantee tracking of fund usage and records that show matching funds and grant funds are used in equal proportions. The grantee will provide verifiable documentation regarding matching funds usage, *i.e.*, bank statements or copies of funding obligations from the matching source.

B. Grantee will retain financial records, supporting documents, statistical records, and all other records pertinent to the grant for a period of at least 3 years after final grant disbursement, except that the records shall be retained beyond the 3-year period if audit findings have not been resolved. The Grantor and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the Grantee's which are pertinent to the grant for the purpose of making audits, examinations, excerpts, and transcripts.

(5) Procurement and Construction

A. Grantee will comply with the applicable procurement requirements of 7 CFR part 3015 regarding standards of conduct, open and free competition, access to contractor records, and equal employment opportunity requirements.

B. Grantee will, for construction contracts in excess of $50,000, provide performance and payment bonds for 100 percent of the contract price.

(6) Acquired Property

A. Grantee will in accordance with 7 CFR part 3015, hold title to all real property identified as part of the project costs, including improvements to land, structures or things attached to them. Movable machinery and other kinds of equipment are not real property (see Item 2 below). In addition:

(1) Approval may be requested from Grantor to transfer title to an eligible third party for continued use for originally authorized purposes. If approval is given, the terms of the transfer shall provide that the transferee must assume all the rights and obligations of the transferor, including the terms of this Grant Agreement.

(2) If the real property is no longer to be used as provided above, disposition instructions of the Grantor shall be requested and followed. Those instructions will provide for one of the following alternatives:

a. The Grantee may be directed to sell the property, and the Grantor shall have a right to an amount computed by multiplying the Federal (Grantor) share of the property times the proceeds from sale (after deducting actual and reasonable selling and fix-up expenses, if any, from the sale proceeds). Proper sales procedures shall be followed which provide for competition to the extent practicable and result in the highest possible return.

b. The Grantee shall have the opportunity of retaining title. If title is retained, Grantor shall have the right to an amount computed by multiplying the market value of the property by the Federal share of the property.

c. The Grantee may be directed to transfer title to the property to the Federal Government provided that, in such cases, the Grantee shall be entitled to compensation computed by applying the Grantee's percentage of participation in the cost of the program or project to the current fair market value of the property.

Disposition requirements for real property shall expire 20 years from the date of final grant disbursement. This Grant Agreement covers the real property described in Block 10.

Grantee will abide by the requirements of 7 CFR part 3015 pertaining to equipment, which is acquired wholly or in part with grant funds.

B. Disposition requirements for equipment will expire at the end of each item's useful life (which is based on a straight-line, non-accelerated method). This Grant Agreement covers the equipment described in Block 11. Grantee agrees not to encumber, transfer, or dispose of the property or any part thereof, acquired wholly or in part with Grantor funds, without the written consent of the Grantor.

C. If required by Grantor, record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal grant funds, and that use and disposition conditions apply to the property as provided by 7 CFR part 3015.

(7) Reporting

A. Grantee will after Grant Approval through Project Construction:

(1) Provide periodic reports as required by the Grantor. A financial status report and a project performance report will be required on a quarterly basis (Due 30 working days after end of the quarter. For the purposes of this grant, quarters end on March 31, June 30, September 30, and December 31). The financial status report must show how grant funds and leveraged funds have been used to date and project the funds needed and their purposes for the next quarter. A final report may serve as the last quarterly report. Grantees shall constantly monitor performance to ensure that time schedules are being met and projected goals by time periods are being accomplished. The project performance reports shall include the following:

a. A comparison of actual accomplishments to the objectives for that period.

b. Reasons why established objectives were not met, if applicable.

c. Reasons for any problems, delays, or adverse conditions which will affect attainment of overall program objectives, prevent meeting time schedules or objectives, or preclude the attainment of particular objectives during established time periods. This disclosure shall be accomplished by a statement of the action taken or planned to resolve the situation.

d. Objectives and timetables established for the next reporting period.

(2) Final project development report which includes a detailed project funding and expense summary; summary of facility installation/construction process including recommendations for development of similar projects by future applicants to the program.

(3) For the year(s) in which in Grant funds are received, Grantee will provide an annual financial statement to Grantor.

B. Grantee will after Project Construction.

1. Allow Grantor access to the project and its performance information during its useful life.

2. Provide periodic reports as required by Grantor and permit periodic inspection of the project by a representative of the Grantor. Grantee reports will include but not be limited to the following:

a. Purchase of Renewable Energy System Project Report. Commencing the first full calendar year following the year in which project construction was completed and continuing for 3 full years a report detailing the following will be provided:

i. Quantity of Energy Produced. Grantee to report the actual amount of energy produced

in BTUs, kilowatts, or similar energy equivalents.

ii. Environmental Benefits. If applicable, Grantee to provide documentation that identified health and/or sanitation problem has been solved.

iii. Return on Investment. Grantee to provide the annual income and/or energy savings of the renewable energy system.

iv. Summary of the cost of operating and maintaining the facility.

v. Description of any maintenance or operational problems associated with the facility.

vi. Recommendations for development of future similar projects.

b. Energy Efficiency Improvement Project Report. Commencing the first full calendar year following the year in which project construction was completed and continuing for 2 full years. Grantee will report the actual amount of energy saved due to the energy efficiency improvements.

(8) Grant Disbursement

Grantee will disburse grant funds as scheduled. Unless required by funding partners to be provided on a pro rata basis with other funding sources, grant funds will be disbursed after all other funding sources have been expended.

A. Requests for reimbursement may be submitted monthly or more frequently if authorized to do so by the Grantor. Ordinarily, payment will be made within 30 days after receipt of a proper request for reimbursement.

B. Grantee shall not request reimbursement for the Federal share of amounts withheld from contractors to ensure satisfactory completion of work until after it makes those payments.

C. Payment shall be made by electronic funds transfer.

D. Standard Form 271, "Outlay Report and Request for Reimbursement for Construction Programs," or other format prescribed by Grantor shall be used to request Grant reimbursements.

E. For renewable energy projects, grant funds will be disbursed in accordance with the above through 90 percent of grant disbursement. The final 10 percent of grant funds will be held by the Grantor until construction of the project is completed, operational, and has met or exceeded the test run requirements as set out in the grant award requirements.

(9) Post-Disbursement Requirements

Grantee will own, operate, and provide for continued maintenance of the Project.

IN WITNESS WHEREOF, Grantee has this day authorized and caused this Agreement to be signed in its name and its corporate seal to be hereunto affixed and attested by its duly authorized officers thereunto, and the Grantor has caused this Agreement to be duly executed in its behalf by:

Name:
Title:

Date

UNITED STATES OF AMERICA RURAL DEVELOPMENT

By:
Name:
Title:

Date

[FR Doc. 04–10052 Filed 5–4–04; 8:45 am]

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Federal Register

Wednesday,
May 5, 2004

Part IV

Small Business Administration

13 CFR Parts 121, 125, and 134
Small Business Size Regulations; Government Contracting Programs; Final Rule

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 125 and 134

RIN 3245–AF16

Small Business Size Regulations; Government Contracting Programs

AGENCY: Small Business Administration.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule implements that section of the recently enacted Veterans Benefits Act of 2003 (VBA), which addresses procurement programs for small business concerns (SBCs) owned and controlled by service-disabled veterans. According to the interim final rule, a contracting officer may restrict competition for a requirement to service-disabled veteran-owned (SDVO) SBCs. The interim final rule defines the term service-disabled veterans, explains when competition may be restricted to SDVO SBCs, and establishes procedures for protesting the status of an SDVO SBC.

DATES: This rule is effective May 5, 2004. Comments must be received on or before July 6, 2004.

ADDRESSES: You may submit comments, identified by the RIN number, by any of the following methods: through the Federal rulemaking portal at *http://www.regulations.gov* (follow the instructions for submitting comments); through e-mail at *SDVOSBCProgram@sba.gov* (include RIN number in the subject line of the message); or by mail to Dean Koppel, Assistant Administrator, Office of Policy and Research, 409 3rd Street, SW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, Office of Policy and Research at (202) 205–7322 or at *SDVOSBCProgram@sba.gov*.

SUPPLEMENTARY INFORMATION: On December 16, 2003, the VBA was enacted, Public Law 108–183. Section 308 of that law amended the Small Business Act to establish a procurement program for SBCs owned and controlled by service-disabled veterans. This procurement program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs, if certain conditions are met. The Veterans Benefits Act of 2003 also provides that the U.S. Small Business Administration (SBA) may verify the eligibility of any SDVO SBC.

The SBA is issuing regulations to implement this procurement program for service-disabled veterans. As discussed below, the SBA has determined that it is necessary to issue the regulations as interim final and effective the same day it is published in the **Federal Register.** Although the SBA is issuing this rule as interim final with an immediate effective date, the Agency is seeking public comment concerning ways that the SBA can enhance this program for service-disabled veterans.

I. Justification for Publication as Interim Final Status Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act and SBA regulations. 5 U.S.C. 553 and 13 CFR 101.108. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation. In this present case, the Agency notes that this procurement program for service-disabled veterans became effective upon enactment of the Veterans Benefits Act of 2003. Therefore, although contracting activities are required to abide by the set-aside requirements of this procurement program for service-disabled veterans, regulations are needed to implement the program and provide actual guidance. The SBA receives several telephone calls daily from contracting officials stating that they intend to set-aside requirements for service-disabled veterans and seeking guidance and clarification of this program. Consequently, the SBA believes it is necessary to implement this rule as quickly as possible.

In addition, the Federal Acquisition Regulations (FAR) currently provides a definition for service-disabled veteran-owned small business concern. As a result, there are many business concerns that are representing themselves as SDVO SBCs to COs. However, the FAR does not provide a mechanism to check the status of these representations. This has become a critical issue with the enactment of the VBA because COs may now award sole source and set-aside contracts to business concerns that represent themselves as SDVO SBCs. The SBA's regulations provide for a mechanism to check SDVO SBC status through protests and appeals. Therefore, it is urgent that the SBA issue this regulation as interim final.

Finally, the purpose of this procurement program is to assist agencies in achieving the statutorily mandated 3% government-wide goal for procurement from service-disabled veteran-owned SBCs. When drafting the Veterans Benefits Act of 2003, Congress found that agencies were falling far short of reaching this goal. Consequently, the legislative history specifically states that Congress urges the SBA and the Office of Federal Procurement Policy to expeditiously and transparently implement this program.

Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need to establish procedures for determining when a business concern is a SDVO SBC, provide guidance to CO's on when and how to issue a sole source or set-aside to a SDVO SBC, and provide a mechanism to protect such status. Advance solicitation of comments for this rulemaking would be impracticable and contrary to the public interest, as it would delay the delivery of critical assistance to the Federal procurement community by a minimum of three to six months. Any such delay would be extremely prejudicial to SDVO SBCs. It is likely that CO's would not offer a procurement as a sole source or set-aside for SDVO SBCs despite the fact the statutory requirement is met, or that an SDVO SBC award would be made to a concern that is not qualified for the award, before a rule could be promulgated under standard notice and comment rulemaking procedures.

Although this rule is being published as an interim final rule, comments are hereby solicited from interested members of the public. SBA may then consider these comments in making any necessary revisions to these regulations.

II. Justification for Immediate Effective Date of Interim Final Rule

The APA requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. § 553(d)(3). SBA finds that good cause exists to make this final rule effective the same day it is published in the **Federal Register.**

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule

takes effect. For the reasons set forth above in I, Justification of Publication of Interim Final Status Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date.

SBA also believes, based on its contacts with interested members of the public, that there is strong interest in immediate implementation of this rule. SBA is aware of many procuring activities and business concerns that will be assisted by the immediate adoption of this rule.

Section-by-Section Analysis

In § 121.401, SBA is amending the size regulations to state that the Service-Disabled Veteran-Owned Small Business Concern Program (SDVO Program) is subject to size determinations. SBA is also amending the size regulations, at § 121.1001, to provide that the following may protest the size of a SBC in connection with a particular SDVO Program procurement: any offeror on an SDVO Program set-aside; the CO; the SBA Government Contracting Area Director; and the Associate Administrator for Government Contracting.

The SBA is also amending § 125.6 to provide that SDVO SBCs awarded a contract as a result of a set-aside must meet certain limitations on subcontracting requirements. These subcontracting limitations are required for all SBCs awarded a contract as a result of their SBC status. For purposes of the SDVO SBC Program, the regulation allows the SDVO SBC prime contractor to utilize other SDVO SBCs to help it meet these subcontracting limitations.

SBA has added a new subsection 125.8 to address the SDVO Program. Section 125.8 sets forth the definitions important to the program, including several that were defined by statute. For example, the Veterans Benefits Act of 2003 defines the term "contracting officer" while the Small Business Act defines the terms "veteran," "service-disabled veteran" and "small business owned and controlled by service-disabled veterans." For those terms, SBA merely reiterated the definition set forth in statute.

The Small Business Act defines the term veteran by referencing 38 U.S.C. 101, and therefore these regulations reference that statute as well. Section 101 of Title 38 defines the term "veteran" to mean a person who served in the active military, naval, or air service, and who was discharged or released under conditions other than dishonorable. The Small Business Act also defines the term "service-disabled veteran" as one with a disability that is service-connected, as defined by 38 U.S.C. 101. Section 101 of Title 38 defines the term "service-connected disability" as a disability that was incurred or aggravated in line of duty in the active military, naval, or air service.

The Small Business Act further defines the term "owned and controlled by service-disabled veterans" to mean: (1) A SBC that is not less than 51% owned by one or more service-disabled veterans; and (2) the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such a veteran. Neither the Small Business Act nor the Veterans Benefits Act of 2003 defined the terms referenced in that definition, such as "permanent and severe disability," "spouse," or "permanent caregiver." When possible, such as for the definition of "spouse," SBA utilized the definition set forth in 38 U.S.C. 101, which sets forth definitions necessary for statutory programs for Veteran's Benefits.

For the term "permanent and severe disability," SBA referred to the regulations promulgated by the U.S. Department of Veteran's Affairs (VA) for guidance. The VA makes determination on permanent and "total" disability for purposes of determining pension benefits and other compensation for veterans. When discussing "total" disability, the VA's regulations often refer to a severe disability. Accordingly, SBA believes that it should rely on these determinations of permanent and total disability by the VA to determine whether a veteran is permanently and severely disabled for purposes of this procurement program.

With respect to the definition of the term "permanent caregiver," SBA reviewed several definitions for caregiver or a similar term set forth in the VA's regulations and state sources. In addition, the SBA reviewed the purpose and intent of this reference in the Veterans Benefits Act of 2003. For purposes of a SDVO SBC, a permanent caregiver will be the person managing the business concern for the service-disabled veterans with a permanent and severe disability. Therefore, the SBA believes that a permanent caregiver can be the spouse, or an individual 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran. Although the permanent care-giver may reside in the same household as the service-disabled veteran, he or she is not required to do so. In the case of a service-disabled veteran lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody.

SBA has also set forth guidance on the ownership criteria of a service-disabled veteran-owned SBC. In § 125.9, SBA explains that ownership must be direct and that stock options are given present effect when they are held by non-service disabled veterans. This is consistent with SBA's other programs, including the 8(a) Business Development Program.

In § 125.10, the SBA sets forth the criteria for determining who controls a service-disabled veteran-owned SBC. The regulation provides that the management and daily business operations of the concern must be controlled by a service-disabled veteran (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver). This means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver). SBA utilizes the same criteria for its 8(a) BD Program and SBA believes that this definition has worked well in determining who controls a business concern for purposes of eligibility into the 8(a) BD Program. In addition, SBA and its Office of Hearings and Appeals (OHA) has established policy on this criteria that will be helpful for this program.

SBA has added § 125.12 to address whether an SDVO SBC may have affiliates and § 125.13 to address whether participants in SBA's other programs (such as the HUBZone or 8(a) BD Programs) may be SDVO SBCs. SBA has received several inquiries from the general public on these topics and therefore feels it is necessary to address them in the regulation. With § 125.12, SBA explains that a concern may have affiliates so long as the aggregate size of the concern and all its affiliates is small as defined in part 121. With § 125.13, SBA explains that participants in SBA's other programs may qualify as SDVO SBCs if they meet the eligibility requirements set forth in this regulation.

These regulations also address contracting with SDVO SBCs. In § 125.14, SBC explains that service-disabled veteran-owned contracts are those awarded to an SDVO SBC via a sole source award or a set-aside based on competition restricted to SDVO SBCs. To be eligible to receive one of these contracts, § 125.15 explains that a

business concern must be small pursuant to the NAICS code assigned to the procurement and be an SDVO SBC.

In addition, the regulations allow SDVO SBCs to joint venture with other SBCs for an SDVO contract so long as certain conditions are met. First, the venture partners must meet certain size requirements, similar to those for other programs and similar to those set forth in 13 CFR 121.103(f), which sets forth exclusions from affiliation for certain joint ventures. In addition, SBA requires the joint venture to have a written agreement that specifically names the SDVO SBC as the managing venturer, states that not less than 51% of the net profits earned by the joint venture will be distributed to the SDVO SBC and specifies the responsibilities of each party with respect to the contract. These requirements ensure that the contract benefits will go to the SDVO SBC, since this is the purpose of the program.

Section 125.15 also explains that an SDVO SBC that is a nonmanufacturer may submit an offer on a sole source or set-aside service-disabled veteran-owned contract if it meets the requirements of the non-manufacturer rule set forth in 13 CFR § 121.406(b)(1). Section 121.406(b)(1) outlines the requirements all SBCs must meet to bid as a nonmanufacturer for a contract in which it receives some type of preference for its status as a SBC. These requirements are: (1) The SBC (together with its affiliates) cannot exceed 500 employees; (2) it is primarily engaged in the wholesale or retail trade and normally sells the items being supplied to the general public; and (3) it will supply the end items of a small business manufacturer or processor made in the United States or obtains a waiver of such requirements.

Section 125.16 explains that status as an SDVO SBC does not guarantee receipt of a contract. The regulation states that SDVO SBCs must market their capabilities to appropriate procuring agencies in order to increase their prospects of having a procurement set-aside for SDVO SBCs. Likewise, § 125.17 states that the contracting officer for the contracting activity makes the decision as to whether a contract opportunity should be set-aside for SDVO SBCs.

The Veterans Benefits Act of 2003 specifically states that a contracting activity may not make a requirement available for an SDVO SBC if the activity would otherwise fulfill that requirement through award to Federal Prison Industries, Inc. or through the Javits-Wagner-O'Day Act. Section 125.18 states the same as the statute.

Section 125.19 addresses when a CO may set-aside a requirement for SDVO SBCs. This regulation provides that the CO should look at the 8(a), HUBZone, and SDVO Program before considering setting-aside the requirement for SBCs. If the CO does decide to set-aside the requirement for SDVO SBCs, he must have a reasonable expectation that at least two responsible SDVO SBCs will submit offers and that award can be made at fair market price.

Section 125.20 addresses when a CO may award a sole source contract to an SDVO SBC. The regulations, like the Veterans Benefits Act of 2003, provides that a CO may award a sole source contract to an SDVO SBC when: (1) The anticipated award price of the contract, including options, will not exceed $5,000,000 for a requirement within the NAICS codes for manufacturing or $3,000,000 for a requirement within all other NAICS codes; (2) two or more SDVO SBCs are not likely to submit offers; (3) an SDVO SBC is a responsible contractor able to perform the contract; and (4) contract award can be made at a fair and reasonable price.

The regulations provide, at § 125.20, that CO's may set aside requirements at or below the simplified acquisition threshold for consideration among SDVO SBCs, using simplified acquisition procedures.

The regulations also address protests for this program. Because SDVO SBCs will be attesting to their eligibility at the time of offer, and not through a certification process established by the SBA, it is important to have some mechanism to check eligibility for receipt of a contract issued as a sole source or set-aside for SDVO SBCs.

Section 125.22 addresses who may protest the status of an SDVO SBC. This regulation, similar to those promulgated for SBA's certification programs, provides that for sole source procurements, SBA or the CO may protest the proposed awardee's status. For competitive set-asides, any interested party (any offeror, the SBA, or CO) may protest the apparent successful offeror's SDVO SBC status.

Section 125.23 explains how one files an SDVO status protest. Protests relating to the concern's size must still be processed pursuant to 13 CFR part 121. Protests relating to the status of an SDVO will be processed by SBA's Associate Administrator for Government Contracting (AA/GC). The protest must be in writing, and set forth specific grounds for a protest. For negotiated acquisitions, the protest must be submitted by the close of business on the fifth business day after notification by the CO of the apparent successful offeror. For sealed bid acquisitions, an interested party must submit its protest by close of business on the fifth business day after bid opening.

The regulations also require a referral letter from the CO, when submitting a protest to SBA. The referral letter will describe the procurement so that SBA has enough facts to determine whether the protest was submitted on time and by an interested party.

When reviewing an SDVO protest, in cases where the protest is based on a service-connected disability or veteran status, the AA/GC will only consider a protest alleging that the owner or owners cannot provide documentation from the VA to show that they meet the definition of service-disabled veteran. When determining a protest related to an issue of ownership and control, the AA/GC will consider a protest only if the protestor presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protestor must present credible evidence that the concern is not controlled by the veteran, spouse or permanent caregiver of such veteran or that the veteran does not have a permanent and severe disability.

Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it. SBA will dismiss all protests that are determined to be premature, untimely, nonspecific, or based on non-protestable allegations. The protestor will have the right to appeal the dismissal to the SBA's OHA in accordance with 13 CFR part 134.

The regulations further provide that if SBA determines the protest is timely, sufficiently specific and is based upon protestable allegations, it will notify the protested concern of the protest and of its right to submit information responding to the protest within five business days from the date of the notice, and forward a copy of the protest to the protested concern, with a copy to the contracting officer if one has not already been made available. The SBA will determine the SDVO SBC status of the protested concern within 15 business days after receipt of the protest, or within any extension of that time which the contracting officer may grant SBA. However, if SBA does not issue its determination within the 15-day period, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

SBA will notify the contracting officer, the protestor, and the protested

concern in writing of its determination. SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, the concern may not submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (*e.g.*, it meets the size standard under a different NAICS code or changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8).

Finally, the regulations, at § 125.29, address criminal and civil penalties for false representations with respect to SDVO status and eligibility for an SDVO contract. Compliance with Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

SBA has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

This action meets applicable standards set forth in §§ 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

This regulation will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, the SBA determines that this rule has no federalism implications warranting preparation of a federalism assessment.

Because this rule has been issued as interim final, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act analysis.

OMB determined that this rule constitutes a "significant regulatory action" under Executive Order 12866. The SBA's Regulatory Impact Analysis is set forth below.

Regulatory Impact Analysis

A. General Considerations

1. Is There a Need for the Regulatory Actions?

Yes. The SBA is statutorily authorized to administer the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) Program. The SDVO SBC Program is established pursuant to Public Law 108–183, the Veterans Benefits Act of 2003. Section 308 of that law amended the Small Business Act to establish a procurement program for SBCs owned and controlled by service-disabled veterans. This procurement program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs, if certain conditions are met. The VBA also provides that the SBA may verify the eligibility of any SDVO SBC.

The SBA is issuing regulations to implement this procurement program for service-disabled veterans. The Agency notes that this procurement program for service-disabled veterans became effective upon enactment of the VBA. Therefore, although contracting activities are required to abide by the set aside requirements of this procurement program for service-disabled veterans, regulations are needed to implement the program and provide further guidance. The SBA receives several telephone calls daily from contracting officials seeking guidance and clarification for this program; stating that they intend to set aside requirements for service-disabled veterans. Consequently, the SBA believes that this regulation is necessary and that is must be implemented as quickly as possible.

In addition, the purpose of this procurement program is to assist agencies in achieving the statutorily mandated 3% government-wide goal for procurement from SDVO SBCs. Congress found that agencies were falling far short of reaching this goal. Consequently, the legislative history specifically states that Congress urges the SBA and the Office of Federal Procurement Policy to expeditiously and transparently implement this program. Thus, the SBA must issue regulations implementing this program and must do so with an interim final rule.

2. Alternatives

The SBA must implement this program through regulations. There are no practical alternatives to the implementation of this rule. Issuance of policy directives, for example, which are not generally published material like regulations, would hinder a SBC's access to this needed information.

One alternative the SBA did consider for SDVO SBCs was proposing a certification program, similar to its 8(a) Business Development and HUBZone Programs. The statute implementing those programs discusses certain certification and program procedures. The SBA did not believe such a certification program was necessary to implement the VBA or was required by the VBA. Rather, the SDVO SBC will be able to self-represent its status to the contracting activity as part of its offer. The contracting officer, the SBA, or other SDVO SBCs may protest this representation. If the protest is specific, the SBA will review the protested firm to determine whether it meets the program's requirements. A similar protest procedure is used for small business set-asides.

B. Potential Benefits and Costs of This Regulation

SDVO SBCs will be the primary beneficiaries of this rule. Specifically, 15 U.S.C. 664(g), (502(b), Public Law 106–50, August 17, 1999), established a 3 percent prime contracting and subcontracting goal for SDVO SBCs for Federal contracting. This statutory provision did not, however, establish a procurement mechanism to encourage contracting activities to award contracts to SDVO SBCs. On December 16, 2003, Public Law 108–183, the VBA, was signed into law by the President. Section 308 of the VBA revised the Small Business Act to add new section 36 (15 U.S.C. 657f, a procurement program for SDVO SBCs. This program provides that contracting officers may award a sole source or set-aside contract to SDVO SBCs, if certain conditions are met.

The SBA cannot accurately determine how many concerns will be competing for SDVO SBC contract awards because there is insufficient data on SDVO SBCs ready and able to perform on a government contract to support a reasonable estimate. However, a review of the data available from several different sources evidences the following.

According to the Department of Veterans Affairs (DVA), there were 2.5 million veterans with a service connected disability. (*See http://www.va.gov/vetdata/demographics/index.htm).* This does not mean that each of those veterans own a SBC or own a business concern that would qualify for the program. Thus, the SBA looked at data available from the state of California, the only state that has a similar SDVO SBC Program. (*See http://www.ca.gov.*) In Fiscal Year (FY) 2001, California awarded contracts to 832 Disabled Veteran Business Enterprises (DVBEs). In FY 2002, California awarded 2.8% of all State contract actions to 973 DVBEs. The dollar value of contract awards for 2001 and 2002 was not readily available. In FY 2003, California awarded $142,670,222, or 2.7% of all State contract actions to DVBEs. California requires DVBE Program participants to be a disabled veteran. SBA could not determine how many DVBEs were small business concerns. The SBA welcomes comments

discussing other State-level DVBE Programs.

In addition, the SBA reviewed the 1992 Economic Census data reported under "Characteristics of Business Owners." (*See http://www.census.gov.*) This data revealed that disabled veterans represented 1.8% of all businesses, or approximately 310,557 businesses. The U.S. Bureau of the Census did not distinguish between small and large businesses or whether the veteran's disability status was based on a "service-connected" disability as defined in 38 U.S.C. 101.

Therefore, the SBA also reviewed information contained in the U.S. Department of Defense's Central Contractor Registration (CCR) database. There are 4,825 SDVO SBCs registered in CCR. This represents a small portion, 15.9% of the 30,434 veteran-owned businesses registered in CCR. Again, it is not known what percentage of the service-disabled veterans based their representation on the "service-connected" disability as defined by 38 U.S.C. 101.

Finally, the SBA reviewed data from the Federal Procurement Data System. In FY 2001, there were 9,142 contract actions awarded to SDVO SBCs in the amount of $554,167,000. This represented .25% of all Federal contracts awarded. In FY 2002, 7,131 contract actions were awarded to SDVO SBCs in the amount of $298,901,000. This represented .13% of all Federal contracts awarded.

Although there are over 2 million service-disabled veterans, only a small portion own small businesses. However, it is assumed that the establishment of a sole source and set-aside procurement vehicle for SDVO SBCs will attract more of these entities to the Federal procurement arena. In addition, according to the data set forth above, few contracts were awarded to SDVO SBCs in the Federal and State arenas. This number could increase as a result of the implementation of the VBA through this regulation. Nonetheless, based on the relatively small percentage of SDVO SBCs (2.4%) registered in the CCR (4,852), as compared to the total number of SBCs (201,742), the SBA believes that this rule will not have a major impact on SBCs in the Federal procurement arena.

The SBA welcomes comments discussing the potential number of concerns that could become eligible under this rule. The SBA also specifically requests comments on the rule's impact on current small business participants.

With respect to who will benefit from this regulation, the SBA notes that it believes currently eligible SDVO SBCs will benefit immediately since they are ready and able to tender an offer for a Federal procurement. In addition, Federal government agencies will also benefit becuase they will be able to tap the resources of SDVO SBCs using a sole source or set-aside mechanism and therefore have more opportunities to achieve their SDVO SBC goals. This rule will assist agencies in meeting their federally-mandated goal to award contracts to SDVO SBCs.

SBA estimates that the Federal government will require no additional appropriations for agencies to implement this program. The awards would come from existing appropriated funds and current agency procurement needs and therefore there would be no increase in the cost to the Government. Further, while some agencies have actively sought SDVO SBCs, the SBA expects an increase in contract awards made to SDVO SBCs due to the enactment of Public Law 108–183 and the corresponding increase of contract opportunities made available through this contracting mechanism.

SBA estimates that implementation of this regulation for SDVO SBCs will require no additional proposal costs under this program as compared to submitting proposals under any other small business set-aside program. In addition, SDVO SBCs currently represent their status for purposes of data collecting in small business goaling in accordance with 15 U.S.C. 644(g).

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Loan programs—business, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 134

Administrative practice and procedure, Organization and functions (government agencies).

■ For the reasons set forth in the preamble, amend parts 121, 125, and 134 of title 13 of the Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for 13 CFR part 121 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c) 662(5), and 657f; Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188; Pub. L. 106–24, 113 Stat. 39.

§ 121.401 [Amended]

■ 2. Amend § 121.401 by adding the phrase "the Service-Disabled Veteran-Owned Small Business Concern program" after the phrase "the HUBZone Program."

■ 3. Amend § 121.1001 by adding paragraph (a)(8) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a)* * *

(8) For SBA's Service Disabled Veteran-Owned Small Business Concern program, the following entities may protest in connection with a particular service-disabled veteran-owned procurement:

(i) Any concern that submits an offer for a specific service-disabled veteran-owned small business set-aside contract;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Associate Administrator for Government Contracting, or designee.

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 4. The authority citation for 13 CFR part 125 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 637, 744, and 657f; 31 U.S.C. 9701, 9702.

■ 5. Amend § 125.1 by revising the second sentence to read as follows:

§ 125.1 Programs included.

* * * There are five main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; the Certificate of Competency program; and Service-Disabled Veteran-Owned Small Business Concern contracting assistance.* * *

■ 6. In § 125.6, redesignate paragraphs (b), (c), (d), (e), (f), and (g) as paragraphs (c), (d), (e), (f), (g), and (h), respectively, and add new paragraph (b) to read as follows:

§ 125.6 Prime contractor performance requirements (limitations on subcontracting).

* * * * *

(b) An SDVO SBC prime contractor can subcontract part of an SDVO contract (as defined in § 125.15) provided:

(1) In the case of a contract for services (except construction), the SDVO SBC spends at least 50% of the cost of the contract performance incurred for personnel on the concern's

employees or on the employees of other SDVO SBCs;

(2) In the case of a contract for general construction, the SDVO SBC spends at least 15% of the cost of contract performance incurred for personnel on the concern's employees or the employees of other SDVO SBCs;

(3) In the case of a contract for construction by special trade contractors, the SDVO SBC spends at least 25% of the cost of contract performance incurred for personnel on the concern's employees or the employees of other SDVO SBCs; and

(4) In the case of a contract for procurement of supplies or products (other than procurement from a non-manufacturer in such supplies or products), at least 50% of the cost of manufacturing the supplies or products (not including the costs of materials), will be performed by the SDVO SBC prime contractor or other SDVO SBCs.

* * * * *

■ 7. Add Subpart A, consisting of § 125.8, to read as follows:

Subpart A—Definitions for the Service-Disabled Veteran-Owned Small Business Concern Program

§ 125.8 What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program?

(a) *Contracting Officer* has the meaning given such term in section 27(f)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(f)(5)).

(b) *Interested Party* means the contracting activity's contracting officer, the SBA or any concern that submits an offer for a specific SDVO contract.

(c) *Permanent caregiver* is the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran, to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran. In the case of a service-disabled veteran lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody. There may be no more than one "permanent caregiver" per service-disabled veteran.

(d) *Service-Disabled Veteran with a Permanent and Severe Disability* means a veteran with a service-connected disability that has been determined by the U.S. Department of Veterans Affairs to have a permanent and total disability for purposes of receiving disability compensation or a disability pension.

(e) *Service-Connected* has the meaning given that term in section 101(16) of Title 38, United States Code.

(f) *Service-disabled veteran* is a veteran with a disability that is service-connected.

(g) *SBC owned and controlled by service-disabled veterans* (also known as a Service-Disabled Veteran-Owned SBC) is a concern—

(1) Not less than 51% of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more service-disabled veterans;

(2) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran; and

(3) That is small as defined by § 125.11.

(h) *Spouse* has the meaning given the term in section 101(16) of Title 38, United States Code.

(i) *Veteran* has the meaning given the term in section 101(2) of Title 38, United States Code.

■ 8. Add subpart B, consisting of §§ 125.9 through 125.13, to read as follows:

Subpart B—Eligibility Requirements for the SDVO SBC Program

Sec.

§ 125.9 Who does SBA consider to own an SDVO SBC?

A concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically:

(a) *Ownership must be direct.* Ownership by one or more service disabled veterans must be direct ownership. A concern owned principally by another business entity that is in turn owned and controlled by one or more service-disabled veterans does not meet this requirement. Ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by service-disabled veterans where the trust is revocable, and service-disabled veterans are the grantors, trustees, and the current beneficiaries of the trust.

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, at least 51% of every class of partnership interest must be unconditionally owned by one or more service-disabled veterans. The ownership must be reflected in the concern's partnership agreement.

(c) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more service-disabled veterans.

(d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more service-disabled veterans.

(e) *Stock options' effect on ownership.* In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by service-disabled veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-service-disabled veterans sill be treated as exercised, except for any ownership interests which are held by investment companies licensed under the Small Business Investment Act of 1958.

(f) *Change of ownership.* A concern may change its ownership or business structure so long as one or more service-disabled veterans own and control it after the change.

§ 125.10 Who does SBA consider to control an SDVO SBC?

(a) *General.* To be an eligible SDVO SBC, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran). Control by one or more service-disabled veterans means that both the long-term decisions making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran).

(b) *Managerial position and experience.* A service-disabled veteran (or in the case of a service-disabled

veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to run the concern. The service-disabled veteran manager (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) need not have the technical expertise or possess the required license to be found to control the concern if the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

(c) *Control over a partnership.* In the case of a partnership, one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must serve as general partners, with control over all partnership decisions.

(d) *Control over a limited liability company.* In the case of a limited liability company, one or more service-disabled veterans (or in the case of a veteran with permanent or severe disability, the spouse or permanent caregiver of such veteran) must serve as managing members, with control over all decisions of the limited liability company.

(e) *Control over a corporation.* One or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must control the Board of Directors of the concern. Service-disabled veterans are considered to control the Board of Directors when either:

(1) One of more service-disabled veterans own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or

(2) Service-disabled veterans comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

§ 125.11 What size standards apply to SDVO SBCs?

(a) At time of contract offer, an SDVO SBC must be small within the size standard corresponding to the NAICS code assigned to the contract.

(b) If the contracting officer is unable to verify that the SDVO SBC is small, the concern shall be referred to the responsible SBA Government Contracting Area Director for a formal size determination in accordance with part 121 of this chapter.

§ 125.12 May an SDVO SBC have affiliates?

A concern may have affiliates provided that the aggregate size of the concern and all its affiliates is small as defined in part 121 of this chapter.

§ 125.13 May 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, Very Small Businesses, or Women-Owned Small Businesses qualify as SDVO SBCs?

Yes, 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, Very Small Businesses, and Women-Owned SBCs, may also qualify as SDVO SBCs if they meet the requirements in this subject.

■ 9. Add Subpart C, consisting of §§ 125.14 through 125.23, to read as follows:

Subpart C—Contracting with SDVO SBCs

Sec.

§ 125.14 What are SDVO contracts?

SDVO contracts are contracts awarded to an SDVO SBC through a sole source award or a set-aside award based on competition restricted to SDVO SBCs.

§ 125.15 What requirements must an SDVO SBC meet to submit an offer on a contract?

(a) *Representation of SDVO SBC status.* At the time an SDVO SBC submits its offer on a specific contract, it must represent to the contracting officer that:

(1) It is an SDVO SBC;

(2) It is small under the NAICS code assigned to the procurement;

(3) It will meet the percentage of work requirements set forth in § 125.6;

(4) If applicable, it is an eligible joint venture; and

(5) If applicable, it is an eligible nonmanufacturer.

(b) *Joint ventures.* An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO contract.

(1) Size of concerns to an SDVO SBC joint venture.

(i) A joint venture of at least one SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive SDVO SBC procurement so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(B) For a procurement having an employee-based size standard, the procurement exceeds $10 million;

(ii) For sole source and competitive SDVO SBC procurements that do not exceed the dollar levels identified in paragraphs (b)(1)(i)(A) and (B) of this section, an SDVO SBC entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the SDVO contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the NAICS code assigned to the SDVO contract.

(2) Contents of joint venture agreement. Every joint venture agreement to perform an SDVO contract must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for performance of the SDVO contract;

(iii) Stating that not less than 51% of the net profits earned by the joint venture will be distributed to the SDVO SBC(s);

(iv) Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVO contract;

(v) Obligating all parties to the joint venture to ensure performance of the SDVO contract and to complete performance despite the withdrawal of any member;

(vi) Requiring the final original records be retained by the managing

venturer upon completion of the SDVO contract performed by the joint venture;

(3) Performance of work. For any SDVO contract, the joint venture must perform the applicable percentage of work required by § 124.510 of this chapter.

(4) Contract execution. The procuring activity will execute an SDVO contract in the name of the joint venture entity or SDVO SBC.

(5) Inspection of records. SBA may inspect the records of the joint venture without notice at any time deemed necessary.

(c) *Non-manufacturers.* An SDVO SBC which is a non-manufacturer may submit an offer on an SDVO contract for supplies if it meets the requirements of the non-manufacturer rule set forth at §121.406(b)(1) of this chapter.

§ 125.16 Does SDVO SBC status guarantee receipt of a contract?

No, SDVO SBCs should market their capabilities to appropriate procuring agencies in order to increase their prospects of having a procurement set-aside for SDVO contract award.

§ 125.17 Who decides if a contract opportunity for SDVO competition exists?

The contracting officer for the contracting activity decides if a contract opportunity for SDVO competition exists.

§ 125.18 What requirements are not available for SDVO contracts?

A contracting activity may not make a requirement available for a SDVO contract if:

(a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 46 *et seq.*, as amended; or

(b) An 8(a) participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) program, unless SBA has consented to release of the requirement from the section 8(a) program.

§ 125.19 When may a contracting officer set-aside a procurement for SDVO SBCs?

(a) The contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to § 125.18.

(b) If the contracting officer determines that § 125.18 does not apply, the contracting officer should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.

(c) If the CO decides to set-aside the requirement for competition restricted to SDVO SBCs, the CO must:

(1) Have a reasonable expectation that at least two responsible SDVO SBCs will submit offers; and

(2) Determine that award can be made at fair market price.

§ 125.20 When may a contracting officer award sole source contracts to SDVO SBCs?

A contracting officer may award a sole source contract to an SDVO SBC only when the contracting officer determines that:

(a) None of the provisions of §§ 125.18 or 125.19 apply;

(b) The anticipated award price of the contract, including options, will not exceed:

(1) $5,000,000 for a requirement within the NAICS codes for manufacturing, or

(2) $3,000,000 for a requirement within all other NAICS codes;

(c) A SDVO SBC is a responsible contractor able to perform the contract; and

(d) Contract award can be made at a fair and reasonable price.

§ 125.21 Are there SDVO contracting opportunities at or below the simplified acquisition threshold?

Yes, if the requirement is at or below the simplified acquisition threshold, the contracting officer may set-aside the requirement for consideration among SDVO SBCs using simplified acquisition procedures or may award a sole source contact to an SDVO SBC.

§ 125.22 May SBA appeal a contracting officer's decision not to reserve a procurement for award as an SDVO contract?

The Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as an SDVO sole source or a SDVO set-aside contact at or above the simplified acquisition threshold.

§ 125.23 What is the process for such an appeal?

(a) *Notice of appeal.* When the contacting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as an SDVO contract, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

■ 10. Add Subpart D, consisting of §§ 125.24 through 125.28, to read as follows:

Subpart D—Protests Concerning SDVO SBCs

Sec.

§ 125.24 Who may protest the status of an SDVO SBC?

(a) *For Sole Source Procurements.* SBA or the contracting officer may protest the proposed awardee's service-disabled veteran status.

(b) *For Competitive Set-Asides.* Any interested party may protest the apparent successful offeror's SDVO SBC status.

§ 125.25 How does one file a service disabled veteran-owned status protest?

(a) *General.* The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether an eligible SDVO SBC is a "small" business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the SDVO SBC and whether the concern meets the SDVO SBC requirements set forth in § 125.15, SBA will process each protest concurrently, under the procedures set forth in part 121 of this chapter and this

part. SBA does not review issues concerning the administration of an SDVO contract.

(b) *Format.* Protests must be in writing and must specify all the grounds upon which the protest is based. A protest merely asserting that the protested concern is not an eligible SDVO SBC, without setting forth specific facts or allegations is insufficient.

(c) *Filing.* An interested party, other than the contracting officer or SBA, must deliver their protests in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer. The contracting officer or SBA must submit their written protest directly to the Associate Administrator for Government Contracting.

(d) *Timeliness.* (1) For negotiated acquisitions, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(2) For sealed bid acquisitions, an interested party must submit its protest by close of business on the fifth business day after bid opening.

(3) Any protest submitted after the time limits is untimely, unless it is from SBA or the CO.

(4) Any protest received prior to bid opening or notification of intended awardee, whichever applies, is premature.

(e) *Referral to SBA.* The contracting officer must forward to SBA any nonpremature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send all protests, along with a referral letter, directly to the Associate Administrator for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416 or by fax to (202) 205–6390, marked Attn: Service-Disabled Veteran Status Protest. The CO's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the CO; whether the contract was sole source or set-aside; whether the protester submitted an offer; whether the protested concern was the apparent successful offeror; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the CO; and whether a contract has been awarded.

§ 125.26 What are the grounds for filing an SDVO SBC protest?

(a) *Status.* In cases where the protest is based on a service-connected disability or veteran status, the Associate Administrator for Government Contracting will only consider a protest alleging that the owner(s) cannot provide documentation from the U.S. Department of Veterans Affairs or U.S. Department of Defense to show that they meet the definition of service-disabled veteran set forth in § 125.8; or

(b) *Ownership and control.* In cases where the protest is based on ownership and control, the Associate Administrator for Government Contracting will consider a protest only if the protestor presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protestor must present credible evidence that the concern is not controlled by the veteran, spouse or permanent caregiver of such veteran or that the veteran does not have a permanent and severe disability.

§ 125.27 How will SBA process an SDVO protest?

(a) *Notice of receipt of protest.* Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it under paragraph (b) of this section.

(b) *Dismissal of protest.* If SBA determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, SBA will dismiss the protest and will send the contracting officer and the protestor a notice of dismissal, citing the reason(s) for the dismissal. The dismissal notice must also advise the protestor of his/her right to appeal the dismissal to SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

(c) *Notice to protested concern.* If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:

(1) Notify the protested concern of the protest and of its right to submit information responding to the protest within five business days from date of the notice; and

(2) Forward a copy of the protest to the protested concern, with a copy to the contracting officer if one has not already been made available.

(d) *Time period for determination.* SBA will determine the SDVO SBC status of the protested concern within 15 business days after receipt of the protest, or within any extension of that time which the contracting officer may grant. SBA. If SBA does not issue its determination within the 15–day period, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

(e) *Notification of determination.* SBA will notify the contracting officer, the protestor, and the protested concern in writing of its determination.

(f) *Effect of determination.* SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, the concern may not submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (*e.g.*, it meets the size standard under a different NAICS code or changes its ownership to satisfy the definition of an SDVO SBC set forth in § 125.8).

§ 125.28 What are the procedures for appealing an SDVO status protest?

The protested concern, the protestor, or the contracting officer may file an appeal of an SDVO status protest determination with OHA in accordance with part 134 of this chapter.

■ 11. Add Subpart E, consisting of § 125.29, to read as follows:

Subpart E—Penalties and Retention of Records

§ 125.29 What penalties may be imposed under this part?

(a) *Suspension or debarment.* The Agency debarring official may suspend or debar a person or concern pursuant to the procedures set forth in part 145 of this chapter. The contracting agency debarring official may debar or suspend a person or concern under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4.

(b) *Civil penalties.* Persons or concerns are subject to severe civil penalties under the False Claims Act, 31 U.S.C. 3729–3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801–3812, and any other applicable laws.

(c) *Criminal penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the SDVO status of a SBC in connection with procurement programs pursuant to section 16 of the Small Business Act, 15 U.S.C. 645, as amended; 18 U.S.C. 1001; and 31 U.S.C. 3729–3733. Persons or concerns also are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA

for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 12. The authority citation for 13 CFR part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 648(1), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

■ 13. Amend § 134.102 by redesignating paragraphs (q) and (r) as paragraphs (r) and (s) respectively and inserting a new paragraph (q) to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(g) Appeals from the Service-Disabled Veteran-owned SBC Program ownership and control status under part 125 of this chapter;

* * * * *

Dated: March 26, 2004.

Hector V. Barreto,

Administrator.

[FR Doc. 04–9727 Filed 5–4–04; 8:45 am]

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May 5, 2004

Part V

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 2, 5, 6, et al.
Federal Acquisition Regulation; Procurement Program for Service-Disabled Veteran-Owned Small Business Concerns; Small Entity Compliance Guide; Interim Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52

[FAC 2001–23; FAR Case 2004–002]

RIN 9000–AJ92

Federal Acquisition Regulation; Procurement Program for Service-Disabled Veteran-Owned Small Business Concerns

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 308 of the Veterans Benefits Act of 2003, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans (Pub. L. 108–183). The law provides for set-aside and sole source procurement authority for service-disabled veteran-owned small business (SDVOSB) concerns. This interim rule is published in conjunction with the interim rule proposed by the Small Business Administration.

DATES: *Effective Date:* May 5, 2004.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before July 6, 2004, to be considered in the formulation of a final rule.

ADDRESSES: Submit electronic comments via the Internet to—*farcase.2004–002@gsa.gov* or *http://www.regulations.gov*. Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405. Please submit comments only and cite FAC 2001–23, FAR case 2004–002, in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. Please cite FAC 2001–23, FAR case 2004–002.

SUPPLEMENTARY INFORMATION:

A. Background

Section 308 of the Veterans Benefits Act of 2003, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans (Pub. L. 108–183) provides that the contracting officer may—

- Award contracts on the basis of competition restricted to SDVOSB concerns if there is a reasonable expectation that two or more SDVOSB concerns will submit offers for the contracting opportunity and that the award can be made at a fair market price; or
- Award a sole source contract to a responsible SDVOSB concern if there is not a reasonable expectation that two or more SDVOSB concerns will submit an offer, the anticipated contract price (including options) will not exceed $5 million (for manufacturing) or $3 million otherwise, and the contract award can be made at a fair and reasonable price.

The law limits use of SDVOSB procurement authority to procurements that would not otherwise be made from Federal Prison Industries (section 4124 or 4125 of title 18, United States Code) or the Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. 46 *et seq*).

The interim rule amends the FAR to—

- Establish the SDVOSB set-aside and sole source procurement authority;
- Correct an ambiguity in the definition of SDVOSB at FAR 2.101, 52.212–3, 52.219–1 and 52.219–8;
- Correct appropriate references to all authorized small business categories at FAR 5.206;
- Require the use of a numbered note when setting aside for SDVOSB at FAR 5.207(d). A new note to accomplish this task has been provided to FedBizOpps;
- Identify SDVOSB set-asides as another method of providing for full and open competition after exclusion of sources, without the need for a separate justification or determination and findings at FAR Subpart 6.2;
- Recognize that SDVOSB set-asides above the micro-purchase threshold, but below the simplified acquisition threshold are at the sole discretion of the contracting officer and are not subject to review by the Small Business Administration (SBA) Procurement Center Representatives, FAR 13.003 and 19.1405;
- Add correct references in FAR 19.301 regarding penalties for misrepresentations and false statements;
- Add FAR 19.307 to address the procedures for protesting a firm's status as an SDVOSB and cross-reference this subpart in FAR 33.102;
- Add FAR Subpart 19.14 to incorporate policy and procedures for the SDVOSB Procurement Program consistent with SBA regulations;
- Revise FAR 36.501 to identify SDVOSB procurements (FAR Subpart 19.14) and awards pursuant to FAR Subpart 19.11 or FAR Subpart 19.13. SBA requested this technical correction regarding FAR Subparts 19.11 and 19.13; and
- Add FAR clause 52.219–27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, to cover both sole source and competitive awards pursuant to this authority.

The Federal Procurement Data System-Next Generation (FPDS-NG) will be updated to reflect SDVOSB procurement authorities.

This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the law provides that the contracting officer may use the set-aside and sole source procurement authority when contracting with SDVOSB concerns. Therefore, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001–23, FAR case 2004–002), in correspondence. The analysis is as follows:

This Initial Regulatory Flexibility Analysis has been prepared in accordance with section 603, title 5, of the United States Code.

1. Description of the reasons why action by the agency is being considered. This interim rule revises the Federal Acquisition Regulation in order to comply with recently enacted Public Law 108–183, Veterans Benefits Act of 2003 (Dec. 16, 2003), section 308, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans. This legislation provides for discretionary set-aside and sole source procurement authority for service-

disabled veteran-owned small business (SDVOSB) concerns. It expands upon existing legislation that provides assistance and support to SDVOSBs to better equip them to form and expand small business enterprises and to increase procurement opportunities, thereby enabling them to realize the American dream that they fought to protect, becoming disabled while serving our country.

2. Succinct statement of the objectives of, and legal basis for, the interim rule. This interim rule implements section 308 of Public Law 108–183 and provides for discretionary set-aside and sole source procurement authority for SDVOSB concerns. The objective is to provide Federal contracting officials a means to improve their performance toward the statutorily mandated 3% government-wide goal for procurement from service-disabled veteran-owned small business concerns.

3. Description of, and, where feasible, estimate of the number of small entities to which the interim rule will apply. The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the law provides that the contracting officer may use the set-aside and sole source procurement authority when contracting with SDVOSB concerns. Specifically, a query of the Central Contractor Registration system indicates there are 198,732 small businesses registered, but only 4,714 (or 2.3%) of these small businesses are categorized as SDVOSBs. Further, a search of the web site maintained by the Veterans Administration only resulted in the identification of 775 SDVOSBs. However, these numbers may not be accurate as terminology has not always been used consistently in all databases and regulations. Although the percentage is less than 2.5% it will undoubtedly impact the contracting dollars and opportunities afforded small business entities in the various small business categories as well as service-disabled veteran-owned small business entities.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the interim rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record. The rule will impose no new reporting or recordingkeeping requirements on large or small entities.

5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the interim rule. The companion interim rule by SBA will be published at the same time as the FAR interim rule.

6. Description of any significant alternatives to the interim rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the interim rule on small entities. There are not any alternatives to publishing this interim rule that will accomplish the stated objectives of Public Law 108–183, Veterans Benefits Act of 2003 (Dec. 16, 2003), Section 308. The rule includes only FAR text revisions required to implement the statute cited herein.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this interim rule includes FAR text revisions required to implement recently enacted Public Law 108–183, Veterans Benefits Act of 2003 (December 16, 2003), Section 308, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans.

However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 2, 5, 6, 13, 14, 15, 19, 33, 36, 52

Government procurement.

Dated: April 26, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Federal Acquisition Circular (FAC) 2001–23 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–23 are effective May 5, 2004.

Dated: April 23, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: April 23, 2004.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: April 21, 2004.

Tom Luedtke,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b) in the definition "Service-disabled veteran-owned small business concern" by revising paragraph (1)(ii) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Service-disabled veteran-owned small business concern—

(1) * * *

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.206 by revising the introductory text of paragraph (a) to read as follows:

5.206 Notices of subcontracting opportunities.

(a) The following entities may transmit a notice to the GPE to seek competition for subcontracts, to increase participation by qualified HUBZone small business, small, small disadvantaged, women-owned small business, veteran-owned small business and service-disabled veteran-owned small business concerns, and to meet established subcontracting plan goals:

* * * * *

■ 4. Amend section 5.207 by revising paragraph (d) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(d) *Set-asides.* When the proposed acquisition provides for a total or partial small business set-aside, very small business set aside, HUBZone small business set-aside, or a service-disabled veteran-owned small business set-aside, the appropriate Numbered Note will be cited.

* * * * *

PART 6—COMPETITION REQUIREMENTS

■ 5. Add section 6.206 to read as follows:

6.206 Set-asides for service-disabled veteran-owned small business concerns.

(a) To fulfill the statutory requirements relating to the Veterans Benefits Act of 2003 (15 U.S.C. 657f), contracting officers may set-aside solicitations to allow only service-disabled veteran-owned small business concerns to compete (*see* 19.1405).

(b) No separate justification or determination and findings are required under this part to set aside a contract action for service-disabled veteran-owned small business concerns.

■ 6. Amend section 6.302–5 by adding paragraph (b)(7) to read as follows:

6.302–5 Authorized or required by statute.

* * * * *

(b) * * *

(7) Sole source awards under the Veterans Benefits Act of 2003 (15 U.S.C. 657f).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 7. Amend section 13.003 by revising paragraph (b)(2) to read as follows:

13.003 Policy.

* * * * *

(b) * * *

(2) The contracting officer may set aside for HUBZone small business concerns (*see* 19.1305) or service-disabled veteran-owned small business concerns (*see* 19.1405) an acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold and not exceeding the simplified acquisition threshold. The contracting officer's decision not to set aside an acquisition for HUBZone small business or service-disabled veteran-owned small business concerns participation below the simplified acquisition threshold is not subject to review under Subpart 19.4.

* * * * *

PART 14—SEALED BIDDING

■ 8. Amend section 14.502 by redesignating paragraph (b)(6) as (b)(7) and adding a new paragraph (b)(6) to read as follows:

14.502 Conditions for use.

* * * * *

(b) * * *

(6) The use of a set-aside for service-disabled veteran-owned small business concerns (*see* Subpart 19.14).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 9. Amend section 15.503 in paragraph (a)(2) by—

■ a. Removing "or" from the end of paragraph (a)(2)(i)(B);

■ b. Removing the period from the end of paragraph (a)(2)(i)(C) and adding "; or" in its place;

■ c. Adding a new paragraph (a)(2)(i)(D); and

■ d. Revising paragraph (a)(2)(ii)(C) to read as follows:

15.503 Notifications to unsuccessful offerors.

* * * * *

(a) * * *

(2) * * *

(i) * * *

(D) When using the service-disabled veteran-owned small business procedures in 19.1405.

(ii) * * *

(C) That no response is required unless a basis exists to challenge the small business size status, disadvantaged status, HUBZone status, or service-disabled veteran-owned status of the apparently successful offeror.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 10. Amend section 19.000 by revising paragraph (a)(3); removing "and" from the end of paragraph (a)(10); revising paragraph (a)(11); and adding paragraph (a)(12) to read as follows:

19.000 Scope of part.

(a) * * *

(3) Setting acquisitions aside for exclusive competitive participation by small business, HUBZone small business, and service-disabled veteran-owned small business concerns;

* * * * *

(11) The use of veteran-owned small business concerns; and

(12) Sole source awards to HUBZone small business and service-disabled veteran-owned small business concerns.

* * * * *

■ 11. Amend section 19.201 by revising paragraph (d)(10) to read as follows:

19.201 General policy.

* * * * *

(d) * * *

(10) Make recommendations in accordance with agency procedures as to whether a particular acquisition should be awarded under Subpart 19.5 as a small business set-aside, under Subpart 19.8 as a Section 8(a) award, under Subpart 19.13 as a HUBZone set-aside, or under Subpart 19.14 as a service-disabled veteran-owned small business set-aside;

* * * * *

■ 12. Amend section 19.202–6 by—

■ a. Removing "and" from the end of paragraph (a)(3);

■ b. Removing the period from the end of paragraph (a)(4) and adding "; and" in its place; and

■ c. Adding paragraph (a)(5) to read as follows:

19.202–6 Determination of fair market price.

(a) * * *

(5) Service-disabled veteran-owned small business set-asides (*see* Subpart 19.14).

* * * * *

■ 13. Amend section 19.301 by revising paragraph (d) to read as follows:

19.301 Representation by the offeror.

* * * * *

(d) If the SBA determines that the status of a concern as a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business has been misrepresented in order to obtain a set-aside contract, an 8(a) subcontract, a subcontract that is to be included as part or all of a goal contained in a subcontracting plan, or a prime or subcontract to be awarded as a result, or in furtherance of any other provision of Federal law that specifically references Section 8(d) of the Small Business Act for a definition of program eligibility, the SBA may take action as specified in Sections 16(a) or 16(d) of the Act. If the SBA declines to take action, the agency may initiate the process. The SBA's regulations on penalties for misrepresentations and false statements are contained in 13 CFR 121.108 for

small business, 13 CFR 124.501 for 8(a) small business, 13 CFR 124.1011 for small disadvantaged business, 13 CFR 125.29 for veteran or service-disabled veteran-owned small business, and 13 CFR 126.900 for HUBZone small business.

■ 14. Redesignate section 19.307 as section 19.308 and add a new section 19.307 to read as follows:

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

(a) For sole source acquisitions, the SBA or the contracting officer may protest the apparently successful offeror's service-disabled veteran-owned small business status. For service-disabled veteran-owned small business set-asides, any interested party may protest the apparently successful offeror's service-disabled veteran-owned small business concern status.

(b) Protests relating to whether a service-disabled veteran-owned small business concern is a small business for purposes of any Federal program are subject to the procedures of Subpart 19.3. Protests relating to small business size status for the acquisition and the service-disabled veteran-owned small business status requirements will be processed concurrently by SBA.

(c) All protests must be in writing and must state all specific grounds for the protest. Assertions that a protested concern is not a service-disabled veteran-owned small business concern, without setting forth specific facts or allegations, are insufficient. An offeror must submit its protest to the contracting officer. The contracting officer and the SBA must submit protests to SBA's Associate Administrator for Government Contracting. The SBA regulations are found at 13 CFR 125.24 through 125.28.

(d) An offeror's protest must be received by close of business on the fifth business day after bid opening (in sealed bid acquisitions) or by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror (in negotiated acquisitions). Any protest received after these time limits is untimely. Any protest received prior to bid opening or notification of intended award, whichever applies, is premature and shall be returned to the protester.

(e) Except for premature protests, the contracting officer must forward to SBA by mail or facsimile transmission (202–205–6390) any protest received, notwithstanding whether the contracting officer believes that the protest is insufficiently specific or untimely. The protest must be accompanied by a referral letter, with the notation on the envelope or facsimile cover sheet: "Attn: Service-Disabled Veteran Status Protest," and be sent to Associate Administrator for Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(f) The referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including the solicitation number; the name, address, telephone number and facsimile number of the contracting officer; whether the contract was sole-source or set-aside; whether the protestor submitted an offer; whether the protested concern was the apparent successful offeror; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted; and whether a contract has been awarded.

(g) The Associate Administrator for Government Contracting will notify the protester and the contracting officer of the date the protest was received and whether the protest will be processed or dismissed for lack of timeliness or specificity.

(h) All questions about service-disabled veteran-owned small business size or status must be referred to the SBA for resolution. When making its determinations of veteran or service-disabled veteran's status, the SBA will rely upon existing Department of Veteran's Affairs or Department of Defense determinations. SBA will determine the service-disabled veteran-owned small business status of the protested concern within 15 business days after receipt of a protest. If SBA does not contact the contracting officer within 15 business days, the contracting officer may award the contract to the apparently successful offeror, unless the contracting officer has granted SBA an extension. The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest.

(i) SBA will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Associate Deputy Administrator for Government Contracting and Office of Hearings and Appeals (OHA) pursuant to 13 CFR part 134.

(j) The protested service-disabled veteran-owned small business concern, the protester, or the contracting officer may file appeals of protest determinations with SBA's OHA. The OHA must receive the appeal no later than 5 business days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the 5-day period.

(k) The appeal must be in writing. The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the decision is erroneous or what significant fact the Office of Government Contracting (OGC) failed to consider.

(l) The party appealing the decision must provide notice of the appeal to the contracting officer and either the protested service-disabled veteran-owned small business concern or the original protester, as appropriate. SBA will not consider additional information or changed circumstances that were not disclosed at the time of the OGC's decision or that are based on disagreement with the findings and conclusions contained in the determination.

(m) The OHA will make its decision within 5 business days of the receipt of the appeal, if practicable, and will base its decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested service-disabled veteran-owned small business concern. The SBA decision, if received before award, will apply to the pending acquisition. SBA rulings received after award will not apply to that acquisition. The OHA's decision is the final decision.

■ 15. Amend section 19.501 by redesignating paragraphs (d) thru (h) as paragraphs (e) thru (i), respectively; adding a new paragraph (d); and revising the second sentence of newly designated paragraph (e) to read as follows:

19.501 General.

* * * * *

(d) The small business reservation and set-asides requirements at 19.502–2 do not preclude award of a contract to a service-disabled veteran-owned small business concern under Subpart 19.14.

(e) * * * The contracting officer shall document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless a HUBZone or service-disabled veteran-owned small business set-aside or HUBZone or service-disabled veteran-owned small business sole source award is anticipated. * * *

* * * * *

19.800 General.

■ 16. Amend section 19.800 in the first sentence of paragraph (e) by removing "19.5 or 19.13," and adding "19.5, 19.13, or 19.14," in its place.

■ 17. Amend section 19.804–2 by revising paragraph (a)(9) to read as follows:

19.804–2 Agency offering.

(a) * * *

(9) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business, HUBZone, or service-disabled veteran-owned small business set-aside and that no other public communication (such as a notice through the Governmentwide point of entry (GPE)) has been made showing the contracting agency's clear intention to set-aside the acquisition for small business, HUBZone small business, or service-disabled veteran-owned small business concerns.

* * * * *

■ 18. Amend section 19.1007 by revising paragraphs (b)(2) and (c)(1)(i) to read as follows:

19.1007 Procedures.

* * * * *

(b) * * *

(2) Acquisitions in the designated industry groups must continue to be considered for placement under the 8(a) Program (*see* Subpart 19.8), the HUBZone Program (*see* Subpart 19.13), and the Service-Disabled Veteran-Owned Small Business Procurement Program (*see* Subpart 19.14).

(c) * * *

(1) * * *

(i) For acquisitions $25,000 or less, proceed in accordance with Subpart 19.5, 19.8, 19.13, or 19.14; or

* * * * *

■ 19. Amend section 19.1102 by redesignating paragraphs (b)(5) and (b)(6) as (b)(6) and (b)(7), respectively; and adding a new paragraph (b)(5) to read as follows:

19.1102 Applicability.

* * * * *

(b) * * *

(5) That are set-aside for service-disabled veteran-owned small business concerns;

* * * * *

■ 20. Amend section 19.1202–2 by revising paragraph (b)(1) to read as follows:

19.1202–2 Applicability.

* * * * *

(b) * * *

(1) Small business set-asides (*see* Subpart 19.5), HUBZone set-asides (*see* Subpart 19.13), and service-disabled veteran-owned small business set-asides (*see* Subpart 19.14);

* * * * *

■ 21. Add Subpart 19.14, consisting of sections 19.1401 through 19.1407, to read as follows:

Subpart 19.14—Service-Disabled Veteran-Owned Small Business Procurement Program

Sec.

19.1401 General.

(a) The Veterans Benefit Act of 2003 (15 U.S.C. 657f) created the procurement program for small business concerns owned and controlled by service-disabled veterans (commonly referred to as the "Service-Disabled Veteran-owned Small Business (SDVOSB) Procurement Program").

(b) The purpose of the Service-Disabled Veteran-Owned Small Business Program is to provide Federal contracting assistance to service-disabled veteran-owned small business concerns.

19.1402 Applicability.

The procedures in this subpart apply to all Federal agencies that employ one or more contracting officers.

19.1403 Status as a service-disabled veteran-owned small business concern.

(a) Status as a service-disabled veteran-owned small business concern is determined in accordance with 13 CFR parts 125.8 through 125.13; also *see* 19.307.

(b) At the time that a service-disabled veteran-owned small business concern submits its offer, it must represent to the contracting officer that it is a—

(1) Service-disabled veteran-owned small business concern; and

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the procurement.

(c) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

(d) Any service-disabled veteran-owned small business concern (nonmanufacturer) must meet the requirements in 19.102(f) to receive a benefit under this program.

19.1404 Exclusions.

This subpart does not apply to—

(a) Requirements that can be satisfied through award to—

(1) Federal Prison Industries, Inc. (*see* Subpart 8.6);

(2) Javits-Wagner-O'Day Act participating non-profit agencies for the blind or severely disabled (*see* Subpart 8.7);

(b) Orders under indefinite delivery contracts (*see* Subpart 16.5);

(c) Orders against Federal Supply Schedules (*see* Subpart 8.4);

(d) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) Program, unless SBA has consented to release the requirements from the 8(a) Program; or

(e) Requirements for commissary or exchange resale items.

19.1405 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business concerns when the requirements of paragraph (b) of this section can be satisfied. The contracting officer shall consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards (*see* 19.1406).

(b) To set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the contracting officer must have a reasonable expectation that—

(1) Offers will be received from two or more service-disabled veteran-owned small business concerns; and

(2) Award will be made at a fair market price.

(c) If the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern. If the contracting

officer receives no acceptable offers from service-disabled veteran-owned small business concerns, the service-disabled veteran-owned set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (*see* Subpart 19.5).

(d) The procedures at 19.202–1 and, except for acquisitions not exceeding the simplified acquisition threshold, at 19.402 apply to this section. When the SBA intends to appeal a contracting officer's decision to reject a recommendation of the SBA procurement center representative to set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 working days of receiving the contracting officer's notice of rejection. Upon receipt of notice of SBA's intent to appeal, the contracting officer shall suspend action on the acquisition unless the head of the contracting activity makes a written determination that urgent and compelling circumstances, which significantly affect the interests of the Government, exist. Within 15 working days of SBA's notification to the contracting officer, SBA shall file its formal appeal with the head of the contracting activity, or that agency may consider the appeal withdrawn. The head of the contracting activity shall reply to SBA within 15 working days of receiving the appeal. The decision of the head of the contracting activity shall be final.

19.1406 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to service-disabled veteran-owned small business concerns on a sole source basis (*see* 19.501(d) and 6.302–5), provided—

(1) Only one service-disabled veteran-owned small business concern can satisfy the requirement;

(2) The anticipated award price of the contract (including options) will not exceed—

(i) $5 million for a requirement within the NAICS codes for manufacturing; or

(ii) $3 million for a requirement within any other NAICS code;

(3) The service-disabled veteran-owned small business concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The SBA has the right to appeal the contracting officer's decision not to make a service-disabled veteran-owned small business sole source award.

19.1407 Contract clauses.

The contracting officer shall insert the clause 52.219–27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, in solicitations and contracts for acquisitions under 19.1405 and 19.1406.

PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 22. Amend section 33.102 by revising the last sentence of paragraph (a) to read as follows:

33.102 General.

(a) * * * (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, and 19.307 for protests of service-disabled veteran-owned small business status.)

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.501 [Amended]

■ 23. Amend section 36.501 in the first sentence of paragraph (b) by removing "19.5 or 19.8," and adding "19.5, 19.8, 19.11, 19.13, or 19.14" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–3 Offeror Representations and Certifications—Commercial Items.

■ 24. Amend section 52.212–3 by revising the date of the provision to read "(May 2004)"; and in paragraph (a) of the provision in the definition "Service-disabled veteran-owned small business concern", paragraph (1)(ii), by removing "case of a" and adding "case of a service-disabled" in its place.

■ 25. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing "(Oct 2000)" from paragraph (b)(7) and adding "(May 2004)" in its place;

■ c. Redesignating paragraphs (b)(13) through (b)(33) as (b)(14) through (b)(34), respectively;

■ d. Adding a new paragraph (b)(13); and

■ e. Removing "(Oct 2000)" from paragraph (e)(1)(i) and adding "(May 2004)" in its place. The revised and added text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (May 2004)

* * * * *

(b) * * *

(13) 52.219–27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (May 2004).

* * * * *

52.213–4 [Amended]

■ 26. Amend section 52.213–4 by revising the date of the clause to read "(May 2004)"; and by removing "(Apr 2003)" from paragraph (a)(2)(vi) of the clause and adding "(May 2004)" in its place.

52.219–1 [Amended]

■ 27. Amend section 52.219–1 by—

■ a. Revising the date of the provision to read "(May 2004)";

■ b. Removing "case of a" from paragraph (c), in the definition "Service-disabled veteran-owned small business concern", paragraph (1)(ii), and adding "case of a service-disabled" in its place; and

■ c. Removing "19.307(a)(2)" from Alternate I and adding "19.308(a)(2)" in its place.

52.219–2 [Amended]

■ 28. In the introductory text of section 52.219–2, remove "19.307(c)" and add "19.308(c)" in its place.

52.219–8 [Amended]

■ 29. Amend section 52.219–8 by revising the date of the clause to read "(May 2004)"; and in paragraph (c) in the definition "Service-disabled veteran-owned small business concern", remove "case of a" from paragraph (1)(ii) and add "case of a service-disabled" in its place.

52.219–22 [Amended]

■ 30. Amend section 52.219–22 by removing "19.307(b)" from the introductory paragraph and the introductory paragraph of Alternate I and adding "19.308(b)" in their place.

■ 31. Add section 52.219–27 to read as follows:

52.219–27 Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside.

As prescribed in 19.1407, insert the following clause:

Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (May 2004)

(a) *Definition. Service-disabled veteran-owned small business concern*—

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more service-disabled

veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) *Service-disabled veteran* means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

(b) *General.* (1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation will be made to a service-disabled veteran-owned small business concern.

(c) *Agreement.* A service-disabled veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for—

(1) Services (except construction), at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other service-disabled veteran-owned small business concerns;

(2) Supplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other service-disabled veteran-owned small business concerns;

(3) General construction, at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other service-disabled veteran-owned small business concerns; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other service-disabled veteran-owned small business concerns.

(d) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations: That it is a service-disabled veteran-owned small business concern, and that it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement; and

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation.

(4) The joint venture meets the requirements of 13 CFR 125.15(b)

(e) Any service-disabled veteran-owned small business concern (nonmanufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this program.

(End of Clause)

52.244–6 [Amended]

■ 32. Amend section 52.244–6 by revising the date of the clause to read "(May 2004)"; and by removing "(Oct 2000)" from paragraph (c)(1)(i) of the clause and adding "(May 2004)" in its place.

[FR Doc. 04–9752 Filed 5–4–04; 8:45 am]
BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2001–23 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001–23 which precedes this document. These documents are also available via the Internet at *http://www.arnet.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact Ms. Rhonda Cundiff at (202) 501–0044.

*** Procurement Program for Service-Disabled Veteran-Owned Small Business Concerns (FAR Case 2004–002)**

This interim rule amends FAR parts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52 to implement Section 308 of the Veterans Benefits Act of 2003, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans (Pub. L. 108–183). The law provides for set-aside and sole source procurement authority for service-disabled veteran-owned small business (SDVOSB) concerns. This interim rule is published in conjunction with the interim rule proposed by the Small Business Administration.

Dated: April 26, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

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Federal Register

Wednesday,
May 5, 2004

Part VI

The President

Federal Register
Vol. 69, No. 87
Wednesday, May 5, 2004

Presidential Documents

Title 3—

The President

Proclamation 7776 of April 30, 2004

Older Americans Month, 2004

By the President of the United States of America

A Proclamation

More than 47 million Americans are 60 years old or older. During Older Americans Month, we honor our senior citizens for enriching and strengthening our Nation, and we pledge to continue working to enhance their quality of life.

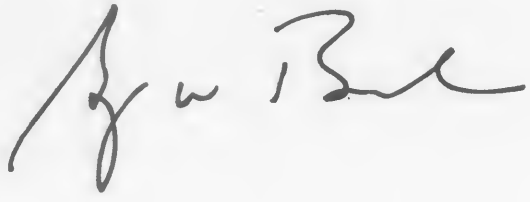
This year's theme, "Aging Well, Living Well," reflects the many ways that older Americans contribute to our national character. Many are working beyond traditional retirement age, while others volunteer their time serving worthy causes. Through the Senior Corps program of the USA Freedom Corps, more than half a million older Americans donated time to their communities last year, and many others are volunteering through the Peace Corps and other programs.

My Administration is committed to helping our senior citizens lead better, healthier, and longer lives. Late last year, I was proud to sign into law the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. This historic legislation represents the greatest improvement in senior health care since President Lyndon Johnson signed the Social Security Act Amendments that created Medicare in 1965. It gives seniors access to affordable prescription drug coverage, provides for preventive screenings to diagnose and treat health conditions early, and updates the Medicare system to let seniors choose coverage that best meets their needs. These changes are vital to ensuring that seniors can obtain the health care and prescription drugs they deserve.

Older Americans help others to understand the past, and they teach timeless lessons of courage, endurance, and love. Through their legacy of patriotism, service, and responsibility, America's seniors also unite families and communities and serve as role models for younger generations.

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 May 2004 as Older Americans Month. I commend older Americans for the contributions they make to our communities. I further commend Federal officials, State, and local governments, tribal organizations, service and health care providers, caregivers, volunteers, and all those who work on behalf of our senior citizens. I encourage all Americans to honor their elders and publicly reaffirm our Nation's commitment to older Americans during this month and throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 04–10366
Filed 5–4–04; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7777 of April 30, 2004

National Charter Schools Week, 2004

By the President of the United States of America

A Proclamation

America looks to its schools to give all students the skills they need to realize their dreams and reach their potential. Charter schools help fulfill this mission. During National Charter Schools Week, we celebrate the successes of these institutions.

Charter schools are an important part of our effort to improve the public school system and offer broader educational options to every family. Like other public schools, charter schools are open to all students. Because they are subject to fewer State and district regulations than other public schools, charter schools offer teachers and administrators more freedom in tailoring programs to meet specific student and community needs. In exchange for this freedom, they must meet stricter accountability standards.

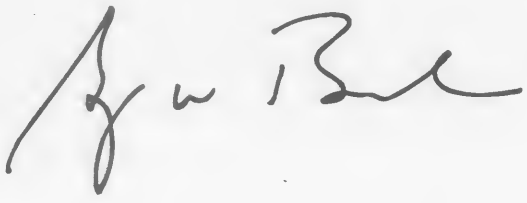
Now in their second decade, the demand for charter schools is growing among families from all backgrounds. During this school year, our Nation's charter schools will educate nearly 700,000 students. Many families choose charter schools because of the innovative curriculum and focus on academic achievement, and because these schools can be a promising alternative to a low-performing neighborhood school.

Charter schools are an important part of the No Child Left Behind Act. They provide parents with more choices for their children's education. The greater autonomy of charter schools allows them to employ innovative educational practices. Studies have shown that many charter schools improve academic achievement for their students and that parents of students in charter schools are satisfied with their children's schools.

My fiscal year 2005 budget includes an overall 49 percent increase for elementary and secondary education over 2001 levels, and it proposes $219 million for charter school grants and $100 million for charter school facilities. Together, funding for these two charter school programs has increased 68 percent over 2001 levels. By raising expectations, insisting on results, and refusing to accept failure, we are strengthening our public schools and improving education for all children in America.

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 May 2 through May 8, 2004, as National Charter Schools Week. I commend our Nation's charter schools, and I call on parents of charter school students to share their successes to help all Americans understand more about the important work of charter schools.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 04–10367
Filed 5–4–04; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7778 of April 30, 2004

Law Day, U.S.A., 2004

By the President of the United States of America

A Proclamation

The theme of this year's Law Day, "To Win Equality by Law: Brown v. Board at 50," celebrates the 50th anniversary of the Supreme Court's landmark decision in *Brown v. Board of Education.*

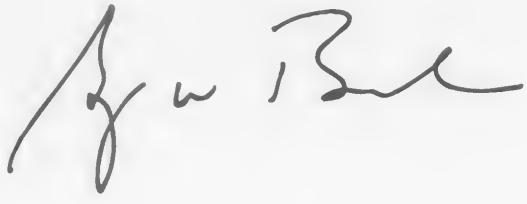
The Declaration of Independence declared the equality of each person before God and the responsibility of Government to secure the rights of all. However, it was not until ratification of the 14th Amendment in 1868 that the equality of all citizens under law was guaranteed by the Constitution. Still, for decades afterwards, millions of African-American citizens were subjected to shameful discrimination, and in many public school systems, students were segregated by race. Finally, in the 1954 *Brown* decision, the Supreme Court ruled that segregating students in our public schools violated our Constitution.

Our Nation is grateful for the brave men and women and boys and girls who challenged segregation and helped make equal justice under law a reality for all Americans. We remember Thurgood Marshall, the heroic lawyer who represented Linda Brown and fought for her rights and the rights of all African Americans. We remember the nine justices of the Supreme Court of the United States who helped America begin to make equal justice under law a reality for African Americans.

Nearly 50 years after *Brown*, we appreciate the progress America has made, but we also recognize that there is still work to be done to ensure that our country lives up to the founding principle that all of God's children are created equal. As we observe this Law Day and commemorate the anniversary of *Brown v. Board of Education*, I encourage all Americans to celebrate the great distance we have traveled as a Nation and to continue our work to promote equality and opportunity for all.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, in accordance with Public Law 87–20, as amended, do hereby proclaim May 1, 2004, as Law Day, U.S.A. I call upon all the people of the United States to observe this day with appropriate ceremonies and activities. I also call upon Government officials to display the flag of the United States in support of this national observance.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 04–10368
Filed 5–4–04; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7779 of April 30, 2004

Loyalty Day, 2004

By the President of the United States of America

A Proclamation

As Americans, we work to preserve the freedom declared by our Founding Fathers, defended by generations, and granted to every man and woman on Earth by the Almighty. On Loyalty Day, we are reminded that we are citizens with obligations to our country, to each other, and to our great legacy of freedom and democracy.

We learn lessons of loyalty from the selfless dedication and unwavering allegiance of our men and women in uniform. We are grateful for their courage and willingness to sacrifice for our country, and we stand united behind them. Through the "On the Homefront" program, a USA Freedom Corps initiative, many Americans are writing to service members, contributing to the purchase of care packages to be sent overseas, and helping the families of those deployed with basic family needs such as home repairs, financial planning, and child care. By supporting our troops and their families, citizens are making a difference in their communities and showing loyalty to our country through their patriotism.

America's citizens are also demonstrating their loyalty to our Nation through volunteer service. In answering the call to serve something greater than self, Americans reflect the compassion and decency that make our country great. Through the USA Freedom Corps, my Administration is providing information about volunteer opportunities to Americans so they can give back to their communities and help their fellow citizens in need. The hard work and generosity of America's volunteers help build a culture of service and responsible citizenship that strengthens America and sets a positive example for future generations.

Over the past few years, America has once again witnessed the loyalty and character of our citizens. We must continue to ensure that our young people know the great cause of freedom and why it is worth defending. Our Founders believed the study of history and citizenship should be at the core of every American's education. By encouraging students to learn more about American history and values, we can help prepare the next generation of Americans to carry our heritage of freedom into the future. To further this goal, my Administration has created initiatives such as "We the People" and "Our Documents" to help bring the stories and documents central to our history into the modern classroom.

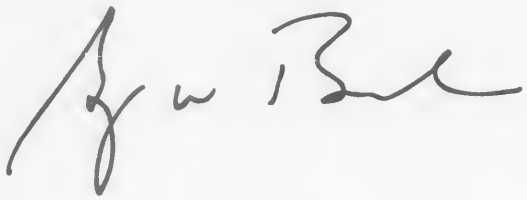
Loyalty Day encourages citizens to demonstrate their commitment to our country by supporting our military, serving each other, and teaching our young people about our history and values. Being an American is a privilege, and our patriotism is a living faith in our country's founding ideals and the promise of the American Dream.

The Congress, by Public Law 85–529, as amended, has designated May 1 of each year as "Loyalty Day," and I ask all Americans to join me in this day of celebration and in reaffirming our allegiance to our Nation.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim May 1, 2004, as Loyalty Day. I call upon all the people of the United States to join in support of this national

observance. I also call upon government officials to display the flag of the United States on all government buildings on Loyalty Day.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 04–10369
Filed 5–4–04; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7780 of April 30, 2004

National Day of Prayer, 2004

By the President of the United States of America

A Proclamation

In his first Inaugural Address, President George Washington prayed that the Almighty would preserve the freedom of all Americans. On the National Day of Prayer, we celebrate that freedom and America's great tradition of prayer. The National Day of Prayer encourages Americans of every faith to give thanks for God's many blessings and to pray for each other and our Nation.

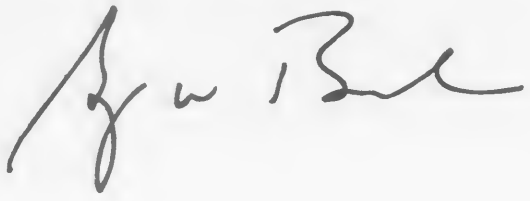
Prayer is an opportunity to praise God for His mighty works, His gift of freedom, His mercy, and His boundless love. Through prayer, we recognize the limits of earthly power and acknowledge the sovereignty of God. According to Scripture, "the Lord is near to all who call upon Him . . . He also will hear their cry, and save them." Prayer leads to humility and a grateful heart, and it turns our minds to the needs of others.

On this National Day of Prayer, we pray especially for the brave men and women of the United States Armed Forces who are serving around the world to defend the cause of liberty. We are grateful for their courage and sacrifice and ask God to comfort their families while they are away from home. We also pray that the people of Iraq and Afghanistan, and throughout the Greater Middle East, may live in safety and freedom. During this time, we continue to ask God's blessing for our Nation, granting us strength to meet the challenges ahead and wisdom as we work to build a more peaceful future for all.

The Congress, by Public Law 100–307, as amended, has called on our citizens to reaffirm the role of prayer in our society by recognizing annually a "National Day of Prayer."

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim May 6, 2004, as a National Day of Prayer. I ask the citizens of our Nation to give thanks, each according to his or her own faith, for the freedoms and blessings we have received and for God's continued guidance and protection. I also urge all Americans to join in observing this day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 04–10370
Filed 5–4–04; 8:45 am]
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Federal Register

Wednesday,
May 5, 2004

Part VII

The President

Federal Register
Vol. 69, No. 87
Wednesday, May 5, 2004

Presidential Documents

Title 3—

The President

Executive Order 13336 of April 30, 2004

American Indian and Alaska Native Education

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to recognize the unique educational and culturally related academic needs of American Indian and Alaska Native students consistent with the unique political and legal relationship of the Federal Government with tribal governments, it is hereby ordered as follows:

Section 1. *Purpose.* The United States has a unique legal relationship with Indian tribes and a special relationship with Alaska Native entities as provided in the Constitution of the United States, treaties, and Federal statutes. This Administration is committed to continuing to work with these Federally recognized tribal governments on a government-to-government basis, and supports tribal sovereignty and self-determination. It is the purpose of this order to assist American Indian and Alaska Native students in meeting the challenging student academic standards of the No Child Left Behind Act of 2001 (Public Law 107–110) in a manner that is consistent with tribal traditions, languages, and cultures. This order builds on the innovations, reforms, and high standards of the No Child Left Behind Act of 2001, including: stronger accountability for results; greater flexibility in the use of Federal funds; more choices for parents; and an emphasis on research-based instruction that works.

Sec. 2. *Interagency Working Group.* There is established an Interagency Working Group on American Indian and Alaska Native Education (Working Group) to oversee the implementation of this order.

(a) The Working Group's members shall consist exclusively of the heads of the executive branch departments, agencies, or offices listed below:

(i) the Department of Education;
(ii) the Department of the Interior;
(iii) the Department of Health and Human Services;
(iv) the Department of Agriculture;
(v) the Department of Justice;
(vi) the Department of Labor; and
(vii) such other executive branch departments, agencies, or offices as the Co-Chairs of the Working Group may designate.

A member of the Working Group may designate, to perform the Working Group functions of the member, an employee of the member's department, agency, or office who is either an officer of the United States appointed by the President, or a full-time employee serving in a position with pay equal to or greater than the minimum rate payable for GS–15 of the General Schedule. The Working Group shall be led by the Secretaries of Education and the Interior, or their designees under this section, who shall serve as Co-Chairs.

(b) The function of the Working Group is to oversee the implementation of this order. The Working Group shall, within 90 days of the date of this order, develop a Federal interagency plan that recommends initiatives, strategies, and ideas for future interagency actions that promote the purpose, as stated in section 1, of this order. In carrying out its activities under this order, the Working Group may consult with representatives of American Indian and Alaska Native tribes and organizations, in conformity with Executive Order 13175 of November 6, 2000, and with the National Advisory Council on Indian Education (NACIE). Any such consultations shall be

for the purpose of obtaining information and advice concerning American Indian and Alaska Native education and shall be conducted in a manner that seeks individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 3. *Study and Report.* The Secretary of Education, in coordination with the Working Group, shall conduct a multi-year study of American Indian and Alaska Native education with the purpose of improving American Indian and Alaska Native students' ability to meet the challenging student academic standards of the No Child Left Behind Act of 2001.

(a) The study shall include, but not be limited to:

(i) the compilation of comprehensive data on the academic achievement and progress of American Indian and Alaska Native students toward meeting the challenging student academic standards of the No Child Left Behind Act of 2001;

(ii) identification and dissemination of research-based practices and proven methods in raising academic achievement and, in particular, reading achievement, of American Indian and Alaska Native students;

(iii) assessment of the impact and role of native language and culture on the development of educational strategies to improve academic achievement;

(iv) development of methods to strengthen early childhood education so that American Indian and Alaska Native students enter school ready to learn; and

(v) development of methods to increase the high school graduation rate and develop pathways to college and the workplace for American Indian and Alaska Native students.

The Secretary of Education shall develop an agenda, including proposed timelines and ongoing activities, for the conduct of the study, and shall make that agenda available to the public on the Internet.

(b) The Secretary of Education, in coordination with the Working Group, shall issue a report to the President that shall:

(i) provide the latest data available from the study;

(ii) comprehensively describe the educational status and progress of American Indian and Alaska Native students with respect to meeting the goals outlined in the No Child Left Behind Act of 2001 and any other student achievement goals the Secretary of Education or the Secretary of the Interior may deem necessary;

(iii) report on proven methods for improving American Indian and Alaska Native student academic achievement; and

(iv) update the Federal interagency plan outlined in section 2(b) of this order.

Sec. 4. *Enhancement of Research Capabilities of Tribal-Level Educational Institutions.* The Secretary of Education and the Secretary of the Interior shall consult with the entities set forth in section 2(a) of this order and tribally controlled colleges and universities to seek ways to develop and enhance the capacity of tribal governments, tribal universities and colleges, and schools and educational programs serving American Indian and Alaska Native students and communities to carry out, disseminate, and implement education research, as well as to develop related partnerships or collaborations with non-tribal universities, colleges, and research organizations.

Sec. 5. *National Conference.* The Secretary of Education and the Secretary of the Interior, in collaboration with the Working Group and Federal, State, tribal, and local government representatives, shall jointly convene a forum on the No Child Left Behind Act of 2001 to identify means to enhance communication, collaboration, and cooperative strategies to improve the education of American Indian and Alaska Native students attending Federal, State, tribal, and local schools.

Sec. 6. *Administration.* The Department of Education shall provide appropriate administrative services and staff support to the Working Group. With

the consent of the Department of Education, other participating agencies may provide administrative support to the Working Group, to the extent permitted by law and consistent with their statutory authority.

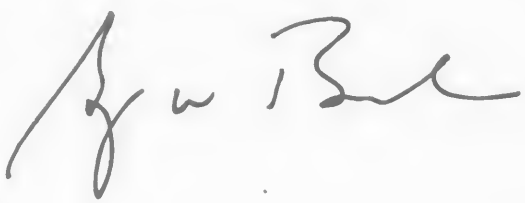
Sec. 7. *Termination.* The Working Group established under section 2 of this order shall terminate not later than 5 years from the date of this order, unless extended by the President.

Sec. 8. *Consultation.* The Secretary of Education and Secretary of the Interior shall consult the Attorney General as appropriate on the implementation of this order, to ensure that such implementation affords the equal protection of the laws required by the due process clause of the Fifth Amendment to the Constitution.

Sec. 9. *General Provisions.*

(a) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(b) Executive Order 13096 of August 6, 1998, is revoked.



THE WHITE HOUSE,
April 30, 2004.

[FR Doc. 04–10377
Filed 5–4–04; 8:45 am]
Billing code 3195–01–P

Presidential Documents

Executive Order 13337 of April 30, 2004

Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to amend Executive Order 11423 of August 16, 1968, as amended, and to further the policy of my Administration as stated in Executive Order 13212 of May 18, 2001, as amended, to expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects, and to provide a systematic method for evaluating and permitting the construction and maintenance of certain border crossings for land transportation, including motor and rail vehicles, that do not require construction or maintenance of facilities connecting the United States with a foreign country, while maintaining safety, public health, and environmental protections, it is hereby ordered as follows:

Section 1. (a) Except with respect to facilities covered by Executive Order 10485 of September 3, 1953, and Executive Order 10530 of May 10, 1954, the Secretary of State is hereby designated and empowered to receive all applications for Presidential permits, as referred to in Executive Order 11423, as amended, for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country.

(b) Upon receipt of a completed application pursuant to paragraph (a) of this section, the Secretary of State shall:

(i) Request additional information needed from the applicant, as appropriate, before referring the application to other agencies pursuant to paragraph (b)(ii) of this section;

(ii) Refer the application and pertinent information to, and request the views of, the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Secretary of Homeland Security, the Administrator of the Environmental Protection Agency, or the heads of the departments or agencies in which the relevant authorities or responsibilities of the foregoing are subsequently conferred or transferred, and, for applications concerning the border with Mexico, the United States Commissioner of the International Boundary and Water Commission; and

(iii) Refer the application and pertinent information to, and request the views of, such other Federal Government department and agency heads as the Secretary of State deems appropriate.

(c) All Federal Government officials consulted by the Secretary of State pursuant to paragraph (b)(ii) or (b)(iii) of this section shall provide their views and render such assistance as may be requested, consistent with their authority, in a timely manner, but not to exceed 90 days from the date of the request.

(d) Should any of the Federal Government officials consulted pursuant to paragraph (b)(ii) or (b)(iii) of this section request from the Department of State additional information that is necessary for them to provide their views or to render such assistance as may be required, the time elapsed

between the date of that request for additional information and the date such additional information is received shall not be counted in calculating the time period prescribed in paragraph (c) of this section.

(e) The Secretary of State may also consult with such State, tribal, and local government officials and foreign governments, as the Secretary deems appropriate, with respect to each application. The Secretary shall solicit responses in a timely manner, not to exceed 90 days from the date of the request.

(f) Upon receiving the views and assistance requested pursuant to paragraphs (b) and (e) of this section, the Secretary of State shall consider, in light of any statutory or other requirements or other considerations, whether or not additional information is needed in order to evaluate the application and, as appropriate, request such information from the applicant.

(g) After consideration of the views and assistance obtained pursuant to paragraphs (b) and, as appropriate, (e) and (f) of this section and any public comments submitted pursuant to section 3(a) of this order, if the Secretary of State finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary's judgment require, and shall notify the officials required to be consulted under paragraph (b)(ii) of this section of the proposed determination that a permit be issued.

(h) After consideration of the views obtained pursuant to paragraphs (b) and, as appropriate, (e) and (f) of this section and any public comments provided pursuant to section 3(a) of this order, if the Secretary of State finds that issuance of a permit to the applicant would not serve the national interest, the Secretary shall notify the officials required to be consulted under paragraph (b)(ii) of this section of the proposed determination that the application be denied.

(i) The Secretary of State shall issue or deny the permit in accordance with the proposed determination unless, within 15 days after notification pursuant to paragraphs (g) or (h) of this section, an official required to be consulted under paragraph (b)(ii) of this section shall notify the Secretary of State that he or she disagrees with the Secretary's proposed determination and requests the Secretary to refer the application to the President. In the event of such a request, the Secretary of State shall consult with any such requesting official and, if necessary, shall refer the application, together with statements of the views of any official involved, to the President for consideration and a final decision.

Sec. 2. (a) Section 1(a) of Executive Order 11423, as amended, is amended to read as follows: "Except with respect to facilities covered by Executive Order Nos. 10485 and 10530, and by section 1(a) of the Executive Order of April 30, 2004, entitled "Issuance of Permits with Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States" (the order of April 30, 2004), the Secretary of State is hereby designated and empowered to receive all applications for Presidential permits for the construction, connection, operation, or maintenance, at the borders of the United States, of:

(i) pipelines, conveyor belts, and similar facilities for the exportation or importation of all products, except those specified in section 1(a) of the order of April 30, 2004, to or from a foreign country;
(ii) facilities for the exportation or importation of water or sewage to or from a foreign country;
(iii) facilities for the transportation of persons or things, or both, to or from a foreign country;
(iv) bridges, to the extent that congressional authorization is not required;
(v) similar facilities above or below ground; and

(vi) border crossings for land transportation, including motor and rail vehicles, to or from a foreign country, whether or not in conjunction with the facilities identified in (iii) above.

(b) Section 1(b) of Executive Order 11423, as amended, is amended by deleting the text "(a)(iii), (iv), or (v)" and by inserting the text "(a)(iii), (iv), (v), or (vi)" in lieu thereof.

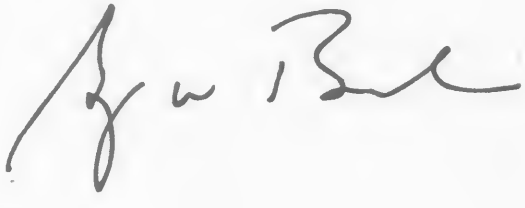
Sec. 3. (a) The Secretary of State may provide for the publication in the **Federal Register** of notice of receipt of applications, for the receipt of public comments on applications, and for notices related to the issuance or denial of applications.

(b) The Secretary of State is authorized to issue such further rules and regulations, and to prescribe such further procedures, including, but not limited to, those relating to the International Boundary and Water Commission, as may from time to time be deemed necessary or desirable for the exercise of the authority conferred by this order.

Sec. 4. All permits heretofore issued with respect to facilities described in section 2(a) of this order pursuant to Executive Order 11423, as amended, and in force at the time of issuance of this order, and all permits issued hereunder, shall remain in effect in accordance with their terms unless and until modified, amended, suspended, or revoked by the appropriate authority.

Sec. 5. Nothing contained in this order shall be construed to affect the authority of any department or agency of the United States Government, or to supersede or replace the requirements established under any other provision of law, or to relieve a person from any requirement to obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations subject to the jurisdiction of that department or agency.

Sec. 6. This order is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.



THE WHITE HOUSE,
April 30, 2004.

[FR Doc. 04–10378
Filed 5–4–04; 8:45 am]
Billing code 3195–01–P

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Federal Register

Vol. 69, No. 87

Wednesday, May 5, 2004

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S. 2057/P.L. 108–220
To require the Secretary of Defense to reimburse members of the United States Armed Forces for certain transportation expenses incurred by the members in connection with leave under the Central Command Rest and Recuperation Leave Program before the program was expanded to include domestic travel. (Apr. 22, 2004; 118 Stat. 618)
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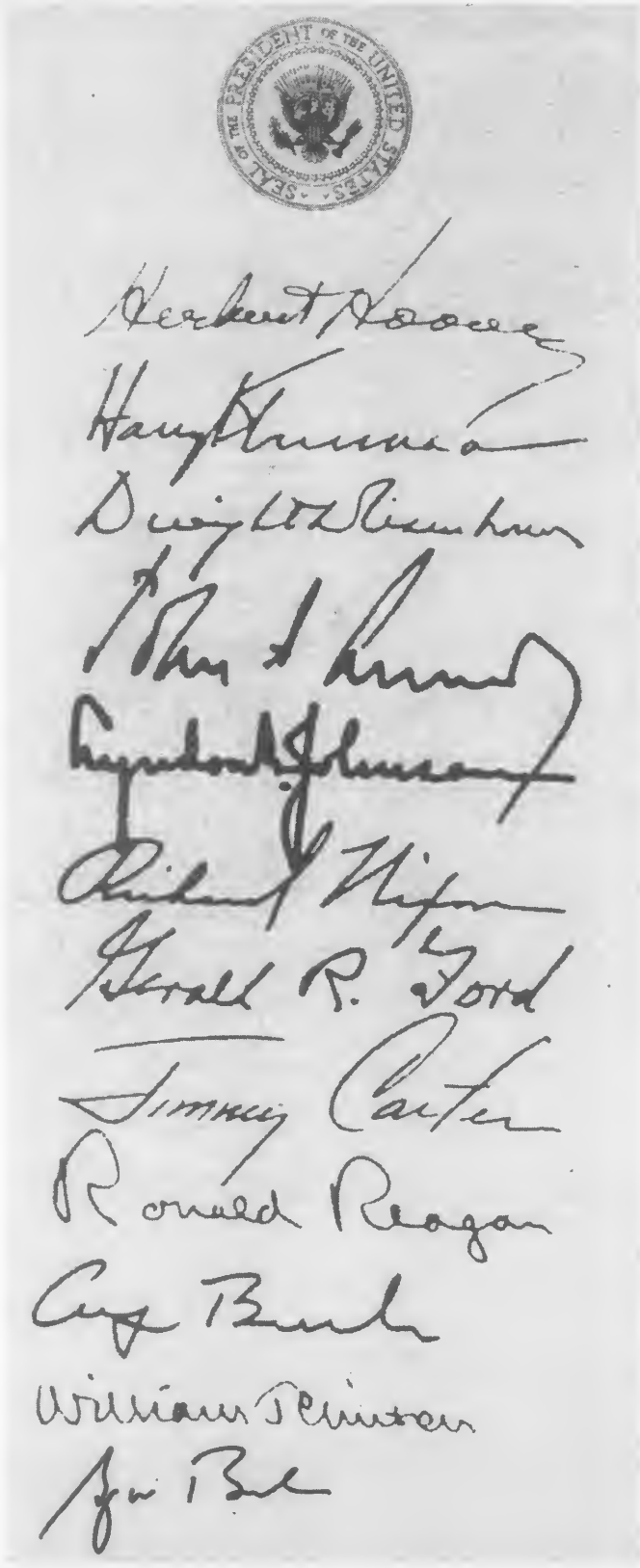

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